ANSWERS TO QUESTIONS FROM SENATOR BIDEN

1. If you assume that every right must have a remedy, difficult questions are raised about what it would mean to eliminate the exclusionary rule. If the courts were to decide that the exclusionary rule is not a proper remedy for violations of an individual's Fourth Amendment rights, the courts would then arguably have to provide some other remedy. Putting aside the issue of whether the exclusionary rule should be abolished, do you believe that there must be some alternative remedy for Fourth Amendment violations before the exclusionary rule could be eliminated?

My testimony before the Committee was that society has paid a high price for putting the exclusionary rule in place. The rule is now an important and workable part of the criminal justice system. It is the duty of the Court to ensure that it is administered in a pragmatic and reasonable manner. Transcript of Hearings, December 15, 1987, Afternoon Session. I also stated before the Committee my belief that when the exclusionary rule was created, the courts were concerned that the Fourth Amendment was not being enforced. Transcript of Hearings, December 15, 1987, Afternoon Session. I am aware that some have argued that alternative means for ensuring compliance with the Fourth Amendment could be substituted in place of the exclusionary rule, but I know of no precise proposal submitted by either Congress or the courts to accomplish this.

2. Even if alternative remedies to the exclusionary rule were in place, it is not clear that the rule should necessarily be abolished. It may be that the rule is desirable for other reasons as well -- to deter police misconduct, for example, or to keep the courts from becoming involved in illegal acts.

In his confirmation hearings to be Director of the Federal Bureau of Investigation, William Sessions testified:

> **As a judge, I know that the protections afforded by the exclusionary rule are extremely important to fair play, and the proper carrying out of the law enforcement responsibility. . . . And my own belief is, in the role as director of the FBI, that I would encourage a careful review of [the exclusionary rule], and a careful carving out, if there can be exceptions. But, by and large, I am happy with it and the way it is, because I know that as difficult as it is for law enforcement in the courts, that it**

protects the rights of citizens and that is important.

It may be that you disagree, at least in part, with Judge Sessions, as you have referred to the "rigidities" of the exclusionary rule in two of your opinions. If there were an alternative remedy in place, would it be proper, in your view, to abolish the exclusionary rule?

Judge Sessions' comments seem generally in accord with the views on the rule that I expressed in answer to your question 1 above, and, in my Committee hearing testimony, particularly in an exchange with Senator Leahy. Transcript of Hearings, December 15, 1987, Afternoon Session.

The exclusionary rule, and the search and seizure protections it secures, must be interpreted in a reasonable, sensible manner. Fourth Amendment principles are basic liberties, but they should not be synonymous with a doctrine of such abstraction that it cannot be implemented in a practical way.

Before the Court could consider any overruling of the exclusionary rule, it would be required to resolve at least two questions. First, the Court would evaluate whether any alternate protections that were offered to replace the exclusionary rule were in fact effective. Second, the Court would consider whether the exclusionary rule, nevertheless, has independent constitutional significance. Respected jurists and commentators have argued that courts become implicated in the violation of a basic constitutional liberty when they rely on tainted evidence. That argument must be carefully considered in any decision affecting the exclusionary rule.

3. You have occasionally been somewhat critical of the way courts have applied the exclusionary rule. In one case, you stated that it may be necessary to "reexamine it altogether," if it "becomes an end in itself." (U.S. v. Harvey.)

These comments are relevant to a debate that has been carried on in the Supreme Court in recent years. Some Justices, such as Justice Brennan, argue that there are strong moral and legal justifications for the exclusionary rule outside of any impact it may have on police behavior. They argue that it is unconstitutional for the courts to accept evidence that was illegally obtained, simply because the courts must have "clean hands," and must not engage in or benefit from illegal conduct.

Other Justices, such as Justice White, reject the notion that the exclusionary rule has a moral force in and of itself. These Justices argue that the only acceptable rationale for the exclusionry rule is if it deters the police from engaging in improper conduct.

Do you believe that there are any acceptable justifications for the exclusionary rule other than deterring improper police conduct?

If you believe that deterrence is the only acceptable rationale, have you found, based on your experience in criminal law cases, that the rule has been successful in influencing police behavior?

I hope that my answers in questions 1 and 2 are sufficient to respond to this question as well. It bears repeating that the exclusionary rule should not become an end in itself in the sense that it becomes unhinged from the real and substantive Fourth Amendment values that it implements and protects. If presented in the context of a concrete dispute before the Court, I will give every consideration to counsels' arguments on potential purposes and justifications for the rule. The rule has been successful in influencing police behavior.

4. Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Education Fund, testified on Wednesday, December 16, that she had considerable concern about your commitment to protecting the civil rights of the Hispanic community. In particular, Ms. Hernandez said:

> **. . . I want . . . to go back and to ask Judge Kennedy to give further assurance and clarification as to how he views Hispanics. My concern is that he might not feel that we deserve the same type of protection as the black community and other protected minorities that are protected from civil rights.**
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> **I want that assurance. I want to see what he states on the record. I'm also concerned on the issue of women, the AFSCME issue. I'm concerned on the Spangler issue, I'm concerned with the TOPIC issue, and basically the common threat that one sees in those cases is the threat that he . . . kicks people out of court, that he doesn't give them that opportunity. And even when they do win, even when they do satisfy the stringent requirements of a Federal District Judge, that he overturns those decisions.**
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> **He is a man of intellect, no question about it; a man of devotion, but he's also a man of the establishment and, unfortunately, we have not been part of that establishment.**

> **And what I want is an expans[ive] consideration of that perception of what America is. (Tr. 12/16/87, at 258-59.)**

Please identify those aspects of your record that, in your view, respond to Ms. Hernandez's concerns. In addition, please discuss whether and how the philosophy and approach that you would bring to the Supreme Court, should you be confirmed by the Senate, would be responsive to these concerns.

As a Californian, I have understood for many years that Hispanic people are a vital part of our society and culture, and that their ethnic or minority status should not be used to disadvantage them, either by acts of hostility or acts of passive indifference.

Indifference to the civil rights of Hispanics, women, and other minorities is unacceptable. Hispanic persons are entitled to civil rights protections, in whatever degree is necessary to ensure that they have each and every one of the rights guaranteed to all Americans. In my testimony before the Committee, I stated that "We simply do not have any real freedom if we have discrimination based on race, sex, religion or national origin, and I share that commitment." Transcript of Hearings, December 14, 1987, Afternoon Session. I also stated in my testimony that the Equal Protection Clause applies to all persons: "[t]he amendment by its terms, of course, includes persons, and I think was very deliberately drafted in that respect." Transcript of Hearings, December 14, 1987, Afternoon Session. I stated in my response to the Senate Judiciary Committee Questionnaire that "[c]ompassion, warmth, sensitivity, and an unyielding insistence on justice are the attributes of every good judge." Questionnaire at 54.

I have written or joined various opinions ruling in favor of claims brought by Hispanics, women, and other civil rights claimants. In Flores v. Pierce, 617 F.2d 1386 (9th Cir.), cert. denied, 444 U.S. 875 (1980), I upheld a judgment in favor of Hispanics against municipal officials who had a history of racially motivated activity against Hispanics. In James v. Ball, 613 F.2d 180 (9th Cir. 1980), rev'd, 451 U.S. 355 (1981), a voting rights case, I invoked the one-person, one-vote principle to strike as unconstitutional a state statute that limited voting in elections for directors of an agriculture and power district to landowners, even though a large number of the district's users of water and power were not landowners. In Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984), I upheld an employer's obligations under a Title VII consent decree that required four of each ten new employees be minority group members, by finding that the consent decree applied to the successor employer that had acquired the business. In NLRB v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979) (Kennedy, J., concurring), I concluded that illegal aliens are employees entitled to protection under the

National Labor Relations Act, and stated that "if the [Act] were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case." Id. at 1184. In Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977), I wrote an opinion that adopted a broad and generous interpretation of the time period for claimants to bring suit in sex discrimination cases.

The Flores case extensively reviewed evidence of discrimination, including subtle code words for discrimination, such as statements that applications were reviewed for "desirability" of the applicant, that the town involved was "a fine little town," and that it was necessary to keep the town on a "good level." In summarizing the holding of the case, I stated:

> One of the first cases interpreting the equal protection clause stands for the rule, among others, that the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference but also a necessary one. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). In the instant case, the disparate effect of the action on Mexican-Americans was so compelling that the effect may approach, if it does not reach, the demonstration of an intent to discriminate that was made in Yick Wo v. Hopkins. This might be a case where "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action." Arlington Heights, supra, 429 U.S. at 266, 97 S. Ct. at 564. We need not, however, rely on effect alone, for other evidence suggests a motive or intent to discriminate. It was shown that the defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.

617 F.2d at 1389.

In addition, from 1967 through 1969, I represented a group of Hispanic citizens of the Sacramento area. The group planned to develop a city block in downtown Sacramento as a cultural center and retail complex with emphasis on fostering Hispanic culture and providing opportunities for businesses owned

by Hispanic proprietors. We were successful in obtaining from the Redevelopment Agency of the City of Sacramento development rights for one square block in the downtown area. We incorporated an entity called Plaza de las Flores. After submission of a prospectus, we received a permit from the Commissioner of Corporations of the State of California for a limited public offering to raise the necessary capital. Building costs, interest rates, and other economic factors became unfavorable, and the cultural center was not developed. I devoted over five hundred hours of unpaid legal services to this project, and in the course of it came to know better and understand the aspirations of the Hispanic community in California.