Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Edward M. Kennedy

Willingness to Expand Rights

You have said you take a modest view of the role of the judiciary, but you must be aware that the courts also have a historic role of doing justice – protecting minorities or the powerless from what is often called the tyranny of the majority. Your repeated statements here about the limited role of judges raise a concern that you don't support that part of the judicial role, and that concern is heightened by the memos from your years in the Reagan Administration. During that time, there were people, in the Administration on several occasions who took a broader view than you did of the role of the courts in redressing wrongs and meeting the need for civil rights legislation.

1. Was there any occasion where you argued that courts or Congress should pursue a broader view of strengthening civil rights or protecting civil liberties than others did?

RESPONSE: I explained in my response to the Judiciary Committee's Questionnaire that "the framers insulated the federal judiciary from popular pressure in order that the courts would be able to discharge their responsibility of interpreting the law and enforcing the limits the Constitution places on the political branches. Thoughtful critics of 'judicial activism' — such as Justices Holmes, Frankfurter, Jackson, and Harlan — always recognized that judicial vigilance in upholding constitutional rights was in no sense improper 'activism.'" Response to Question 28.

In addition, I have argued for broader protection of civil rights on many occasions, including in the following cases:

In United States v. Halper, 490 U.S. 435 (1989), I argued on behalf of an individual that the Double Jeopardy Clause barred the imposition of civil penalties under federal law against someone who had been convicted and punished under federal criminal law for the same conduct. In a unanimous opinion, the Court agreed.

In Washington v. Harper, 494 U.S. 210 (1990), I argued as an amicus on the side of a mentally-ill inmate in a Washington prison who challenged the State's attempt to administer psychiatric medication against his will as a violation of due process.

In Hudson v. McMillian, 503 U.S. 1 (1992), representing the United States as amicus curiae, I argued on behalf of a Louisiana prison inmate who had filed suit against several corrections officers, alleging that the officers had used excessive force while attempting to restrain him. I argued that the inmate was not required to show a "significant injury" as part of his claim that the officers' conduct amounted to cruel and unusual punishment under the Eighth Amendment.

In Feltner v. Columbia Pictures Television Inc., 523 U.S. 340 (1998), I argued on behalf of an individual sued for copyright infringement that he was entitled to a jury trial under the Seventh Amendment.

In the case of Barry v. Little, 669 A.2d 115 (D.C. 1995), I represented a class of District of Columbia residents receiving general public assistance benefits, and argued that persons whose benefits had been terminated by a change in eligibility standards had been denied due process.

Hamdi v. Rumsfeld

In Hamdi v. Rumsfeld, the Administration took the position that it could deny access to the courts to anyone it seized as an enemy combatant in the war on terror. Citizens or non-citizen – could be swept up – at home or abroad – and sent off to prison indefinitely with no chance to convince a court that they were innocent. The prospect of the government arresting people and holding them in secret without time limits and without any recourse for review is terrifying.

We have always condemned other societies where governments can simply make people "disappear." In this country, we have protections against this kind of abuse. Yet, with this extreme assertion of authority, President Bush has rejected the guarantee of due process that is the heart of the rule of law in our society.

You testified that the President has an obligation to uphold the Constitution and make his own independent determinations about what is and what is not constitutional. Where Congress has provided general grants of authority, such as the Authorization to Use Military Force passed after the 9/11 attacks, how much deference should be given to the President when the President is interpreting his own power? Please do not restrict your answer to referring to Youngstown. Assuming its application, your views on statutory interpretation will be extremely important.

1. What will be your approach to interpreting Presidential power in such areas?

RESPONSE: Issues concerning the limits of Executive authority, especially during wartime, are among the most serious the Court faces. I have repeatedly referred to Youngstown because it offers a useful framework for thinking about these issues, and yet is adaptable to the myriad factual and legal contexts in which questions about Presidential power are likely to arise. As to the issue of deference, certain matters may fall within the Executive's special capacity, such as the President's power as commander-in-chief to direct troops on the battlefield. In such cases, the President may be entitled to considerable latitude. Where his actions fall within an area of overlap with Congressional authority, the President may be entitled to a lesser degree of deference.

Executive Authority

You testified in response to Senator Durbin's questions that the anti-torture statute - the subject of the Justice Department's Torture Memorandum - would not be unconstitutional merely because it conflicted with the President's commander-in-chief authority.

1. To be clear, is there any other reason why the statute might be unconstitutional? Does it fall squarely within the Congress's power to make rules for the armed forces?

RESPONSE: As with any analysis of the extent of the President's authority, the established framework for deciding whether presidential action is constitutional was laid out in Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). First, Justice Jackson stated that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Id. at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Id. at 637. Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. If a statute — such as the anti-torture statute — is held to prohibit certain executive action, a reviewing court will find itself in the third category of the Youngstown analysis. In such a situation, the court must first decide whether the President's asserted power falls within his own constitutional authority, and, if so, whether the legislative prohibition falls within Congress's.

If I am confirmed and this question comes before me, I would employ the framework outlined above, considering the matter in the context of the factual circumstances of the particular case, and in light of the arguments presented by the parties.

In response to questions from Senator Leahy, you seemed to suggest that, as a matter of statutory interpretation, the anti-torture statute does not apply to the President.

2. Do you think the statute prohibits the President from authorizing the torture of prisoners?

RESPONSE: While Senator Leahy and I were discussing the Youngstown framework, I noted that "the first issue for a Court confronting the [Youngstown analysis] would be whether Congress specifically intended to address the question of the President's exercise of authority or not." I did not mean to state a view regarding whether the anti-torture statute (or any other statute) does or does not apply to the President. Rather, I was articulating the proposition that, in order for a court to decide which of Justice Jackson's

Youngstown categories is the appropriate one under which to analyze a President's asserted power, the court must first decide whether or not Congress has authorized the President's actions, prohibited them, or has not spoken either way.

Criminal Issues

Criminal sentencing

The United States has the highest incarceration rates in the world and it's on the rise even while the country is experiencing historically low rates in crime. Over 2 million people are in federal or state prisons. Two-thirds of prisoners are African American or Hispanic. Twelve percent of all young African-American men are incarcerated.

Women are the fastest-growing part of the prison population and as many as 700,000 people with mental illnesses are incarcerated each year. More than 1.5 million children have a parent behind bars. Obviously, the impact of jail for these individuals -- and their families -- does not end on the last day behind bars.

The problems in the criminal justice system and prisons affect all communities. Estimates suggest that one in every ten prisoners in the country is raped. We still don't know how many more are victims of sexual abuse and exploitation. We do know that the system is not perfect and innocent people are sometimes sent to prison and we know that ninety percent of those accused of crimes are poor.

Barry Scheck, co-founder of the Innocence Project, recently testified before this Committee that there have been 159 post-conviction exonerations based on DNA evidence. In forty-five of those cases, the real perpetrator was then apprehended.

Much has been written about the possibilities for more exonerations based on DNA evidence. But 80% of cases involving wrongful convictions have other causes, such as ineffective lawyers, misconduct by prosecutors or police, fraudulent evidence, mistaken identifications, false confessions, or perjury.

1. Given the realities I have just highlighted, what is your view on the severity of federal sentences and high incarceration rates? Based on your experience as a judge, what is your view of mandatory minimum sentencing?

RESPONSE: The prevalence of crime carries with it many societal consequences, one of the most serious being that innocent people are sometimes swept up in efforts to stamp it out. No American—and certainly no judge—welcomes the fact that among the more than one million criminal convictions handed down yearly in the United States, some are erroneous. It is the role of judges in both the state and federal systems to be constantly vigilant in guarding against wrongful convictions.

The Court's precedents understand the Eighth Amendment to include a "narrow proportionality principle that applies to noncapital sentences." Ewing v. California, 538 U.S. 11, 20 (2003). In Solem v. Helm, 463 U.S. 277 (1983), for example, the Court struck down a sentence of life imprisonment without possibility of parole that was imposed upon the defendant after his seventh nonviolent felony conviction. At the same

time, the Court has stated that the choice of "sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." Ewing, 538 U.S. at 25.

In a 2003 speech to the American Bar Association, Justice Anthony Kennedy called for major changes in sentencing and corrections. He said: "Our resources are misspent, our punishments too severe, our sentences too long." He also said, "I can accept neither the wisdom, the justice nor the necessity of mandatory minimums. In all too many cases, they are unjust."

Judge Roberts, in your confirmation hearings in 2003, you told Senator Durbin that, "[at] the core of constitutional liberties, we don't group people according to characteristics and say, well, you share this characteristic and so you must be like this." You said, "We treat people as individuals."

Also during that 2003 hearing, in response to a question I asked, you said, "As a judge, you need to apply the law fairly – without regard to persons."

I would like to know how you reconcile these two statements in the context of sentencing of criminal defendants.

2. Do you think the current federal sentencing system does a sufficient job of treating people as individuals? What is your view on the impact that mandatory minimums have on fairness in sentencing?

RESPONSE: I agree that criminal sentencing requires accommodating the various purposes of punishment. There is on the one hand a need for fairness and uniformity in sentencing. It is generally thought that persons who commit the same crimes should receive similar punishment. Yet, there is also a concern that sentences be tailored in a manner that takes some account of individual circumstances. These aspects of criminal sentencing may on occasion be in tension, and it is primarily the role of the legislature to strike the appropriate balance. Of course, after the Court's decision in United States v. Booker, 125 S. Ct. 738 (2005), the issue of federal sentencing is likely to play out in the federal courts for some time to come.

As a lawyer in the Attorney General's office, you worked on efforts to establish a commission to investigate organized crime during the 1980's on the theory that such a commission would be in the best position to analyze data on specific topics and make policy recommendations.

I would like to know more about your views on independent agencies – and how independent they should be. As you know, the United States Sentencing Commission was established as a result of the enactment of the Sentencing Reform Act of 1984. Over several years, this Committee worked together in a spirit of bipartisan cooperation to pass that bill.

As we intended when we passed that legislation, the Commission is an independent agency in the judicial branch. One of its key roles is to establish sentencing policies

for the federal courts, to research sentencing practices throughout the country and to make recommendations to Congress.

In recent years, one policy recommendation made by the Sentencing Commission was the elimination of all mandatory minimum statutes, because they disrupt the federal sentencing guidelines, which are intended to provide certainty and fairness within the criminal justice system.

3. What is your view on the Sentencing Commission's recommendation against mandatory minimum sentences? As an independent agency, should the Sentencing Commission be primarily responsible for analyzing the need for further federal sentencing reform?

RESPONSE: It is important that the federal judiciary continue to examine the operation of the court system. These efforts may include making policy recommendations to Congress about matters of particular concern. This was, for example, one of the primary reasons for the establishment of the Judicial Conference, which is tasked with "mak[ing] a comprehensive survey of the condition of business in the courts of the United States." 28 U.S.C. § 331. I do not think it would be appropriate for me to state a particular view about the Sentencing Commission's recommendation regarding mandatory minimums. Nevertheless, initiatives to work more closely with Congress on issues affecting the court system are likely to lead to better relations between the judicial and legislative branches.

As set forth by the Sentencing Commission, the federal sentencing guidelines authorize judges to consider a wide range of so-called "relevant conduct" in deciding sentences. They can consider information not presented to the jury and can even consider information related to charges on which a defendant was acquitted by a jury.

Recent Supreme Court decisions have identified constitutional problems when judges find facts not considered by a jury or admitted by a defendant.

In one of your recent decisions, United States v. Smith, you upheld a sentencing enhancement based on a number of facts, including the defendant's conduct on an uncharged offense.

4. Based on your experience with that case, what is your view on the appropriateness of sentencing based on facts not considered by a jury or admitted by a defendant?

RESPONSE: The per curiam opinion in United States v. Smith, 401 F.3d 497 (2005), was an attempt to apply the remedial aspect of the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005). In Booker, the Court ruled that the Guidelines were no longer mandatory, but that judges were still required "to take account of the Guidelines together with other sentencing goals." 125 S. Ct. at 764. Our court ruled in Smith that the sentencing judge had in effect already done what Booker required in imposing a sentence greater than what was mandated by the Guidelines. The decision in Smith stated no view about whether Booker, or any of its forerunners, were rightly decided; it simply applied the law. I do not think it would be appropriate for me to state a view on the issue now, as it is one that will almost certainly come before the Court again.

Death Penalty

Perhaps more than any other area of Supreme Court law, the death penalty has tested the sensibilities of individual justices and resulted in concrete changes in constitutionality and propriety. Justice Harry Blackmun's public renunciation of the death penalty in *Callins v. Collins*, where he said "From this day forward, I no longer shall tinker with the machinery of death," is the most famous. But, Justice Sandra Day O'Connor's evolution was notable too.

In 1989, she refused to declare capital punishment for the moderately mentally retarded unconstitutional. But in July 2001, Justice O'Connor stated "After 20 years on [the] high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country." In 2002, she joined a majority of the Court in holding the death penalty unconstitutional for the mentally retarded. And last year, she joined the majority that required defense lawyers to dig more aggressively for information that might persuade a jury to choose life imprisonment instead of the death penalty in the sentencing phase of a capital case. So her priorities clearly evolved.

1. Do you believe that this country's death penalty jurisprudence can continue to "evolve?"

RESPONSE: The extent to which the Court's death penalty jurisprudence should "evolve" and how much it should draw on contemporary understanding to decide what constitutes "cruel and unusual punishment" is a matter of continuing controversy on the Court. The Court's decisions in this area observe that what is cruel and unusual must be evaluated in light of "the evolving standards of decency that mark the progress of a maturing society." See Trop v. Dulles, 356 U.S. 86, 100–01 (1958). The application of this principle has been a source of deep disagreement on the Court — disagreement that can in part be traced to the language of the Eighth Amendment, which is susceptible to both broad and narrow interpretations.

2. If so, what kind of objective measures would you use to make that determination? Can you give us some examples of death penalty topics which might reflect "progress of a maturing society" in the future?

RESPONSE: The Court looks to "objective factors to the maximum extent possible" in discerning the contemporary understanding of what constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977). The actions of state legislatures represent the "clearest and most reliable objective evidence of contemporary values." Penry v. Lynaugh, 492 U.S. 302, 331 (1989). The Court has explained that, for similar reasons, the practices of sentencing juries afford "a significant and reliable objective index" of societal mores. Coker, 433 U.S. at 596.

It is important in this area, as elsewhere, that judges be ever mindful of their limited role: "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." Coker, 433 U.S. at 592. As in other areas, I would apply

the Eighth Amendment to the particular circumstances of cases that arise, guided by the meaning of the Constitution and the precedents of the Court, consistent with principles of stare decisis.

3. Given your hostility to the Supreme Court as 4th or 5th guesser on death penalty issues, can you honestly say that you have an open mind on this issue? What evidence can you point to that you can keep an open mind?

RESPONSE: My comments about the Court serving as the fourth or fifth guesser under habeas corpus were made in the early 1980s, and reflected the state of habeas corpus law at that time prior to judicial and legislative reforms that addressed some of the concerns in the area. If questions in this area come before me as a judge or, if confirmed, as a Justice, I would approach those questions with an open mind, guided by precedent under principles of stare decisis, conscious of the limited nature of the judicial role, and open to the considered views of my colleagues on the bench.

In exercising its judgment about the constitutionality of executing juveniles and the mentally retarded, the Court looked at, among other things, laws of other countries and international authorities, which are "instructive" for interpreting the Eighth Amendment's ban on cruel and unusual punishment.

4. What is your view about the relevance of laws of other countries in developing our Eighth Amendment jurisprudence?

RESPONSE: Without commenting on any particular Supreme Court decision, relying on foreign law as precedent generally 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. 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 Supreme Court held that defendants have wide latitude to raise any aspect of their character, or record, or circumstances of their offenses in seeking a sentence less than death.

5. Do you feel you can follow the established precedents in this area? How much weight would you give to precedents in death penalty cases? Please explain.

RESPONSE: Just last term, in Tennard v. Dretke, 124 S. Ct. 2562 (2004), the Supreme Court held that the sentencer in a capital case must be permitted to give full effect to any mitigating evidence which met the low threshold for relevance. See also Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). Tennard v. Dretke — and the line of cases it relied on — are precedents of the Court, and just like any other precedent, entitled to weight under stare decisis analysis.

Questions on Miranda & Exclusionary Rule

In criminal law, certain rights to privacy are clear. The Fourth Amendment protects against unreasonable searches, and the Fifth Amendment protects against compelled self-incrimination. I would like to get a better understanding of your views of the Court's longstanding interpretations of these rights.

In the Miranda case nearly 40 years ago, the Supreme Court held that police had to inform suspects about their Fifth Amendment right to remain silent and to have an attorney. The Court has long held that the only way to protect citizens against unreasonable searches was to prohibit the use of unlawfully obtained evidence at trials. Long-standing privileges protect confidentiality between husband and wife, clergy and parishioners, physicians and patients, and attorneys and clients.

These basic rules are an important part of criminal law and procedure, but many of us are concerned about recent trends to chip away at these protections.

1. Do you believe it is within the Court's role to impose rules such as Miranda or the Exclusionary Rule?

RESPONSE: In Dickerson v. United States, 530 U.S. 428 (2000), the Court held that, because Miranda had announced a rule of constitutional import, Congress could not supersede that rule by legislation. Speaking more broadly, the Court has recognized its power to impose rules in two sets of circumstances. First, the Supreme Court "has supervisory authority over the federal courts," and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." Carlisle v. U.S., 517 U.S. 416, 425–26 (1996). Of course, "Congress remains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." Dickerson, 530 U.S. at 437–38 (2000).

The Court has also recognized, in certain circumstances, the need for judicially-created guidelines to prevent constitutional violations. For example, the Court has explained that the Fourth Amendment's exclusionary rule was adopted to effectuate the right of persons "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Illinois v. Gates, 462 U.S. 213, 254 (1983).

In the decision of U.S v. Dickerson, Chief Justice Rehnquist wrote that Miranda was of "constitutional import." In an interview shortly after the decision, you called the ruling on Miranda a "loss for conservatives." [Roberts' Interview with WFAA/ABC's Dallas Affiliate on July 2, 2000].

2. Does that mean you think it's not appropriate for courts to establish rules like Miranda to make constitutional rights effective? Or, is this an example of judges going too far?

RESPONSE: I was asked, during the July 2, 2000, interview about some of the cases that conservatives had "lost" during the Supreme Court's most recent term (October Term 1999). I mentioned that some of those cases might not "be as serious as they look." I cited Dickerson — which upheld Miranda over a supervening Congressional statute — as an example, because the holding in Dickerson was based in part on stare decisis grounds.

During his confirmation hearings, Justice Thomas answered questions about his views on Miranda and the Exclusionary Rule and noted the need for judicially-created guidelines to prevent constitutional violations. He stated that these rules deter law enforcement officials from unconstitutional practices and said such rules were not evidence of "judicial activism."

The Fourth Amendment was enacted in response to the use of blank search warrants by British officers to search the homes of colonists. These tactics so alienated the colonists that it helped fuel the battle for independence. Since that time, the Fourth Amendment has continued to have a fundamental role in restraining government and preventing police abuse. Looking the other way only promotes official lawlessness, arbitrary enforcement, and disrespect for law.

In a January 1983 memo, you cited a study finding that more felony drug arrests were not prosecuted as support for your view that the Exclusionary Rule should be abolished. You wrote: "The study shows that the exclusionary rule resulted in the release of 29% of felony drug arrestees in Los Angeles in one year - a far cry from the highly misleading 0.4% figure usually bandied about. This study should be highly useful in the campaign to amend or abolish the exclusionary rule." [Memo from John G. Roberts to Kenneth Cribb, Jr. re: New Study on Exclusionary Rule, January 4, 1983]

3. What made you think that this statistic was evidence that the Exclusionary Rule was responsible for decisions by prosecutors not to pursue these arrests? Were you suggesting that this isolated statistic for a group of narcotics cases could justify such a dramatic change in the entire code of criminal procedure?

RESPONSE: The study I quoted analyzed the number of felony drug arrestees in Los Angeles who were released because of the application of the exclusionary rule to the facts of their case. Evidence obtained in a police search that violates the Fourth Amendment — because the police did not have probable cause to conduct the search, did not seek a warrant, were issued a facially invalid warrant which failed to specify with particularity the thing to be searched, or participated in a search that was for any other reason "unreasonable" — may not be introduced as evidence in a criminal trial. That evidence, and any derivative evidence, is barred by the exclusionary rule.

The Court does not consider the exclusionary rule an all-or-nothing proposition. Despite a broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in every circumstance, Illinois v. Gates, 462 U.S. 213, 254 (1983); it has "been restricted to those areas where its remedial objectives are thought most efficaciously served," United States v. Leon, 468 U.S. 897, 908 (1984). This is due, in part, to the Supreme Court's recognition of the "well known" costs of applying the rule. California v. Minjares, 443 U.S. 916, 919–20 (1979). The focus of the trial is diverted; the physical evidence excluded is normally reliable; truthfinding is deflected; and the guilty may be set free. Stone v. Powell, 428 U.S. 465, 489–91 (1976). In deciding whether to extend the exclusionary rule to another context, the Court weighs these costs against the deterrent effects of exclusion. See United States v. Calandra, 414 U.S. 338, 347–48 (1974). The memorandum from which you quoted concerned proposals to amend the exclusionary rule, in part to recognize that there may be circumstances, when police are operating in good faith, in which it does not serve its deterrent purpose. The Supreme Court adopted a limited good faith exception to the exclusionary rule in the Leon case.

A few weeks after you brought this study to the attention of White House lawyers, Attorney General William French Smith testified before the Senate Judiciary and used this study as a justification to abolish the Exclusionary Rule. Relying upon the statistic you had highlighted, he made the sweeping assertion that: "The exclusionary rule has substantially hampered our law enforcement efforts." He further stated, "The suppression of evidence has freed the clearly guilty, diminished public respect for the law, distorted the truth-finding process, chilled legitimate police conduct, and put a tremendous strain on the courts."

The Supreme Court did, in fact, create new exceptions to the Exclusionary Rule in 1984. According to other documents, the Reagan Administration would have supported a decision that went even further and abolished the Exclusionary Rule entirely. The Office of Legal Counsel was asked to consider legislative proposals to allow evidence to be used in trial even if it was obtained as a result of a clear violation of the Fourth Amendment.

4. What was your view on this issue during your years in the Reagan Administration? Were you in favor of eliminating the Exclusionary Rule? Do you still have that view now? Do you believe that, even if obtained unconstitutionally, all evidence should be admissible because it aids the search for the truth?

RESPONSE: The views of the Reagan Administration were clear with respect to the exclusionary rule. As an Associate Counsel to the President, it was my job to articulate administration policy — not my personal views. If questions in this area come before me as a judge or, if confirmed, as a justice, I would approach those questions with an open mind, not on the basis of whatever personal views I may have held over 20 years ago when I addressed such questions in an entirely different capacity. I can say, however, that it is not my view as a general matter that all evidence, even if obtained unconstitutionally, should be admissible because it would aid in the search for truth.

5. What is your view on the Supreme Court's decision that the Exclusionary Rule should be applied to both federal and state criminal proceedings based on the view that no one is to be convicted on unconstitutional evidence? As in other cases where you opposed existing remedies, if you oppose the Exclusionary Rule as a remedy for Fourth Amendment violations, what remedies do you support?

RESPONSE: I have no quarrel with the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961), holding that the exclusionary rule applies to state as well as federal proceedings. The Reagan Administration's proposal to reform the exclusionary rule included consideration of various proposals to deter violations of the Fourth Amendment, short of exclusion of the evidence in all cases. Those included, for example, administrative sanctions against officers conducting an illegal search, unless the officers were acting in good faith.

Eavesdropping and search warrants under the act have mushroomed since September 11th and the passage of the PATRIOT Act, which eliminated the requirement that the purpose of the surveillance or search must be "primarily" for intelligence, rather than a criminal investigation. As a result, *any* intelligence purpose will suffice. Even if the main purpose is for a criminal investigation, and the intelligence aspect is merely incidental, authorities do not have to seek an ordinary search warrant.

6. What role should the courts have in monitoring these warrants in a criminal trial when secretly-obtained evidence by a search or wiretap is introduced by the government? What is your view on whether the government can be trusted to continue to operate in complete secrecy, immune from the adversary process?

RESPONSE: In October 2001, Congress amended FISA to change "the purpose" language in 50 U.S.C. 1804(a)(7)(b), to "a significant purpose." Thus, section 1804(a)(7)(b)'s wording became "that a significant purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(7)(b) (2004). In In Re Sealed Case, 310 F.3d 717 (FISCR 2002), the U.S. Foreign Intelligence Surveillance Court of Review held that this provision — permitting government surveillance of an agent of a foreign power if foreign intelligence is a "significant purpose" of such surveillance — does not violate the Fourth Amendment.

The increasing scope of electronic and other surveillance is troubling, both for those who do not want an intrusive government, and for those who want a productive counterterrorism policy. The wider the eavesdropping, searches, and other surveillance, the more the material collected is of no value. It's a fishing expedition. The government is expanding surveillance to include ordinary individuals without any connection to terrorism or criminal conduct.

7. As Justice O'Connor stated, the "war on terrorism" should not be a "blank check." The question is: to what extent should the courts monitor the Executive's use of these unchecked surveillance powers? At what point do these Executive

practices threaten the balance of power among the three branches and the continued vitality of First and Fourth Amendment rights?

RESPONSE: In the Fourth Amendment context, the "touchstone" of constitutionality is reasonableness; the Court has eschewed bright-line rules and "litmus-paper tests," instead engaging in a fact-specific examination of the "totality of the circumstances." See, e.g., Ohio v. Robinette, 519 U.S. 33, 39 (1996). This approach generally requires a reviewing court to "balanc[e] the need to search against the invasion which the search entails." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

In a recent decision by the DC Circuit, *United States v. Jackson*, you dissented from the majority opinion that excluded evidence obtained in violation of the Fourth Amendment rights. You said that you "wholeheartedly subscribe[d]" to views of Judge Edwards in his concurring opinion on the important role of judges in protecting privacy from unreasonable government intrusion, but you still dissented in the case.

That seems to raise a question about other constitutional exclusionary rules, such as evidence obtained in violation of the Fifth Amendment on Self-Incrimination, the Sixth Amendment on Right to Counsel, and the Fourteenth Amendment Due Process Clause.

8. Would you do away with these exclusionary rules as well? Can you explain further your dissent in *United States v. Jackson*?

RESPONSE: Nothing in my dissenting opinion in United States v. Jackson, 415 F.3d 88 (D.C. Cir. 2005), suggested doing away with the exclusionary rule. The question for the court was whether the circumstances of a traffic stop presented "a fair probability that contraband or evidence of a crime [would] be found" in the trunk of the car Mr. Jackson was driving. As I explained in my dissent, "I wholeheartedly subscribe to the sentiments expressed in the concurring opinion about the Fourth Amendment's place among our most prized freedoms.... But sentiments do not decide cases; facts and the law do." On the law, there was no dispute; the majority, concurrence, and my dissent in United States v. Jackson all agreed that, if the officers had probable cause to search the trunk, they did not need a warrant to comply with the Fourth Amendment. See California v. Acevedo, 500 U.S. 565, 574 (1991). If the officers did not have probable cause, no warrant would issue in any event. As for the facts, an experienced district court judge had concluded — and I agreed — that the circumstances gave rise to probable cause to search the trunk. The circumstances included the facts that the officers encountered an unlicensed driver operating an unregistered car with a broken tag light and stolen tags at 1:00 am.

Given your writings on the topic of "judicial activism" and "judicial restraint," I would like to know your views on this subject. In your draft article on "Judicial Restraint," you asserted that "The basic reasons for avoiding judicial policymaking are fairly clear." You seemed to express a negative view of a trend in "modern courts" to "enshrine fundamental rights not discernible in the Constitution."

9. In the criminal justice context, does your view of judicial activism change? For example, what is your opinion of the Miranda and the Exclusionary Rules? Are they examples of judicial activism?

RESPONSE: The draft article in question was prepared for Attorney General William French Smith, and was intended to reflect his views. I understand "judicial activism" to refer to a judge who has transgressed the limited role assigned to the judicial branch under the Constitution, and has either undertaken to exercise the legislative function by imposing his own personal policy preferences under the guise of legal interpretation, or has arrogated to himself the executive function by imposing his policy views of how the law should be administered.

The holding in Miranda was recently reaffirmed by the Court in Dickerson v. United States, 530 U.S. 428 (2000). Although the precise contours of the exclusionary rule have been shaped by various judicial decisions, United States v. Leon, 468 U.S. 897 (1984), I am not aware of any litigation revisiting its basic protections.

Questions on Gun Control

At a 1993 House hearing on a bill to increase the number of prisons and impose mandatory minimum sentences, you said, "[t]he most effective way to reduce crime is to catch criminals, convict them, and then punish them swiftly and surely. That may seem obvious, but there is a good deal of rhetoric these days to the effect that we cannot respond to the crime problem simply by locking up criminals. Maybe not, but it's a good place to start."

1. What did you mean when you said this? Why not have strong gun laws to make it more difficult for criminals to get guns in the first place?

RESPONSE: The statement that you quote was meant to express the view that part of effective law enforcement must include a criminal justice system that punishes criminals. I also noted, however, that locking up criminals is a necessary, but not sufficient, component of an effective solution to our crime problem. Directly after the statement you quote in your question, I stated that "[o]f course we should look to the root causes of crime and address them through things like enterprise zones and tenant ownership of public housing." I went on to say, however, that "in the meantime, we still need to deal effectively with the criminal who sticks a gun in a victim's face, a victim who may have had just as deprived a childhood as the gunman and may have been brought up in just as deprived a neighborhood and, yet, like the vast majority of Americans in the most deprived circumstances has, nonetheless, chosen to follow the law."

An analysis of any particular gun regulation and its effect on crime falls squarely within legislative — not judicial — competence, and I would not presume to pass judgment on that issue.

In your dissenting opinion in *Rancho Viejo v. Norton*, you said that the Commerce Clause did not give the federal government authority to ban the possession of guns near schools.

2. In your view, how much authority does Congress have under the Commerce Clause to regulate firearms? Can it regulate the possession of firearms, in addition to their manufacture and sale?

RESPONSE: In my dissent from denial of rehearing en banc in Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. 2003), I noted that the Supreme Court had "upheld [a] facial Commerce Clause challenge[] to legislation prohibiting the possession of firearms in school zones . . . ." Id. at 1160 (citing United States v. Lopez, 514 U.S. 549 (1995)). As I stated before the Committee, there may be other ways for Congress to pursue such objectives, such as by imposing a jurisdictional requirement meant to ensure that any regulated gun possessed in a school zone had been transported in interstate commerce. It is my understanding that Congress has done so.

As a general matter, Congress's powers under the Commerce Clause have been said to reach "three broad categories of activity." Lopez, 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate . . . those activities that substantially affect interstate commerce." Id. at 558–59. If a case came before me challenging Congress's power to regulate any activity, I would begin the analysis with that framework applied to the particular facts of the case.

The Senate recently passed a law to give the gun industry broad immunity from state and federal lawsuits. It would exempt the industry from basic principles of liability and substitute special rules for such suits. It orders state courts to dismiss pending cases against gun sellers, even if the validity of those cases under state law had already been established.

3. Are there any limits on the power of Congress to dictate results to state courts in pending cases? And to do it retroactively? Isn't the independence of state courts threatened when Congress orders pending cases against an industry to be dismissed?

RESPONSE: As you note, the Senate recently passed the legislation in question. Given that this legislation may be enacted into law, it would inappropriate for me to comment on possible constitutional challenges to it. If the bill does become law, any such constitutional challenge could well come before the Court, and — if confirmed — I would approach it with an open mind in light of the record and arguments of the parties.

4. Isn't it inconsistent for you to say that Congress can't order gun restrictions near local schools, but can order state courts to dismiss lawsuits against the gun industry?

RESPONSE: I have said neither that Congress cannot order gun restrictions near local schools, nor that Congress can order state courts to dismiss lawsuits against the gun industry. I have not expressed any view of the constitutional propriety of either of these exercises of congressional authority.

As Erwin Griswold, Former Dean of Harvard Law School and Solicitor General under President Nixon wrote, in 1990:

> **"... that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law."**

The federal courts have never struck down a gun law on Second Amendment grounds. Recently, the National Rifle Association has encouraged its members to

boycott Conoco Phillips for opposing a state law to prevent employers from banning guns in cars at the company's parking lot. NRA Executive Vice President Wayne LaPierre said, "[a]cross the country, we're going to make ConocoPhillips the example of what happens when a corporation takes away your Second Amendment rights."

In your 2003 confirmation hearing, you said, "*Roe v. Wade* is the settled law of the land."

5. Would you agree with Dean Griswold that Second Amendment law is equally settled and that the Amendment is no barrier to strong gun laws?

RESPONSE: The Supreme Court has not addressed a Second Amendment case since United States v. Miller, 307 U.S. 174 (1939), in which it held that the sawed-off shotgun at issue in that case did not constitute "arms" within the meaning of the Second Amendment. Id. at 178. As noted in my response to Questions 6–8, there is currently a circuit split on the issue of whether the Second Amendment protects a "collective" or "individual" right. The Supreme Court may be called upon to resolve that split. Resolution of that issue would not, in itself, determine whether a particular enactment violated the Second Amendment.

6. Do you believe that the Second Amendment guarantees an individual's right to own a firearm for reasons unrelated to service in a state militia?

RESPONSE: Although the Supreme Court has not spoken on this issue, three conflicting theories seem to have emerged in the courts of appeals. Some circuits subscribe to what might be called the "collective rights" theory, under which the Second Amendment only protects rights of states to organize militias and the Amendment may not be invoked by private individuals. See, e.g., Silveria v. Lockyer, 312 F.3d 1052 (9th Cir. 2003); Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999); Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995); United States v. Warin, 530 F.2d 103 (6th Cir. 1976). Other circuits have adopted what might be termed the "quasi-collective rights" theory, under which the Second Amendment only protects an individual right to bear arms in connection with their service in an organized state militia. See, e.g., United States v. Wright, 117 F.3d 1265 (11th Cir. 1997); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384 (10th Cir.); Cases v. United States, 131 F.2d 916 (1st Cir. 1942). Finally, one circuit recently adopted the view that the Second Amendment protects an individual right to bear arms. See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

Because of this sharp split among the circuits regarding this issue, it is likely that this question will reach the Supreme Court soon. I therefore believe it would inappropriate to comment on the merits of any one of the theories that have been put forth by various courts. If I am confirmed, and if this question comes before the Court, I would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties.

7. If so, how do you reconcile your view with the express language of the Second Amendment, which refers to a "well regulated Militia"? Doesn't the individual rights view read the militia language out of the Amendment?

RESPONSE: Please see my above response to Question 6.

8. If not, how do you reconcile your view with the express statement of the Supreme Court in *United States vs. Miller* in 1939 that the Amendment must be interpreted in light of its militia purpose?

RESPONSE: Please see my above response to Question 6.

Immigration/Immigrants' Rights

Plyler v. Doe - Right to Public Education for Undocumented Children

As you know, *Plyler v. Doe* was a Supreme Court decision in 1982 which guaranteed a free public education for undocumented immigrant children. The question was whether, consistent with the equal protection clause of the 14th Amendment, a state could deny to undocumented school-age children the free public education that it provides to U.S. citizen children or legal aliens. The Court held that it could not. Yet, in a Justice Department memo co-written by you, you criticized the decision and suggested the Administration could have obtained a contrary result if the Solicitor General had filed a brief supporting the State reciting "the values of judicial restraint".

1. **What is your current view on *Plyler v. Doe*? Do you believe the Court should reconsider this precedent and why or why not? What is your personal view, not legal view on whether undocumented children should have access to public education?**

RESPONSE: Plyler v. Doe, 457 U.S. 202 (1982), is a precedent of the Court and entitled to respect under principles of stare decisis. As for my personal view on the underlying questions, I stated at the hearing that I believed all children should be educated. That, however, is a different question from the issue in Plyler: whether the Texas law was unconstitutional. I would not assume that the dissenters in the Plyler case — including Justices White and O'Connor — were any less committed on a personal level to the importance of educating children than their colleagues in the majority.

As Justice Brennan wrote, "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries... whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."

2. If the Supreme Court exercised "judicial restraint" here, what do you believe would have been the impact on society of having a "subclass of illiterate children?"

RESPONSE: The four dissenters in Plyler "fully agree[d] that it would be folly — and wrong — to tolerate creation of a segment of society made up of illiterate persons," 457 U.S. at 242, and I agree with that assessment. As I read the various opinions in the case, there was no dispute on that point.

Rights of Noncitizens Under the Constitution

All legal scholars would say that anyone present in the United States has core due process rights, no matter what their legal status is.

1. What are your views on the rights of illegal immigrants in the United States generally? Do they have the same constitutional rights as United States citizens? Which constitutional amendments do you believe apply equally to citizens and noncitizens?

RESPONSE: In considering whether aliens may invoke the protections of the Constitution, the Supreme Court has differentiated between aliens who have entered the United States and those at the point of entry. The Court has held, for example, that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" of the Fifth Amendment, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953), including its equal protection component, see Mathews v. Diaz, 426 U.S. 67 (1976). See also Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). The Court has also held that the Equal Protection and Due Process guarantees of the Fourteenth Amendment apply to aliens, even if they have entered the country illegally. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982); Yick Wo v. Hopkins, 118 U.S. 356 (1886). "But an alien on the threshold of initial entry," the Court has held, "stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" Shaughnessy, 345 U.S. at 212 (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

The Court has also ruled on the applicability of other constitutional rights to aliens. For example, the Court has held that excludable aliens are not protected by the First Amendment, United States ex rel. Turner v. Williams, 194 U.S. 279 (1904), while resident aliens are, Bridges v. Wixon, 326 U.S. 135 (1945). The Court has also held that aliens are protected by the Just Compensation Clause, Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), and the Sixth Amendment, Wong Wing v. United States, 163 U.S. 228 (1896). The decisions in these cases are highly dependent upon the particular constitutional provision at issue and upon the facts before the Court. If I am confirmed, and if such an issue were raised before the Court, I would approach the issue with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties, with due regard for the doctrine of stare decisis.

Plenary Power Doctrine

As you know the plenary power doctrine over immigration matters began with the Supreme Court decision in the Chinese exclusion case, *Ping v. the United States*, in 1889. This doctrine basically gives the legislative and executive branches broad and often exclusive authority over immigration decisions. Many academic commentators criticize the doctrine, but it seems to be alive and well in the courts.

1. What are your views on the plenary power doctrine in immigration law?

RESPONSE: In Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Supreme Court stated that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Id. at 588–89. But to say that the political branches are "largely immune" from judicial review in these areas is not to say that they are wholly immune. The Harisiades Court noted that "[i]t is . . . probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution." Id. at 590. And while the political branches have historically had vast authority over immigration policy, the Court noted in Zadvydas v. Davis, 533 U.S. 678 (2001), that the political branches' authority is nonetheless "subject to important constitutional limitations." Id. at 695. The question whether judicial review over a decision of immigration policy made by the political branches is appropriate is highly dependent upon the facts of any particular case. If I am confirmed and such a case comes before the Court, I would approach it with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties, with due regard for the doctrine of stare decisis.

2. A Supreme Court in decision 1991 (*Zadvydas v. INS)* stated that the plenary power "is subject to important constitutional limitations." Do you agree with the Court or do you believe there should be an automatic deference to the political and legislative branches of the government?

RESPONSE: Please see my response to Question 1.

Meaningful Judicial Review: Habeas Corpus Relief

There are efforts to further limit judicial review for immigrants. Any limits on rights guaranteed by the Constitution deserve careful and deliberate consideration. Habeas corpus is a bedrock principle of U.S. law, reaching back to Magna Carta, six centuries before the Constitution. It has long been used as a safeguard for people facing unlawful detention and deportation by the government, and is a constitutionally-protected right. It is a fundamental principle of American justice and we owe it to future generations not to undermine the values inherent in the nation's great legal tradition. It's my understanding that the Supreme Court held in the *St. Cyr* case in 2001 that habeas corpus review guaranteed under the Constitution, must be preserved.

1. What is your view on the role of habeas corpus to challenge immigration detention decisions? Did you agree or disagree with the Court's analysis in the *St. Cyr* case?

RESPONSE: The Supreme Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001), dealt, as you suggest, with habeas review of executive detentions of aliens, not with collateral review of state court criminal convictions. The Court held that as a matter of statutory interpretation, that the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), did not preclude federal habeas review of the question whether decisions concerning the deportation of resident aliens are within the Attorney General's discretion. In dictum, however, the Court stated that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" St. Cyr, 533 U.S. at 301 (quoting Felker v. Turpin, 518 U.S. 641, 663–64 (2001)). In dissent, Justice Scalia argued that the Suspension Clause did not "guarantee[] any particular habeas right that enjoys immunity from suspension," id. at 338, but rather precluded Congress from temporarily suspending whatever habeas review is available at any given time except in cases of rebellion or invasion. See id. at 336–41. Since there is a lively debate about the substance of the Suspension Clause among the Justices, and since the issue may well come before me if I am confirmed, I believe it would be inappropriate to comment on the merits of any argument.

Indefinite Detention

1. What are your views on noncitizens who are detained with no prospect of their being returned to their home country because we don't have repatriation agreements with those countries or there are no functioning governments? Should they be detained indefinitely, or should they be released under supervision?

RESPONSE: In Zadvydas v. Davis, 533 U.S. 678 (2001), the Supreme Court held that, as a matter of statutory construction, federal authorities may not indefinitely detain removable aliens that have previously entered the country. See id. at 699. This holding was in large part based on an invocation of the canon of constitutional avoidance — aliens that have entered the country enjoy the protections of the Due Process Clause, see, e.g., Wong Wing v. United States, 163 U.S. 228 (1896), and a reading of the statute that would allow for indefinite detentions would raise serious constitutional concerns. See Zadvydas, 533 U.S. at 689. In Clark v. Martinez, 125 S. Ct. 716 (2005), the Court extended its holding in Zadvydas to inadmissible aliens who are not afforded the protections of the Due Process Clause. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). Although reading the statute to allow indefinite detentions of inadmissible aliens may not raise serious constitutional concerns, the same statute can only mean one thing as applied to all situations within its ambit. See Clark, 125 S. Ct. at 722–23 ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one.") Therefore, under current federal law as interpreted by the Supreme Court, the federal government does not have the authority to detain removable aliens indefinitely. As a judge on the D.C. Circuit, and if confirmed, as a Justice of the Court, I will treat these precedents as I will treat any other precedents of the Court, consistent with principles of stare decisis.

Civil Rights

Affirmative Action and *Rice v. Cayetano*

At the end of our discussion on the last day of questioning, we touched briefly on *Rice v. Cayetano*. You cited it as an example of a case in which you argued in favor of affirmative action. Actually, the *Rice* case did not involve an "affirmative action" program at all according to common understanding of the term. It involved a challenge to the practice in Hawaii of allowing only Native Hawaiians to vote in the election of members to a board of a trust established to benefit Native Hawaiians. The primary argument in your brief was that the issue did not involve racial classifications of any kind.

1. How could that be an example of your advocacy for affirmative action?

RESPONSE: The position of those challenging the statutory provisions at issue in Rice was certainly that the statutes considered race and that such consideration of race — regardless of whether such considerations benefited minority populations which had been discriminated against historically — violated the Constitution. Those opposed to the statutory provisions benefiting Native Hawaiians relied extensively on the Supreme Court precedents invalidating other affirmative action programs, such as Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). See, e.g., Brief for Petitioner, at 28–30; Reply Brief for Petitioner, at 17, 20.

2. Even if we agree, for the sake of argument, that your position in the case was somehow in favor of "affirmative action," isn't it true that the "affirmative action" you were advocating was exclusively for Native Hawaiians and perhaps Native Americans? Weren't your arguments in the case so specific to native peoples that they would not apply, for instance, to African Americans or Latinos? Please explain in detail.

RESPONSE: At the time I argued the Rice case, the Supreme Court had made clear that classifications based on race would generally be subject to strict scrutiny. See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Therefore, in order to put forth the best legal argument on behalf of my client's position, I tried to avoid the strict scrutiny standard of review by distinguishing the nature of the relationship between the Native Hawaiians and the state from that of other racial minorities. The case involved statutory provisions directed solely at Native Hawaiians; it seems to me unsurprising that the legal arguments were similarly framed.

3. Is it accurate to say that there are no examples in your record of cases in which you advocated in favor of race-conscious affirmative action programs to benefit African Americans, Hispanics, or Asian Americans? If that is not accurate, please cite the specific examples you have in mind, and provide in detail the reasons that you believe they qualify as affirmative action.

RESPONSE: I participated in the Legal Reasoning program sponsored by my former law firm, which was designed to prepare students from minority and disadvantaged backgrounds entering law school so that they were better prepared to succeed once they arrived. I regard such programs as a vital adjunct to efforts to increase the representation of minority and disadvantaged students in entering classes.

Franklin v. Gwinnett County Public Schools

In *Franklin v. Gwinnett County Public Schools*, the trial court dismissed a high school student's sexual harassment claim because the court believed she was not entitled to damages. If the Supreme Court had accepted your argument in the case that Ms. Franklin was *not* entitled to damages, she and many others like her would not only have lost out on a remedy; they would have been unable to bring a claim in court *at all.*

1. What role did you have in deciding what position the government would take in the *Franklin* case?

RESPONSE: The government originally participated in the case in response to an order from the Supreme Court inviting the Solicitor General to file a brief expressing the view of the United States. See 498 U.S. 1080 (1991). I am not at liberty to discuss internal deliberations among counsel representing the government concerning the position of the government.

2. When you filed the brief, did you consider its consequences for victims of discrimination if your interpretation of the statute was accepted?

RESPONSE: The issue before the Court in Franklin was what remedies were available under the implied right of action at issue in the case. The courts had to address that issue because Congress had not spelled out either a cause of action or what remedies were available if one were implied by the courts. In helping to prepare the government's position, I did not see my role as determining what would be good policy under the law, but instead as trying to construe the statute that Congress had enacted.

3. Did you think it plausible to believe that Congress would have intended students like Franklin to have no remedy whatsoever for the injuries she suffered as a result of such discrimination? If so, please explain in detail your reasoning.

RESPONSE: While the Administration's position in Franklin was ultimately rejected by the Supreme Court, the court of appeals that heard the case had ruled 3–0 that Title IX did not contain a cause of action for damages for plaintiffs such as Franklin, based on that court's interpretation of prior Supreme Court rulings. See Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990).

4. In your response to, Senator Leahy's questions, you suggested that the Administration believed that "back pay" and "injunctive relief" would be appropriate remedies. But you never answered his question about how "back pay" could be appropriate relief for a teenage student or how a student who had already graduated from the school could benefit from an injunction. Please explain how back pay could have been an approach to remedy for Ms. Franklin in your view?

RESPONSE: I did not mean to suggest that back pay or injunctive relief would have provided Ms. Franklin with an appropriate remedy. In my response, I was trying to convey to the Committee that the case involved the availability of a damages remedy for all title IX plaintiffs. Many of those plaintiffs are in a position to pursue injunctive or backpay relief.

5. Although you testified that you did not condone the discrimination to which Ms. Franklin was subjected, you nonetheless defended your brief in the case as an accurate reflection of Congressional intent. Do you still believe that Congress does not intend damages to be a remedy in Title IX cases?

RESPONSE: I was not advancing my personal beliefs in the Franklin case; I was one of six attorneys in the Department of Justice who signed an amicus brief advancing the Administration's position. I fully accept the Supreme Court's 9–0 ruling in Franklin as precedent, and I have no cause or agenda to revisit that decision.

Brown v. Board of Education – Racial Discrimination

Judge Roberts, in discussing the case of *Brown v. Board of Education* and its holding that segregation of school children on the basis of race is unconstitutional, you said that the Court's conclusion, quote, "was that they didn't care if the effects were equal."

In reviewing the *Brown* decision, however, it's clear that the Court cared very much about the effects. The Court stated that:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children." It also said that segregation "affects the hearts and minds of black children in a way unlikely ever to be undone." It rejected the defense that segregated schools could ever be truly equal.

1. In light of this specific language in the Court's opinion, do you agree that the Court in the Brown case was in fact very much concerned about the effects of segregation and its real harm to African American children?

RESPONSE: I agree that the Court examined and acknowledged the effects of segregation on African American children. But the Court ultimately looked beyond the specific harms demonstrated by the record, to the general stigma caused by the legal recognition of segregation. The passage you quote goes on to make that precise point: "The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." Brown v. Board of Education, 347 U.S. 483, 494 (1954). Thus, the Court struck down all legal segregation in public schools, regardless of the particular harm demonstrated by a particular record. Id. at 495. ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

Brown is widely understood to be a rejection of the doctrine of original intent of the framers. But, during the hearing, you suggested, based on recent research by Professor McConnell, that it was perfectly consistent with the framers' intent.

2. Is that the basis upon which you agree with the decision?

RESPONSE: The framers' specific intent to outlaw segregation — if they had such an intent — is not the primary basis of my agreement with Brown. The point I tried to make before the Committee was that, whatever specific evils the framers sought to address, the Fourteenth Amendment plainly evinces their choice to address them through broad principles such as equal protection. I think the proper role for the Court is to enforce the Amendment as the framers wrote it.

Brown relied on the stigma caused injury done by the separation of the races under

segregation. During the hearings, you stated that it was the classification by race that caused the unlawful discrimination.

3. Do you think all uses of racial classification by government, including affirmative action, is constitutionally objectionable?

RESPONSE: Under the precedents of the Court, affirmative action programs are constitutional if they are narrowly tailored to serve a compelling state interest. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 326 (2003). In Grutter, the Court recognized diversity in higher education as a compelling state interest, and held that the narrow tailoring prong is satisfied by programs that provide individualized consideration to applicants. Affirmative action cases continue to come before the Court, and I do not think that I should comment in any way that would appear to prejudge the outcome in a particular case.

14th Amendment – Racial Discrimination

An important element of much conservative constitutional theory is the view that Justices should adhere to the "original intent" of the Constitution.

1. Without referring to particular cases, what do you see as the original intent of the Fourteenth Amendment to the Constitution?

RESPONSE: Please see my response to Question 2 below.

2. Do you think that "color-blindness" was the motivating idea behind the Fourteenth Amendment, despite the fact that the Reconstruction Congress passed much legislation designed specifically to impair the lives of African Americans, such as the creation of the Freedmen's Bureau?

RESPONSE: I think the best evidence of the original intent of the Fourteenth Amendment is its text, which speaks of the privileges and immunities of citizenship, of due process, and of equal protection.

I agree, of course, that the Amendment protects against discrimination based on race. The Supreme Court has ruled against the notion that race-based classifications are per se unconstitutional, see Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.' "); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1990) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' "), and I would start with those precedents in any case implicating this area of the law.

14th Amendment – Gender Discrimination

In *United States v. Virginia* (the VMI case), Justice Ginsburg, writing for the majority, stated that a law that discriminates based on sex will be struck down unless the government can supply an "exceedingly persuasive justification" for it. Justice O'Connor adopted the same standard when writing for the majority in 1982 in the Mississippi University for *Women v. Hogan* case. However, Justice Rehnquist wrote in a concurring opinion in the VMI case that he did not support the "exceedingly persuasive justification" standard for reviewing laws and policies that discriminate on the basis of sex. Justice Scalia applied what he called "intermediate scrutiny" in the case, but used it to uphold the exclusionary admissions policy. Justice Thomas did not participate in the decision, but in later cases, regardless of his view on the constitutionality of the statute or practice instead he agreed that heightened scrutiny is the appropriate standard for gender discrimination (See, e.g., *Nevada Dept. of Human Resources v. Hibbs* (dissenting); *Grutter v. Bollinger* (dissenting); *Nguyen v. INS* (concurring)).

In responding to questions from Senator Biden, you said you believed that sex discrimination requires intermediate scrutiny under the Constitution. In response to a question from Senator Durbin, you recognized that Justice Ginsburg in *Virginia* adopted a standard for sex-based classifications that you defined as requiring "exacting rigor ... well beyond the rational relation test."

1. Do you agree with the Court's decision in the VMI case that the government must demonstrate an "exceedingly persuasive justification" for sex discrimination, as articulated in Justice Ginsburg's and Justice O'Connor's majority opinions?

RESPONSE: As the opinion in the VMI case makes clear, the Court there applied what is frequently referred to as "intermediate scrutiny." That standard requires that a gender-based distinction be justified as substantially related to an important government interest. See United States v. Virginia, 518 U.S. 515, 533 (1996). The "exceedingly persuasive justification" language you note is a further articulation of that basic standard. I have no quarrel with the approach set forth in the VMI case.

2. If not, what standard would you apply to evaluate sex discrimination under the Equal Protection Clause?

RESPONSE: Please see my above response to Question 1.

3. What do you think of Justice Scalia's position in the *VMI* case that the courts should not interfere with institutions that discriminate against women when that discrimination is part of the traditions of the institution?

RESPONSE: I do not believe that Justice Scalia meant to suggest that an institution's traditions are controlling in a gender discrimination case. Because this is an area that is likely to come before the Court, it would not be appropriate for me to comment any further.

Grove City College v. Bell and the Civil Rights Restoration Act

Memoranda you drafted as an assistant to Attorney General William French Smith indicate that long before the *Grove City College* case was argued in the Supreme Court, you supported the view that if the only federal financial assistance a school receives is federal loans to students, it should not be subject to civil rights laws such as Title VI, Section 504 of the Rehabilitation, and Title IX. In a December 8, 1981 memo, you wrote that you "recommend[ed] acceding to" a proposed change in Department of Education regulations that "would provide that an institution would not be deemed to be receiving federal financial assistance, and thus covered by the anti-discrimination statutes, merely because students attending the institution receive federal financial assistance in the form of loans." You made this recommendation – which the Administration ultimately rejected and did not support in the *Grove City College* case – although you knew it conflicted with "longstanding administrative interpretation to the contrary" and although your analysis showed that this interpretation was not required by the legislative history of the civil rights laws.

1. In hindsight, do you continue to believe that you made the correct recommendation?

RESPONSE: I wrote the memorandum dated December 8, 1981, in response to a proposed change by the Department of Education to its interpretation of the scope of Title VI, Title IX, and § 504 of the Rehabilitation Act. The question the Attorney General asked me to consider was not whether I agreed with the proposed change; the Department of Education, whose expertise and purpose is to consider the effects of such changes, had already made that decision. The only question before me was whether the Department of Education's interpretation of these statutes was a permissible one that would be upheld by the courts. After considering the relevant legal arguments, I came to the conclusion that the Department's position was legally tenable. Accordingly, I recommended that the Attorney General "acced[e]" to it.

2. In making this recommendation, did you give any thought to the effect it would have on minority, female, or disabled students, employees, and on job applicants to these colleges and universities? If so, please explain why you did not include these considerations in your memo.

RESPONSE: Please see my above response to Question 1.

3. When Congress acted to overturn the aspect of the *Grove City College* case that restricted application of Title VI, Title IX, the Rehabilitation Act, and the Age Discrimination Act of 1975 to programs that directly receive federal funds, you argued that the legislation would "radically expand the civil rights laws to areas of private conduct never before considered covered."

4. Please explain in detail why you believed that the Civil Rights Restoration Act was "radical."

RESPONSE: I did not believe that the Civil Rights Restoration Act was "radical." Rather, I argued that it would "radically expand" civil rights laws beyond what any previous civil rights laws were ever thought to cover. Several provisions of the proposed Act — before the introduction of the Dole Amendment — went beyond the "restoration" of what many understood to have been the pre-Grove City civil rights regime. The Administration supported the Dole Amendment because it worked to overturn the "program-specificity" holding in Grove City, which was the main cause of concern for many, without otherwise disturbing the civil rights laws.

The memorandum from which you quote considered Secretary Bell's proposal to overturn that aspect of Grove City basing coverage on student aid, if the program-specificity aspect of Grove City were to be overturned as proposed in the Civil Rights Restoration Act. My memorandum recommended against revisiting the conclusion that coverage under the civil rights statutes was triggered by student aid.

5. Do you still believe that the Civil Rights Restoration Act was radical? If so, please explain.

RESPONSE: Please see my above response to Question 4.

Right to Vote

During your hearing, I asked whether you believe that the right to vote is a fundamental constitutional right. You testified that the right to vote is "precious" and "preservative of all other rights." By this answer, did you mean to indicate that you believe there is a fundamental right to vote under the U.S. Constitution? Please explain in detail.

1. If not, how should we read the appearance of the phrase "right to vote" in the 15th, 19th, 24th and 26th amendments?

RESPONSE: The right to vote is certainly fundamental, in the sense that it guarantees the exercise of the many other freedoms we enjoy as a people. As you note, the right to vote is secured in several amendments to the Constitution: the 15th gave African-Americans the right to vote; the 19th extended the right to women; the 24th ensures that the right to vote is not obstructed by poll taxes; and the 26th extends the right to all persons eighteen years of age or older. The fact that so many amendments concern the right to vote is indicative of the right's importance. In addition, the Court's precedents understand the right to vote to encompass a requirement that each person's vote carry similar weight and that voting districts not be drawn so as to dilute the effect of certain persons' votes.

2. If so, does this create a problem with respect to large disenfranchised populations such as the people of Washington, D.C or Puerto Rico, who have no voting representation in Congress?

RESPONSE: The Court has not ruled that persons living outside the states — in the District of Columbia, for example — are constitutionally entitled to voting representation in Congress.

Privacy

You testified that liberty interests are protected under the Fourteenth Amendment.

1. Do you agree that there are liberty interests not enumerated in the Bill of Rights whose infringement triggers strict or heightened scrutiny?

RESPONSE: I do — the Court has long identified certain liberty interests as fundamental and has subjected laws affecting those interests to heightened judicial scrutiny. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 719–21 (1997).

2. You testified that you agree with the conclusions in *Griswold* and *Eisenstadt* that marital and individual privacy extends to the use and availability of contraception. Why?

RESPONSE: The two decisions stand on somewhat different foundations. The rationale that has come to be accepted for Griswold is that of Justice Harlan, whose dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), grounded a right to marital privacy in the Due Process Clause of the Fourteenth Amendment, in light of a tradition of keeping home and family free from unwarranted government intrusion. In Eisenstadt, the Court relied primarily on the Equal Protection Clause to strike down a law that prohibited the dispensing of contraception for unmarried persons, while simultaneously allowing it for married persons. As I said at the hearing, I believe that the liberty protected by the Due Process Clause is not limited to freedom from physical restraint, but includes protection for privacy.

3. Justice Scalia has said that he would resign if he believed that his duty as a judge required affirming the right to abortion. Do you disagree with him about that?

RESPONSE: It would not be appropriate for me to comment on a statement by a Justice relating to his personal views. As I told the Committee at the hearing, there is nothing in my personal views that would prevent me from carrying out my judicial duties fairly and impartially, in accordance with the judicial oath.

Gay Rights – Romer v. Evans and Lawrence v. Texas

I understand that, while you were a partner at Hogan and Hartson, you helped gay rights leaders prepare for their Supreme Court argument in *Romer v. Evans*. The Court struck down a voter-approved Colorado initiative to allow discrimination against gays and lesbians in many aspects of daily life that most Americans take for granted, such as jobs, housing, or the opportunity to obtain an education. It would have permitted discrimination by restaurants, hotels, medical providers, banks, and even local shopping malls.

1. Were you in favor of the efforts to overturn the Amendment? Please explain the legal theory that allows you to reach that conclusion.

RESPONSE: As I discussed at the hearing, I frequently assisted other lawyers in preparing their arguments for the Court. Often this included holding moot court sessions for attorneys. Indeed, I never turned down a request of this kind. In Romer, as in other cases, I assisted in the preparation of the arguments not because I had a particular view about the outcome, but because I saw it as part of my duty as a lawyer. My own view was not relevant to my participation, and I do not think it would be appropriate for me to state a view now.

In its Reply Brief, Colorado argued that it was tolerant and had repealed its anti-sodomy law, but wanted to signal that heterosexuality is best for people, and homosexuality should not generally be the basis for a "discrimination" claim. The Supreme Court, however, found that the breadth of the Amendment was a violation of the law itself, since it put gay people outside the protection of the law.

2. Do you agree with the conclusion of the Court that the scope of the Amendment placed gays and lesbians outside the law's protection?

RESPONSE: In Romer, the Court held unconstitutional an amendment to the Colorado Constitution prohibiting anti-discrimination laws protective of homosexuals. The amendment, the Court ruled, violated equal protection because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination." 517 U.S. at 627. In this sense, the Court found that the amendment placed homosexuals outside the law's protection. As for my own view of the Court's conclusion, I have adhered to a practice of not discussing recently decided cases involving issues that are likely to come before the Court, as did all the sitting Justices during their confirmation hearings. Romer is a recent decision of the Court, and the implications of its holding continue to be explored. I therefore do not think it would be appropriate for me to state a view about the Court's decision.

Question on Lawrence v. Texas and Stare Decisis:

In *Lawrence v. Texas* (2003), the Supreme Court overturned its 1986 opinion in *Bowers v. Hardwick*.

1. Was the Court right to overrule the precedent that upheld bans on sodomy? Why?

RESPONSE: The Court in Lawrence took into account several factors in considering whether Bowers v. Hardwick, 478 U.S. 186 (1986), should be overruled. The principles applied in Lawrence are those the Court has applied in other cases in which it has considered overruling one of its precedents. These principles include whether there has been reliance on the earlier decision, whether the earlier decision was well-reasoned, whether its rationale has been eroded by subsequent legal or practical developments, and whether the rule announced in the earlier decision has proven workable. These considerations themselves represent precedent regarding when a decision should be overruled. If I were to be confirmed, I would of course be guided by those very same factors in deciding whether to reconsider a precedent of the Court.

2. What were the constitutional principles at issue in that case that warranted a new direction?

RESPONSE: Please see my above response to Question 1.

3. What factors would you have examined if you were assessing whether to reject the *Bowers* precedent?

RESPONSE: As with any case where a precedent was called into question, I would look to the principles of stare decisis that the Court has set forth. These principles include whether there has been reliance on the earlier decision, whether the earlier decision was well-reasoned, whether its rationale has been eroded by subsequent legal or practical developments, and whether the rule announced in the earlier decision has proven workable.

United States v. Fordice

You filed an opening brief in *United States v. Fordice*, a case in 1992 involving racial discrimination in Mississippi's university system. Your brief contained the following statement: "Nor do we discern an independent obligation flowing from the Constitution to correct disparities between what was provided historically black schools in terms of funding, program facilities, and so forth – and what was provided historically white schools." That statement was highly controversial, and it was later retracted in a reply brief stating that "the time has now come" to eliminate such historic disparities, and that "[s]uggestions to the contrary in our opening brief . . . no longer reflect the position of the United States." Your name did not appear on the reply brief.

1. Please explain why you did not sign the reply brief.

RESPONSE: It is the regular practice in the Office of the Solicitor General that reply briefs on the merits are signed only by the Solicitor General. Thus, in the case you reference, six government lawyers signed the opening brief, but only the Solicitor General signed the reply brief.

2. Please describe in detail any views you expressed in the Solicitor General's Office about the remedy in the Supreme Court in *United States v. Fordice*. In addition, please indicate all reasons why the Solicitor General's Office changed its position on the remedy between the opening brief and the reply brief.

RESPONSE: This question calls for the disclosure of internal deliberations among counsel for the United States within the Office of the Solicitor General concerning positions to take in a case then pending before the Supreme Court. For the same reasons that internal documents embodying such deliberations have not been disclosed, I am not at liberty to reveal such privileged communications.

After your nomination was announced by President Bush, did you review any of the documents requested in the letter of July 29, 2005 from the Democratic Members of the Senate Judiciary Committee, which were not provided to the Committee? If so, for each such document,

Please identify the document;
Please state who was present when you reviewed it; and
Please provide a copy of the document.

RESPONSE: I have not reviewed any of the requested documents.