ANSWERS TO QUESTIONS SUBMITTED BY SENATOR LEVIN

QUESTION:

1. A memo you prepared during your clerkship for Associate Justice Robert H. Jackson has been widely reported in the press and came up during your initial confirmation to the Court in 1971. In it, you argued that the "separate but equal" doctrine the Supreme Court had laid down in Plessy v. Ferguson "was right and should be reaffirmed." You also wrote: "To the argument made by Thurgood, not John, Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."

In a letter to then-Chairman of the Judiciary Committee, Senator Eastland, written shortly before the Senate voted on your confirmation and quoted in the New York Times, July 6, 1986, you explained that "the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of the justices, rather than as a statement of my views."

I would appreciate your telling me, to the best of your recollection, how you know that the views expressed in the memo were those of Justice Jackson. Did Justice Jackson discuss the "separate but equal" doctrine with you prior to your preparing this memo and, if so, did your memo reflect this discussion? Did you base your formulation of his views on anything he had previously written about "separate but equal?"

If, as you stated in the letter to Senator Eastland, the memo was intended as a statement of Justice Jackson's views and not your own, did it also reflect your views at that time?

ANSWER:

In my 1971 letter to Senator Eastland, I stated that I then recalled considerable oral discussion with him as to what type of presentation he would make when the school segregation cases came before the Court conference. I also recalled in the 1971 letter Justice Jackson's concern that the conference have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality. While I have no recollection today of the specific content of these oral discussions on the separate but equal doctrine, I continue to adhere to the view expressed in my 1971 letter that I prepared the memo after such oral discussions with Justice Jackson and that the memorandum was intended to reflect the views that he had expressed in those discussions. I do not recall basing the memorandum on anything that Justice

Jackson had previously written about the "separate but equal" doctrine, although much of the substance of the memo reflects views that he had expressed in his book "The Struggle for Judicial Supremacy."

Finally, as I stated in my 1971 letter and reiterated in my hearing before the Judiciary Committee, the statement in the memorandum that "Plessy v. Ferguson was right and should be reaffirmed" did not then and does not now reflect my view.

QUESTION:

2. In an article which appeared in the New York Times Magazine of March 3, 1985, you are quoted as saying: "So I felt that at the time I came on the Court, the boat was kind of heeling over in one direction. Interpreting my oath as I saw it, I felt that my job was, where those sort of situations arose, to kind of lean the other way."

Should a Supreme Court Justice seek through his or her decisions to achieve an overall ideological balance on the Court by overcompensating to one side if in his or her view other Justices are leaning too much the other way?

ANSWER:

No.

QUESTION:

3. Would you say that it has been "often", "sometimes" or "rarely" during your tenure on the court that you have changed your mind about a case either during oral arguments or during the conference of Justices?

ANSWER:

Of the three terms offered in your question, I would have to select "sometimes."

QUESTIONS SUBMITTED BY SENATOR LEVIN

QUESTION:

1. In the memo you say you prepared for Justice Jackson entitled "A Random Thought on the Segregation Cases," you wrote: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think Plessy v. Ferguson was right and should be reaffirmed."

In your reply to my first letter, you restated what you had said in your 1971 letter to Senator Eastland, that the memorandum was intended to reflect the views that Justice Jackson had expressed in oral discussions you had with him. Did Justice Jackson tell you during these oral discussions that he had been "excoriated by 'liberal' colleagues" for his views on Plessy v. Ferguson? If so, please elaborate. If not, when did he tell you that he had been "excoriated by 'liberal' colleagues" for these views? Please be specific. If he didn't tell you, then on what basis did you include this line in the memo?

ANSWER:

As I indicated in my answer to your question of July 23, 1986, I have no recollection today of the specific content of my oral discussions with Justice Jackson relating to the points that he tentatively intended to make at the Court's Conference on the Brown case. I do not recall Justice Jackson telling me in those discussions that he had been "excoriated by liberal colleagues" for his views on the Brown case. It is my strong sense, however, that Justice Jackson acknowledged during our discussions that he fully expected to be criticized sharply by some of his colleagues if he took the position that Plessy v. Ferguson should be reaffirmed.

QUESTION:

2. During the recent Judiciary Committee hearings, Senator Leahy asked you if you had "any second thoughts" about your decision not to disqualify yourself in the Tatum v. Laird case. You replied: "I never thought about it again until these hearings, to tell the truth." Later you stated to Senator Leahy that "Justice Stewart . . . after I wrote this opinion . . . told me that in some respects he thought my comparison of the ABA standards and the statutory standards was incorrect and that the ABA standards had intended to be more stringent."

Having heard Justice Stewart's comments and having now had a chance to reread the ABA standards in effect in 1972, do you still believe that the 1972 ABA standards were not "materially different from the standards enunciated in the congressional statute" in effect at that time?

ANSWER:

I think that the 1972 ABA standards were materially different from the provisions of 28 U.S.C. 455, as it stood in 1972, on the question of disqualification for financial interest. I believe it was this point to which Justice Stewart comments to me were addressed. In so far as disqualification for bias is concerned, the language of the canons is phrased differently from the relevant language of section 455, and could require a result different from that required under section 455 in a particular case.

United States Justice Foundation

September 4, 1986

The Honorable Strom Thurmond
United States Senate
218 Russell Senate Office Building
Washington, DC 20510

Dear Senator:

Please find enclosed a copy of the testimony the UNITED STATES JUSTICE FOUNDATION is hereby submitting to the United States Senate concerning the nomination of Judge Antonin Scalia as Associate Justice and the nomination of Associate Justice William Rehnquist as Chief Justice of the United States Supreme Court.

Thank you for your time.

Sincerely,

Gary G. Kreep
Executive Director
United States Justice Foundation

Enclosure

2091 East Valley Parkway•Suite 1-C•Escondido, California 92027•(619) 741-8086