Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Dianne Feinstein

When you and I discussed the *Casey* decision you said:

> **"Well, that determination in Casey becomes one of the precedents of the Court, entitled to respect like any other precedent of the Court, under principles of stare decisis."**

However, later in your discussion with me and other Senators you acknowledged the Court does view precedent differently. Specifically, you said in a discussion with Senator Cornyn:

> **"The factors that the court looks at in deciding whether to overrule prior precedent or not do not depend upon what the decision is or what area it's in, other than some various things we've talked about. For example, a statutory decision is much less likely to be overturned than a constitutional decision, just because Congress can address those issues themselves."**

1. ***Since some precedents are entitled to different standards of "respect" than others, can you clarify what "respect" Casey is entitled to?***

RESPONSE: Stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808 (1991). Thus, the Court approaches the reconsideration of any of its decisions "with the utmost caution." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

Although every decision of the Court is entitled to the respect due precedent, the Court has explained that stare decisis is at its strongest when the precedent involves the interpretation of a statute. See, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). This simply reflects the recognition that in cases involving constitutional interpretation, the Court's mistakes "cannot be corrected by Congress." Vieth v. Jubelirer, 541 U.S. 267, 305 (2004); Agostini v. Felton, 521 U.S. 203, 235-36 (1997). It continues to remain true that "any departure from . . . stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

2. ***What role, if any, does the amount of time that has passed since a decision was made [play]?***

RESPONSE: Please see my response below to Question 3.

3. ***If a decision is older does it deserve more respect than a more recent decision? Or does a decision that has been made recently lead to the conclusion that because the question has been addressed so recently it should not be reopened?***

RESPONSE: The Court has stated that the force of the doctrine of stare decisis stems, in part, "from the length of time [decisions] have been on the books." United States v. Morrison, 529 U.S. 598, 622 (2000) (reaffirming United States v. Harris, 106 U.S. 629 (1883), and In re Civil Rights Cases, 109 U.S. 3 (1883)). As a general matter, the older a decision, the more weight it is given under stare decisis analysis.

Of course, time alone is not determinative. In Shaffer v. Heitner, 433 U.S. 186 (1977), for example, the Court overruled the approach to in rem jurisdiction established a century earlier in Pennoyer v. Neff, 95 U.S. 714 (1878). On the other side of the ledger, there may be competing considerations such as whether or not a particular precedent has proven unworkable; whether the doctrinal bases of a decision have been eroded by subsequent developments; and whether the factual premises have so far changed as to render the prior holding irrelevant or unjustifiable. In such cases, the Supreme Court may find that a previous decision should be overturned. Brown v. Board of Education and West Coast Hotel v. Parrish, for example, reversed decisions that had been on the books for decades.

As you know, there were several Senators who asked you about the right to privacy. When discussing a right to privacy with Senator Specter and whether it exists in the Constitution you said:

> **"Senator, I do. The right to privacy is protected under the Constitution in various ways."**

Then when Senator Kohl asked if you agreed with the *Griswold* decision to extend this right of privacy to contraception you said:

> **"I agree with the *Griswold* court's conclusion that marital privacy extends to contraception and availability of that. The Court, since *Griswold*, has grounded the privacy right discussed in that case in the liberty interest protected under the due process clause."**

You then went on to say:

> **"Well, I feel comfortable commenting on *Griswold* and the result in *Griswold* because that does not appear to me to be an area that is going to come before the court again."**

I have a few follow up questions regarding your answers.

1. ***Please explain why you agree with conclusion in Griswold.***

RESPONSE: Although the word "privacy" is not mentioned in the Constitution, I believe that privacy interests are nonetheless implicated by a number of constitutional provisions, including the "liberty" protected by the Due Process Clause of the Fifth and Fourteenth Amendments. Prior to Griswold, the Court had recognized constitutional protection for certain privacy interests, including in the Meyer and Pierce cases that specifically addressed such interests through the rubric of the "liberty" protected by the Due Process Clause. While the Griswold majority did not employ this precise method of analysis, more recent decisions in this area have.

I do not suggest that the meaning of "liberty" is self-evident, and believe that in seeking to discern the nature of the privacy interests protected as part of "liberty" judges need to be vigilant to ensure that they do not simply enact their personal preferences into law. I do believe, however, that the Clause can be interpreted with appropriate restraint, through constant appreciation of the limited nature of the judicial role, and reliance on our Nation's history, tradition, and practices. In my view, the outcome in Griswold is consistent with such an approach.

2. ***How did you reach the conclusion that is Griswold settled law?***

RESPONSE: As I indicated in my oral testimony, I have drawn a pragmatic line between questions that are unlikely to come before the Supreme Court, and areas of law that are likely to

come before the Court, as did all the current sitting Justices. In my view, Griswold falls in the former category. I am not aware of any recent attempts to criminalize the use or sale of contraceptives. Indeed, not only would the statute at issue in Griswold be anomalous today, many have noted that enforcement of it was anomalous in 1965, when the Court decided the issue. Therefore, I think it was appropriate for me to comment on the case.

3. ***What makes you believe that the questions of privacy involved in Griswold will not appear before the Court?***

RESPONSE: I did not mean to suggest that questions implicating some aspect of the right to privacy are unlikely to come before the Court again in the future. It is virtually certain that they will; indeed, several cases involving the privacy line of jurisprudence will be heard in the upcoming Term.

My approach, rather, was to address specific controversies that are unlikely to be re-examined. I chose to speak about Marbury v. Madison because the power of judicial review over cases properly before the Court is well established, even though the implications of that power may continue to present legal questions. I chose to address Brown v. Board of Education because the unconstitutionality of segregation in public schools is well established, even though other applications of the Equal Protection Clause continue to come before the courts.

It is exceedingly unlikely that any state would attempt to pass legislation affecting the use of contraceptives by married couples. I therefore concluded that I could comment on the outcome of Griswold, and in the course of doing so, comment on the constitutional right to privacy.

During questioning from Senator Specter he asked you several questions about stare decisis. When Senator Specter asked you about the principles of stare decisis, you discussed the factors to be considered, including settled expectations. You then said:

> **"Whether or not particular precedents have proven to be unworkable is another consideration on the other side -- whether the doctrinal bases of a decision had been eroded by subsequent developments. For example, if you have a case in which there are three precedents that lead and support that result and in the intervening period two of them have been overruled, that may be a basis for reconsidering the prior precedent."**

1. ***If a precedent is altered or modified but not overruled does that serve as a basis for reconsidering the prior precedent?***

RESPONSE: The fact that a precedent has been altered or modified would not, standing alone, dictate revisiting that precedent in a subsequent case. The question is instead, under principles of stare decisis, whether a prior decision's "underpinnings [have been] eroded, by subsequent decisions." United States v. Gaudin, 515 U.S. 506, 521 (1995).

2. ***When evaluating a precedent do you look at the original case or the subsequent case?***

RESPONSE: I am not aware that there is a categorical approach to the question; to the extent a precedent has been previously modified by the Court, the applicable rule of law is set forth in the subsequent decision, and it would seem that the pertinent question would be, under stare decisis, whether to adhere to that rule of law. At the same time, intervening decisions can shed light on the prior decision as well. For example, in Brown v. Board of Education the Supreme Court overruled Plessy v. Ferguson in part because intervening precedents had undermined the authority of Plessy. In Sweatt v. Painter, 339 U.S. 629 (1950), the Supreme Court had held that a segregated law school simply did not provide an equal educational opportunity. And in McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), the Court held that every student at a state-supported graduate school, regardless of his race, was entitled to equal treatment at the hands of the state.

3. ***Senator Specter asked you about the 38 cases where Roe could have been overturned and wasn't. You pointed out that the Court did not address the issue in many of those cases. Does that distinction make a difference in evaluating the weight of precedent?***

RESPONSE: The Supreme Court recently reiterated that questions in a case that are "neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedent." Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S. Ct. 577, 586 (2004) (quoting Webster v. Fall, 266 U.S. 507, 511 (1925)). As such, decisions that do not specifically address Roe do not have the same precedential effect as the express re-examination of Roe's holding in Casey.

4. Are some of the factors to be considered when evaluating precedent more dispositive than others?

RESPONSE: There is no categorical approach to which considerations are dispositive under principles of stare decisis; the Court's stare decisis precedents highlight the pertinent factors that must be weighed in the context of particular precedents. In order to safeguard the basic rule-of-law values embodied in stare decisis — reliance, fairness, predictability, and judicial integrity — stare decisis analysis takes into consideration a number of factors, including whether the precedent in question has proven workable over time, whether it has been eroded by subsequent developments in the law, and the extent to which it has given rise to settled expectations.

Aside from these observations, however, it is difficult to say in the abstract which factors carry more weight; different factors are implicated in different cases, and the balance is never precisely the same.

As you acknowledged in the hearing there are often close questions of law and reasonable and intelligent people can disagree. In an exchange between you and Senator Kohl about the brief you signed in *Rust v. Sullivan* you said,

> **"I don't think there's anything in there that suggests we think or thought that anybody at that time who disagreed was unreasonable. That was our legal position. The other side's was obviously presented in those cases. "**

Then when Senator Hatch asked you about whether reasonable people can differ on issues you said: "Oh, certainly."

When discussing the baseball analogy with Senator Cornyn, the question came up about your approach to the law and whether there are so-to-speak "right" answers. You said:

> **"I do think there are right answers. I know that it's fashionable in some places to suggest that there are no right answers and that the judges are motivated by a constellation of different considerations and, because of that, it should affect how we approach certain other issues.**
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> **That's not the view of the law that I subscribe to. I think when you folks legislate, you do have something in mind in particular and you it into words and you expect judges not to put in their own preferences, not to substitute their judgment for you, but to implement your view of what you are accomplishing in that statute.**
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> **I think, when the framers framed the Constitution, it was the same thing. And the judges were not to put in their own personal views about what the Constitution should say, but they're just supposed to interpret it and apply the meaning that is in the Constitution. And I think there is meaning there and I think there is meaning in your legislation. And the job of a good judge is to do as good a job as possible to get the right answer."**

We can all acknowledge that reasonable people can disagree on important issues. On any given day in the Senate several of us can read language in a bill and come to vastly different conclusions about what the words mean or what their effect is. As has been seen on the Court since the founding of our country, and among the Framers, it is clear that brilliant minds can disagree about what the Constitution means. And as I pointed out during your hearing, in the last 10 years, there have been 193 5-4 decisions of the court, again among great minds.

1. ***Given the reality that brilliant minds can have legitimate and differing views of the exact same language in a statute or in the Constitution, can you explain how you would determine the "right" answer?***

RESPONSE: To be clear, I do not believe that when judges disagree, one of them has abdicated his or her responsibilities as a judge. Yet I believe that every judge acting in good faith should approach each issue by analyzing the legal materials at his or her disposal with a mind toward

finding the better legal answer, and not simply choosing between two reasonable interpretations based on personal preferences. If one does not accept that there are "right" answers, it seems to me that one would have to view the law, and the process of judging, in an entirely different light. If legal texts and arguments could not yield determinate answers, then only the will of the judges could. That would result in a rule of men, not the rule of law.

In my view, a judge interpreting a constitutional or statutory provision should use the traditional judicial tools of interpretation at his disposal to come to the best resolution of the question before him. In any case, I would start with the text of the relevant provision and the precedent in the area, and, when appropriate, would also consider historical practices and understanding, canons of interpretation, and legislative history.

2. ***You said that it is important to look at what the Framers or the legislators were thinking when the words were drafted, but since different Framers and different legislators have different intent, whose intent is controlling?***

RESPONSE: You are right to say that I believe an understanding of the Framers' intent is vitally important in analyzing a legal text. But I do not mean to say that we should attempt to read the minds of drafters of the text, or that we should try to divine how they would have decided the case. Rather, I believe we should gauge their intent by the words that they have written, with the aid of accepted tools of interpretation. If the framers of some legal text decided to use broad language, we should hold them to their word and apply their provision as it is written.

You are of course correct that different drafters may have different intent, which is why any analysis of intent must begin with the text upon which they actually agreed. Beyond that, the Court's precedents provide guidance on materials considered probative in ascertaining the intent of the Framers as a group.

3. ***Can you explain how you come to the conclusion there is a "right" answer when there are strong and valid arguments on many issues, including Constitutional interpretations?***

RESPONSE: Our legal system has always recognized that there may well be compelling arguments on both sides of a legal issue — that is the essence of the adversary system. And it would be naive not to recognize that the resolution of some questions is harder than others; your point about 5-4 decisions confirms that. But when legislators passed legislation or when the Framers drafted the Constitution, they were deciding issues entrusted to them by the electorate. And when a dispute arises in a case before the courts over what these representatives decided, it becomes the role of the judge to discern the answer to that question — to decide what was decided — and not to decide the policy issues in the first instance himself. As Chief Justice Marshall explained in Marbury v. Madison, "[i]t is emphatically the province and duty of the judicial department to say what the law is" — not what it should be.

4. ***In those close cases involving a close question of the law, what will you look to when determining which way to fall?***

RESPONSE: I will consider all the traditional tools of interpretation available to me. For example, my opinions on close questions of statutory interpretation evince a willingness, when necessary, to go beyond the text to resolve ambiguity, to look in a considered way to legislative history, appropriate canons of construction, considerations of purpose, and the like. I apply such traditional tools as guided by applicable precedent under principles of stare decisis, conscious of the limited nature of the judicial role and open to the considered view of colleagues similarly wrestling with the close question.

In answering Senator Schumer's question about the *Wickard* cumulative impact test, you stated:

> **"If the activities are commercial in nature, you get to aggregate them under Wickard against Filburn that we've talked about; you don't have to look at just that particular activity, you'd look at the activity in general."**

Your belief that the *Wickard* test should apply only "if the activities are commercial in nature" casts some doubt on whether or not the *Wickard* test would be applicable to the protection of threatened species under the Endangered Species Act.

- ***Do you believe that an analysis of whether the Endangered Species Act "substantially affects interstate commerce" should examine only the individual species at issue, or apply the Wickard test and look at the cumulative effect on interstate commerce of all endangered species?***

RESPONSE: In answering Senator Schumer's question about Wickard, I was putting forth my best understanding of the Supreme Court's Commerce Clause jurisprudence. In any case where they were relevant, I would apply Wickard and the Court's decision in Gonzalez v. Raich, 125 S. Ct. 2195 (2005), as I would any other precedent in other areas of law. That said, it seems to me that your question puts forth a hypothetical that may come before the Court. The Supreme Court has not addressed whether the aggregation principle announced in Wickard and reiterated in Raich would compel it to examine the cumulative economic impact of all endangered species, instead of the particular species at issue in the case. In accordance with the practice of other nominees to the Court, I would not want to suggest which approach I would take, nor would I want to develop a position without the benefit of considered arguments on both sides of the issue.

During the hearings, you discussed your judicial philosophy with Senator Hatch. Specifically, you stated:

> **"I tend to look at the cases from the bottom up rather than the top down. And I think all good judges focus a lot on the facts. We talk about the law, and that's a great interest for all of us. But I think most cases turn on the facts, so you do have to know those. You have to know the record."**

Then when talking with Senator Sessions you stated:

> **"That's right. And the big difference when you get up to the Court of Appeals is that the facts are not really in play anymore. Somebody's been determined – they think you are guilty or they buy your versions of the events.**
>
> **The Court of Appeals usually just looks at the legal issues."**

1. What role do the facts play in your evaluation at the appellate level?

RESPONSE: Once a case comes before an appellate court, findings of fact have already been made. These factual determinations are transmitted to the appellate court in the record of the case. I did not mean to suggest, however, that facts play no role in the appellate process. On the contrary, while the appellate court determines the legal issues in dispute, it generally cannot resolve the case without applying the legal standard to the facts at hand.

For example, the Supreme Court has held that a person may invoke the Fourth Amendment's prohibition against unreasonable searches and seizures if that person has a "reasonable expectation of privacy." See, e.g., Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring)). In concrete cases, however, a judge cannot answer in the abstract whether a person has a reasonable expectation of privacy in any given situation. Instead, whether a person's expectation of privacy is "reasonable" turns on the facts of the particular case. Compare Minnesota v. Olson, 495 U.S. 91 (1990) (holding that an overnight guest had a reasonable expectation of privacy in the premises where he was staying); with California v. Greenwood, 486 U.S. 35 (1988) (holding that residents of a house did not have a reasonable expectation of privacy in garbage they discarded and exposed to the public). Thus, while appellate courts do not engage in the business of fact-finding, their legal decisions are inextricably intertwined with the facts of the case before them.

2. What about the real world impact of your decisions?

RESPONSE: In my view, the real world impact of a court's decision is often an important consideration in the court's determination of the case. That is not to say that judges should tailor their analysis of the law based on what they regard as the most desirable result in terms of impact — I do not believe that. But to take one example, if a particular legislative construction would lead to deleterious consequences in the real world, it is reasonable to question whether Congress actually intended that construction.