Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Russell D. Feingold

1. On September 13, I asked about the arguments you made in *Wilder v. Virginia Hospital Association* and *Gonzaga University v. Doe*. In the course of our discussion of those cases, you stated that you have litigated both for and against a broad reading of 42 U.S.C. § 1983, the federal law that allows Americans to sue state and local actors who deprive them of their rights under the Constitution or federal statutes. Specifically, you stated:

> **"And the determination in the *Gonzaga* case about what should be shown and what has to be shown is one of the precedents of the Court that I would follow, as any other, consistent with rules of stare decisis. That's not an area in which I have any particular view. I've argued both sides of that issue. On behalf of plaintiffs, I argued in favor of it, and on behalf of defendants, against it."**

a. Please provide examples of cases in which you argued on behalf of plaintiffs that a personal statutory right exists that can be enforced in an action under § 1983.

RESPONSE: I argued on the side of a plaintiff seeking to enforce federal statutory rights under § 1983 in Pharmaceutical Research & Manufacturers of America v. Walsh, 123 S. Ct. 1855 (2003). PhRMA had filed suit under § 1983 seeking to enjoin implementation of a Maine prescription drug law on the ground that it was preempted by the federal Medicaid Act. On behalf of the U.S. Chamber of Commerce, I filed an amicus brief in support of the petitioner, in which I argued that the state law was preempted. The Court ruled against the petitioner, but the Justices differed over the appropriate rationale. The concurring opinions of Justices Scalia and Thomas cited Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and suggested that PhRMA could not bring an action to seek enforcement of the Medicaid Act under § 1983. Justice Thomas's opinion stated: "Under this Court's precedents, private parties may employ 42 U.S.C. § 1983 or an implied right of action only if they demonstrate an 'unambiguously conferred right.'" 123 S. Ct. at 1878 (citing Gonzaga v. Doe, 536 U.S. 273, 283 (2002)).

I also argued in favor of enforcement of federal statutory rights under § 1983 in California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519 U.S. 316 (1997). In Dillingham, a construction firm sued under § 1983 to enforce federal rights guaranteed by the National Labor Relations Act and ERISA. The question before the Court was whether a California law governing wages paid to persons in apprenticeship programs was pre-empted by federal law. I participated in an amicus brief filed on behalf of the Associated General Contractors of America (AGCA), in which we sought to defend the reasoning of two similar Ninth Circuit decisions that had enforced AGCA's federal rights in actions under § 1983.

In addition, I was recalling in my testimony several cases in which I have argued on behalf of § 1983 plaintiffs seeking to enforce constitutional rights. These include: Barry v. Little, 669 A.2d 115 (D.C. 1995), in which I represented a class of District of Columbia residents in a § 1983

action, and argued that the District violated due process when it terminated welfare benefits through a change in eligibility standards; Hudson v. McMillian, 503 U.S. 1 (1992), in which, representing the United States as amicus curiae, I argued on behalf of a Louisiana prison inmate who had filed suit under § 1983 against several corrections officers, alleging that the officers had used excessive force while attempting to restrain him; Washington v. Harper, 494 U.S. 210 (1990), in which I argued as an amicus on the side of a mentally-ill inmate in a Washington prison who had filed a suit under § 1983 challenging the State's attempt to administer psychiatric medication against his will as a violation of due process.

b. Please provide examples of cases in which you argued a position contrary to your position in *Gonzaga*, that in order for a statutory right to be enforceable under § 1983, the Court must find that Congress clearly intended to authorize a private right of action to enforce that right in Federal court.

RESPONSE: As noted above, an argument based on Gonzaga was adverse to the petitioner in the PhRMA case, whom I supported as an amicus. Also, my argument in Gonzaga was not that a statutory right was unenforceable under § 1983 unless the statute itself authorized a cause of action. It was uncontested that the statute did not include an implied private right of action. As my brief in the case stated, the issue was whether — despite the absence of a statutory cause of action — "Congress nonetheless 'unambiguously' expressed the intent in [the Act] to confer individual rights enforceable in private damages actions under [§ 1983]." Since Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), the Court has required that a statute clearly confer individual rights in order to be enforceable under § 1983. My arguments in § 1983 cases have been premised on the Court's decision in Pennhurst.

2. In both *Wilder* and *Gonzaga*, you argued that in order for a statutory right to be enforceable under § 1983, the Court must find that Congress clearly intended to authorize private enforcement of that right in federal court. Do you agree that in both cases, the Supreme Court rejected that particular interpretation of § 1983?

RESPONSE: It is true that certain federal rights may be enforceable through § 1983 where Congress has not clearly intended to provide a cause of action. This is because § 1983 itself can provide the necessary cause of action. At the same time, not all federal laws confer rights enforceable through § 1983: "it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under [§ 1983]." Gonzaga v. Doe, 536 U.S. 273, 283 (2002). In Gonzaga, I argued that FERPA was not intended to confer such rights; in Wilder, I made a similar argument with respect to the Boren Amendment. The Wilder Court concluded that the rights created by the Boren Amendment were sufficiently specific and definite to be enforceable under § 1983. In Gonzaga, the Court reached the opposite conclusion, and "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." Gonzaga, 536 U.S. at 283.

3. On September 15, I asked about your view of plaintiffs' lawyers who represent injured persons in product liability and medical malpractice cases, given that your work in private practice has primarily been on behalf of defendants. You disagreed with my assertion about your legal practice, and stated that you have also represented plaintiffs' interests, citing antitrust cases as an example.

a. Please provide further details about your representation of plaintiffs in antitrust cases, including case names and citations to published opinions where available.

RESPONSE: My representation of antitrust plaintiffs includes the following cases:

At the petition stage in the Supreme Court:

Los Angeles Land Co. v. Brunswick Corp. (No. 93-1290), cert. denied, 510 U.S. 1197 (1994). I represented Los Angeles Land Co., a real estate development company attempting to build a bowling center, in a suit under § 2 of the Sherman Act.

Hydranautics v. Filmtec Corp. (No. 95-1887), cert. denied, 519 U.S. 814 (1996). I represented Hydranautics, a small technology research company, in a suit under § 2 of the Sherman Act.

Hospital Service Dist. No. 1 of Tangipahoa Parish v. Surgical Care Center of Hammond, L.C. (No. 99-210), cert. denied, 528 U.S. 964 (1999). I represented Surgical Care Center in a suit under § 2 of the Sherman Act.

CSU, LLC v. Xerox Corp., (No. 00-62), cert. denied, 531 U.S. 1143 (2001). I represented CSU, LLC., a copier service firm, in a suit under the Sherman Act.

Before courts of appeals:

United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc). I represented 18 states and the District of Columbia in a Sherman Act suit against Microsoft.

American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc., 103 F.3d 1147 (9th Cir. 1997). I represented American Professional Testing Service, Inc., a bar preparation service, in a Sherman Act suit against Harcourt.

Willis-Knighton Medical Center v. Bossier City, 178 F.3d 1290 (5th Cir. 1999). I argued on behalf of Willis-Knighton Medical Center in a Sherman Act suit against the City.

Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc., 198 F.3d 246 (6th Cir. 1999). I argued on behalf of Park Avenue Radiology Associates, a two-person radiology practice, in a suit against an operator of five Memphis, Tennessee-area hospitals.

b. Please provide examples of your representation of plaintiffs in personal injury cases or plaintiffs in cases where an individual was suing a corporation, including case names and citations to published opinions where available.

RESPONSE: I have represented individuals in actions against corporations on many occasions, including the following:

In Feltner v. Columbia Pictures Television Inc., 523 U.S. 340 (1998), I argued in the Supreme Court on behalf of an individual against whom Columbia Pictures had brought a copyright infringement action.

In Rockland Industries, Inc. v. Chumbley (No. 87-1220), cert. denied, 485 U.S. 961 (1988), I represented an individual inventor of a window heat loss prevention system who had sued Rockland Industries for breach of contract.

In Adams v. CSX Transportation, Inc. (No. 96-626), cert. denied, 519 U.S. 1041 (1996), I participated in the representation of individual bondholders who sought to compel CSX to make interest payments.

In Ashcraft & Gerel v. Coady, 244 F.3d 948 (D.C. Cir. 2001), I represented a lawyer in a suit against his former firm.

In Bocock v. Huntington Nat'l Bank, No. 01-6171 (6th Cir.), and Deusner v. Firstar Corp., No. 01-6068 (6th Cir.), I participated in representing individuals on appeal in suits under the Consumer Lending Act.

In Haft v. Dart Group Corp., No. 95-7555 (3d Cir.), I participated in representing an individual on appeal in a suit for breach of contract against his former employer.

In Park Avenue Radiology Associates, P.C. v. Methodist Health Systems, Inc., 198 F.3d 246 (6th Cir. 1999), I represented a two-person radiology practice on appeal in an antitrust suit against an operator of five Memphis, Tennessee-area hospitals.