Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Charles E. Schumer

1. **Over the course of your hearing, you said on multiple occasions that you have "no quarrel" with particular holdings of the Supreme Court. In Justice Thomas's confirmation hearings, he similarly used the term "no quarrel" to describe his perspective on a number of holdings of the Supreme Court. Senator DeConcini asked him, at one point, whether having "no quarrel" meant that he agreed with the Court's holding; he simply said "I mean do not disagree with it" (Confirmation Hearings of Clarence Thomas, p. 414). Justice Thomas later voted to overrule several of those rulings with which he had "no quarrel."**

   a. **Please explain more precisely what you mean by "no quarrel." Does it mean that you agree with the holding?**

   b. **Can we expect your use of the expression "no quarrel" to carry as much weight as Justice Thomas's use of the same words?**

   RESPONSE: What I meant during my oral testimony when I stated that I have "no quarrel" with a particular decision of the Supreme Court is that I would treat that decision as precedent, like any other opinion of the Court, consistent with principles of stare decisis. I tried to make clear that I would bring to the Court no agenda to revisit the particular precedent at issue, and that I would bring to any case implicating that precedent no preconceived view contrary to that precedent. Consistent with my position before the Committee, I do not think I can comment on whether I agree with the holding in such cases. All the current sitting Justices have similarly drawn a line with respect to answering questions about their opinions on cases. I do not presume to know what Justice Thomas meant in saying that he had no quarrel with particular cases.

2. **Particularly, you expressed that you had "no quarrel" with the majority's determination in *Moore v. East Cleveland*, the court's conclusion in *Eisenstadt v. Baird,* or the decisions in *Franklin v. Gwinnett County Public Schools*, *Tennessee v. Lane*, and *Plyer v. Doe.***

   a. **Do you similarly have no quarrel with the holding in *Roe v. Wade*? What about the reasoning in that case?**

   b. **Is there any Supreme Court case that has not been overturned with which you *do* have a quarrel? Bear in mind, in your answer, that we understand that, under the principles of *stare decisis*, expressing a "quarrel" with a particular decision does not mean that you would look to overrule it, given the opportunity. Therefore, your identification of a decision with which you do have a quarrel will in no way be interpreted to indicate your vote on a**

case should the issue come up in the future.

RESPONSE: As I noted before the Committee, issues related to abortion continue to come before the Court, including at least two cases scheduled for the upcoming Term. I do not think that I can express a view on the holding, or reasoning, of Roe v. Wade, without crossing the line that I have drawn and maintained before the Committee, of not commenting on issues that are likely to come before the Court, as have all the sitting Justices. Roe and Casey would be the relevant starting points with respect to consideration of any case arising in the area, and I would treat them as such, just as I would the pertinent precedents in any other area of law.

Sometimes a decision is uniformly acknowledged as having been eroded in precedential effect, without having been expressly overruled. For example, as I indicated in response to a question from Senator Leahy, I would be surprised if any reasonable arguments could be made today in support of Korematsu v. United States, 323 U.S. 214 (1944), which upheld the exclusion from large areas of the country a group solely on the basis of its ethnicity. Because I view the repudiation of Korematsu as widely accepted, I would not give that decision the weight typically accorded to precedent. I believe the same could be said of Buck v. Bell, 274 U.S. 200 (1927).

Where there is disagreement on the continuing validity of a decision, however, I do not think I can comment on the case. I agree, of course, that a Justice's view on the correctness of a decision is not the only relevant factor in deciding whether the precedent should be revisited — I have commented that disagreement with a precedent poses, not answers, the question whether it should be revisited — but I do not think that fact allows me to comment on areas where there is continuing litigation and debate.

3. **Would you have decided the *Rancho Viejo* case differently if it had come after the Supreme Court's decision in *Gonzales v. Raich*?**

RESPONSE: To be clear, I did not decide anything concerning the merits in the Rancho Viejo case. Rather, I dissented from a denial of rehearing en banc because of concern expressed by another circuit court of appeals that what I understood to be the panel's approach was in tension with Supreme Court precedent on the Commerce Clause. I explicitly explained that rehearing en banc would allow the court to consider other grounds for sustaining the Endangered Species Act that did not raise that concern. I did not join another opinion dissenting from denial of rehearing en banc that did express a view on the merits. See 334 F.3d 1158, 1160 (2003).

The question in Ranch Viejo — whether the regulated activity was economic in nature — is antecedent to the issue in Raich — whether Congress may regulate intrastate economic activity under an aggregation theory. Therefore, it is not clear how Raich would have affected the analysis in Rancho Viejo. That said, if Raich had been on the books, the

panel's opinion in Rancho Viejo might have employed a different analysis, so I cannot definitively say whether I would have voted to rehear the case.

4. **In the *Rice v. Cayetano* case you argued that the case was not about race, but rather, a special trust relationship between Congress and the indigenous people of Hawaii based on their unique legal and political status. So like Senator Kennedy, I disagree with your characterization of this case as an affirmative action case. Besides the *Rice* case, and besides your involvement with Street Law and the Legal Reasoning program at your firm, can you identify any instances when you argued for broader protections of civil rights?**

RESPONSE: The position of those challenging the statutory provision that benefited Native Hawaiians at issue in Rice v. Cayetano was certainly that the statutes considered race and that such consideration of race — even to benefit 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.

Other examples of instances in which I argued for broader protections of civil rights include the following:

In United States v. Halper, 490 U.S. 435 (1989), I represented an individual who had been convicted of filing false Medicaid claims, had paid a fine, and had served a sentence of imprisonment. The government thereafter sought to impose civil penalties for the same false Medicaid claims. The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. I argued that the aspect of the Double Jeopardy Clause forbidding successive punishments was not limited to the criminal context, but applied in certain circumstances to civil penalties as well. In a unanimous opinion authored by Justice Blackmun, the Court agreed.

In Washington v. Harper, 494 U.S. 210 (1990), a mentally-ill inmate in a Washington prison challenged the State's attempt to administer psychiatric medication against his will. The question presented was whether, in deciding to medicate the inmate, the State afforded him the process required by the Due Process Clause of the Fourteenth Amendment. I participated in a brief filed on behalf of the American Psychological Association, arguing that the inmate had not been afforded a truly impartial hearing. The Court held that the procedures established by the prison met the requirements of due process.

In Hudson v. McMillian, 503 U.S. 1 (1992), a Louisiana prison inmate filed suit against several corrections officers, alleging that the officers had used excessive force while attempting to restrain him. The question before the Court was whether Hudson was 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. Representing the United States as amicus curiae supporting the inmate, I argued that the "significant injury" test was inappropriate because it lacked any basis in the Constitution or in the Court's prior Eighth Amendment decisions. The Court agreed, ruling that where the claim is excessive force, a plaintiff need not show a "significant injury," but only that "prison officials maliciously and sadistically use[d] force to cause harm." Id. at 9.

In Feltner v. Columbia Pictures Television Inc., 523 U.S. 340 (1998), a district court granted summary judgment against the petitioner in a copyright infringement suit. The question before the Supreme Court was whether the petitioner had a right to have his claim determined by a jury. I represented the petitioner, and argued that both the Copyright Act and the Seventh Amendment of the United States Constitution guaranteed a right to jury trial in copyright infringement cases. Writing for eight Justices, Justice Thomas rejected my Copyright Act argument, but agreed that the Seventh Amendment created a right to jury trial in such cases and remanded the case to district court so that a jury trial could be held.

I participated in the briefing and argued Barry v. Little, 669 A.2d 115 (D.C. 1995), before the District of Columbia Court of Appeals, on a pro bono basis. I represented a class of District of Columbia residents receiving general public assistance benefits — the neediest people in the District. On behalf of that class, I argued that a change in eligibility standards that resulted in a termination of general public assistance benefits without an individual evidentiary hearing denied class members procedural due process. I asserted that class members had a limited entitlement to continued receipt of welfare benefits, and that even if new standards were to be applied, benefits could not be terminated in the absence of an individual evidentiary hearing. The Court of Appeals ruled against my position and upheld the legislative alteration of standards and accompanying automatic termination of benefits.

5. **You said repeatedly at your hearing that the liberty element of the due process clause of the Fourteenth Amendment provides substantive as well as procedural protections. You also said that you thought your view was one that would be accepted by every member of the current Supreme Court. In a concurring opinion that was joined by only Justice Thomas, however, Justice Scalia said the following:**

> **"If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation." *United States v. Carlton*, 512 U.S. 26, 39 (1994).**

Do you agree that what Justice Scalia said in this decision implies that he and Justice Thomas believe that "substantive due process" is not a right guaranteed by the Constitution? Please distinguish your own perspective on substantive due process from the one endorsed by Justices Scalia and Thomas in the above passage.

RESPONSE: As I said at my hearing, I believe the liberty element of the Due Process Clause of the Fourteenth Amendment provides substantive as well as procedural protections. I also believe that every member of the Supreme Court, including Justices Scalia and Thomas, has, at one point or another, agreed with this formulation. For example, Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, wrote that "[i]t is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality opinion). Similarly, Chief Justice Rehnquist, in an opinion joined by Justices O'Connor, Scalia, Kennedy, and Thomas, noted that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

6. **In his dissent in *Bush v. Gore*, Justice Stevens wrote that the claim of the petitioners (the Bush campaign) must necessarily have been based on an "unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed." He went on to write the following:**

> **"Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."**

a. **Do you agree with this statement? Do you have any quarrel with it?**

b. **You worked as a consultant for the Bush campaign in this case; given your role in that case and the warning Justice Stevens has issued about our ability to trust the judiciary, how can you reassure the American people that you will be "an impartial guardian of the rule of law"?**

If you refuse to answer this question because, as you told Senator Kohl, "the issue about the propriety of Supreme Court review in matters of disputed electoral contests... is a matter that could come up again," please explain in more detail why. The Court itself pointed out that its decision in *Bush v. Gore* was limited to the specific factual situation presented by that case. The opinion stated explicitly that "our consideration is *limited to the present circumstances*, for the problem of equal

protection in election processes generally presents many complexities."

RESPONSE: To the extent your question seeks my views on the correctness of the recent decision at issue, I have explained that, like all the sitting Justices, I consider it inappropriate for me to comment. While it is true that the precise facts presented in Bush v. Gore are not likely to come before the Court again, it is not at all improbable that other election disputes will. While the Court in Bush v. Gore stated that its "consideration is limited to the present circumstances," I believe that statement was not meant to deprive the decision of all precedential weight but, rather, to make clear that the precise facts of the case were unique. And while it is undoubtedly true that "the problem of equal protection in election processes generally presents many complexities," the equal protection principles at issue in Bush v. Gore may be implicated in future cases.

More generally, I believe that a fair consideration of my record and background leave no doubt that I would be "an impartial guardian of the rule of law." That is what the American Bar Association concluded, in rating me unanimously well qualified. That is what is amply reflected in the briefs and opinions that I have authored during my time as a litigator and a judge. As a lawyer, although I was representing the views of my clients, my first priority was always to advocate within the bounds of honest and reasonable legal argument. As a judge, I have not aimed to promote an ideological agenda but instead have decided cases according to the particular facts, the arguments presented by each side, and in accordance with the rule of law.

7. **You will recall that earlier this year, during the controversy surrounding the Terri Schiavo case, Congress passed a law specifically creating a federal cause of action for Terri Schiavo's parents. Congress took this action after the claims of Terri Schiavo's parents had been considered and rejected more than a dozen times by state and federal courts. You have criticized Congress, in the context of the Violence Against Women Act, by saying that "we've gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law" (NPR's *Talk of the Nation*, June 24, 1999)**

   a. **Was the Schiavo case an example of that kind of Congressional overreaching? Was the medical condition of one person the appropriate place for Congress to intervene?**

   b. **Is it a good idea for Congress to write legislation aimed at a specific case, especially after numerous courts have already issued decisions in the matter?**

After Congress sent this case back to the 11th Circuit, the court again rejected the claims of Terri Schiavo's parents by a 10-2 vote. And, in a concurring opinion, a Republican-appointed judge criticized President Bush and Congress for acting "in a manner demonstrably at odds with our founding fathers' blueprint for the

governance of a free people" by undermining the separation of powers and the independence of the courts.

c. Do you agree with the sentiment expressed in this opinion? In other words, in your view, did this legislation undermine the independence of the courts?

RESPONSE: As a judge, it is not generally my place to question the wisdom of congressional enactments. That would conflict with my view that a certain modesty and humility characterize the judicial function. A judge's role is to decide whether Congress has acted within its power under the Constitution and, if so, to decide the case before him according to Congress's expressed intent. Therefore, I believe it is inappropriate for me to comment on whether any particular congressional action was "appropriate" or "a good idea." The only relevant question for me as a judge with respect to congressional legislation aimed at a specific case is whether Congress was acting within its constitutional authority in passing that legislation.

Supreme Court precedent sets forth a partial framework for analyzing the constitutionality of legislation aimed at specific litigation. Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992), is particularly relevant. There, in upholding a law aimed at specific litigation, the Court distinguished between statutes that amend preexisting laws and statutes that direct results under old law. See id. at 438-39. The Court held that statutes that serve to amend preexisting laws are permissible, even if they are directed at particular cases, and that the statute at issue in Robertson was such a law. Id. at 441. The Court did not have occasion to decide whether statutes that direct results under old law violate the Constitution, although that is one possible reading of the Court's precedent in United States v. Klein, 80 U.S. 128 (1872). Thus, in analyzing the constitutionality of any statute that is focused on particular litigation, I would begin with the Robertson standard. If I found that the statute was meant to direct results in particular cases, I would then engage in a detailed analysis of the Klein case, other relevant precedent, and separation of powers principles.

8. **During the hearing, Senator Brownback compared the case of *Plessy v. Ferguson* with the case of *Roe v. Wade*. Do you see any appropriate analogy between *Plessy* – which upheld the principle of separate but equal for black Americans - and *Roe* – which affirmed a woman's freedom to make reproductive decisions for herself?**

RESPONSE: I have reviewed Senator Brownback's statements during the hearings with respect to Plessy and Roe, and understand him to be making a point concerning the stare decisis effect of application of a precedent in subsequent decisions, rather than drawing any analogy between the two cases with respect to the questions at issue on the merits. As your question suggests, the two cases concern the disparate issues of whether "separate but equal" satisfied the Equal Protection Clause and whether the right to an abortion is encompassed within the privacy interests protected under the Due Process

Clause.

9. **At her confirmation hearings, when pressed to distinguish the Supreme Court's line of privacy cases – including *Roe* – from the much-discredited decisions in *Dred Scott* and *Lochner*, then-Judge Ginsburg responded as follows:**

> **"In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines."**

Do you – like Justice Ginsburg – see a "sharp distinction" between those two lines of cases?

RESPONSE: I have noted both my view that Dred Scott and Lochner were incorrectly decided and egregious examples of judicial activism, and my view that the "liberty" protected by the Due Process Clause is not limited to freedom from physical restraint, but includes protection for privacy, and that this protection is not only procedural but substantive as well. It is clear, therefore, that I see a sharp distinction between Dred Scott and Lochner, on the one hand, and privacy appropriately protected as a component of liberty under the Due Process Clause, on the other. I have previously explained that I do not regard it as proper to comment on whether I believe Roe v. Wade was correctly decided, because cases implicating the issues arising in that area continue to come before the Court.

10. **We began to discuss, at your hearings, your characterization of Justices Marshall and Brennan as an "activist duo." We did not get to finish that conversation, so let me ask more specifically. In a memorandum to the Attorney General in the early 1980's, you criticized the Solicitor General for filing an amicus brief on the side of a deaf child in *Board of Education v. Rowley*. You wrote the following:**

> **"[T]he dissenting opinion Justice White, joined by an activist duo Justices Brennan and Marshall, specifically relied on the assertion in the government's brief of an activist role for the courts. * * * In this case a conservative majority of the Supreme Court turned back an effort by activist lower court judges to impose potentially huge burdens on the states – even though it had to fight the arguments of the Justice Department to do so."**

a. **Why did you choose the words "activist duo" to describe Justices Brennan and Marshall?**

b. **Do you stand by your statement that Justices Brennan and Marshall were an**

"activist duo"?

c. Can you name any other activist Justices?

d. Are Justices Thomas and Scalia also an "activist duo"?

e. Can there be activists on the left, as well as on the right?

RESPONSE: As I stated at my hearing, my comment was a reflection of the views of the Attorney General at the time, views that the Attorney General had expressed on various occasions. The characterization of the dispute in Rowley as implicating issues of judicial activism was not introduced by me in the memorandum; the opinions of various judges throughout the progress of the litigation are fairly read as framing the debate in such terms. See Board of Education v. Rowley, 458 U.S. 167, 190 n.11 (1982); Rowley v. Board of Education, 632 F.2d 945, 953 (2d Cir. 1980) (Mansfield, J., dissenting). The discussion in my memorandum reflects that fact.

I have described certain past decisions of the Court — including Dred Scott, Lochner, and Adkins — as activist decisions, and accordingly it would be appropriate to label Chief Justice Taney and Justices Peckham and Sutherland as activist judges, at least to the extent of their authorship of those opinions. By an activist judge I mean one who exceeds the properly limited role of the judiciary and decides cases according to his or her own policy preferences, rather than according to the rule of law. Such a flaw can apply to judges of any political background.

11. In 1985 you wrote a memo about a recently decided Supreme Court case, *Wallace v. Jaffree*, which involved issues relating to the separation of church and state. In that memo, you wrote: "Rehnquist . . . tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority. Which is not to say the effort was misguided." We began, but did not finish, discussing this at the hearing. Your memo was surprising, given your invocation of "modesty" and "stability." You were speaking approvingly of Rehnquist's attempt to "revolutionize" a well-settled area of law.

In that memo, you also criticized the opinion of Lewis Powell in the same case, criticizing it as a "lame concurring opinion focusing on *stare decisis*." As you know, Justice Powell, in voting to retain the *Lemon* test, noted that the earlier precedent was a carefully considered opinion of the Chief Justice, was decided by a 7-2 margin, and had been undisturbed for fourteen years.

a. Do you still stand by your analysis?

b. Whether one agrees or disagrees with the *Lemon* test, which Rehnquist

sought to eliminate, what are we to make of your endorsement of Rehnquist's attempt to "revolutionize" an important area of constitutional law?

c. How do you square these comments with your commitment to judicial modesty?

d. What are we to make of your derisive comment about Justice Powell's reliance on *stare decisis*, the pillar of stability in our jurisprudence? How do these comments reflect a commitment to judicial "modesty"?

e. What exactly was "lame" about Justice Powell's reliance on *stare decisis* in his opinion?

f. Are there other Supreme Court opinions that have invoked *stare decisis* that you think were "lame" for doing so?

RESPONSE: I wrote the memorandum you quote in my capacity as a staff attorney in the White House Counsel's office. The Reagan Administration believed that moments of silence in school were constitutional. Any administration has the prerogative to advance particular constitutional interpretations, and the Reagan Administration — like all others — attempted on occasion to do so. You describe the area of the law as "well-settled," but as the memorandum noted, this particular case generated no fewer than six separate opinions.

More than twenty years after the fact, I have no recollection that would allow me to explain further my description of the various opinions in the memorandum. My role as a lawyer for the Administration was to promote the views of my client vigorously and therefore judicial modesty was not at issue for me. As a judge, however, I have no client and no agenda to promote. My only agenda is to uphold the rule of law. I believe that my judicial record reflects that modesty.

With respect to whether I believe that there are examples of cases in which the Court should have overruled prior precedent but did not, the answer is yes. For example, cases such as Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); and Adair v. United States, 208 U.S. 161 (1908), the Supreme Court struck down various economic regulations based on the theory of due process announced most famously in Lochner v. New York, 198 U.S. 45 (1905). As I have stated, I believe that the Lochner decision and its progeny were wrongly decided, should not have been followed by the Supreme Court, and that the Court was correct to overrule this line of cases in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

12. Do you agree with the landmark decision in *NY Times v. Sullivan* (1964), which held that public criticism of public figures is acceptable unless motivated by actual

malice? Who do you believe constitutes a public figure under this standard?

RESPONSE: New York Times v. Sullivan is a precedent of the Court, and I would start with it in any case implicating this area of the law. The application of that precedent, however, continues to present issues for the Court. In particular, the scope of the definition of a "public figure" has been the subject of numerous decisions. See, e.g., Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (committing a crime does not necessarily render one a public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (receipt of significant amounts of federal funding does not necessarily render one a public figure); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (attorney who litigated a civil case against a police officer was not a public figure). In recent years, lower courts have continued to pass upon the public/private figure distinction. See, e.g., Lohrenz v. Donnelly, 350 F.3d 372 (D.C. Cir. 2003); Carr v. Forbes, Inc., 259 F.3d 273 (4th Cir. 2001). I therefore must be careful in answering your question, so as not to comment on an area that may come before me.

The Gertz Court described public figures as follows:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345. I have no quarrel with this basic formulation, and would start with it and other pertinent Supreme Court precedents in evaluating who qualifies as a public figure.

13. **Do you believe the Supreme Court was correct to strike down the Communications Decency Act in *Reno v. ACLU* (1997) on the grounds that pornography on the Internet is protected by the First Amendment?**

RESPONSE: Responding to this question would require me to indicate my views on whether Supreme Court cases in areas likely to come before the Court again were correctly decided. For reasons I have articulated before the Committee, I do not consider it appropriate for me to respond to such questions.

14. **Do you agree with the 1976 decision in which the Supreme Court held that Congress could not extend the Fair Labor Standards Act to state and city employees (*National League of Cities v. Usery*), or do you agree with the later 1985 decision, which held that Congress could (*Garcia v. San Antonio Metropolitan Transit*, overruling *Nat'l League of Cities*). Was the Court right to overturn its precedent nine years later? Why or why not?**

RESPONSE: Responding to this question would require me to indicate my views on whether Supreme Court cases in areas likely to come before the Court again were correctly decided. For reasons I have articulated before the Committee, I do not consider it appropriate for me to respond to such questions.

15. **Do you agree with the 1989 decision in which the Supreme Court held that it was constitutional to execute minors (*Stanford v. Kentucky*), or do you agree with the later 2005 decision, which held that it was unconstitutional (*Roper v. Simmons*). Was the Court right to overturn its precedent 16 years later? Why or why not?**

RESPONSE: Responding to this question would require me to indicate my views on whether Supreme Court cases in areas likely to come before the Court again were correctly decided. For reasons I have articulated before the Committee, I do not consider it appropriate for me to respond to such questions.

16. **You have spoken a bit about the rules of standing; an important related issue is justiciability. Where is the line between questions that are political and questions that are appropriate for a court to decide?**

    a. **Do you agree, as the Supreme Court held in *Baker v. Carr* (1962), that courts could appropriately consider the claims of voters who were being underrepresented in the state legislature? Why or why not?**

    b. **Do you agree, as the Supreme Court held in *Powell v. McCormack* (1969), that courts could appropriately consider the challenge of a duly-elected member of Congress who was prohibited from taking his seat by other members of that body? Why or why not?**

    c. **Do you agree, as the Supreme Court held in *Bush v. Gore* (2000), that the Court could appropriately consider a challenge to disputed state election law? Why or why not?**

    d. **What power does the Supreme Court have to intervene in state election laws (as in *Bush v. Gore*)? What role should the Supreme Court be playing in disputed elections?**

RESPONSE: I believe that the holding in Baker v. Carr is correct. It is well accepted that courts can appropriately consider constitutional challenges to legislative apportionment, and as a practical matter I do not believe that basic question is likely to come before the Court again.

While the Court in Baker v. Carr acknowledged that there were many situations in which

it was not empowered to consider claims because they presented "political questions," it also pointed out that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." Baker v. Carr, 369 U.S. 186, 217 (1962). Simply because a claim can be characterized as "political" does not mean that the Court can disclaim its responsibility to enforce the Constitution and laws. When a valid Equal Protection claim is brought before a court, whether it has to do with apportionment, racial discrimination, or anything else, a court has not only the power but the responsibility to consider it on the merits. Cf. Cohens v. Virginia, 19 U.S. 264, 404 (1821) ("[Courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

I have no quarrel with the approach to the "political question" doctrine reflected in the opinion for the Court in Powell v. McCormack, 395 U.S. 486 (1969). There, the Court reached the merits of a case brought by a duly-elected member of the House of Representatives, who had been prohibited from taking his seat by other members of that body. In finding that the case was justiciable, the Court applied a framework for the political question doctrine first laid out in Baker v. Carr. Specifically, the Powell Court rejected the argument that Article I, Section 5 of the Constitution ("Each House shall be the judge of the elections, returns and qualifications of its own members . . . .") reflected a "textually demonstrable constitutional commitment of the issue to a coordinate political department." Powell, 395 at 548 (quoting Baker, 369 U.S. at 217). The Court reasoned that the Constitution itself contained the standards that the House was to apply, and that the Court could decide whether the decision of the House comported with those standards. Id. The Court also rejected the argument that a decision on the merits would create a "potentially embarrassing confrontation between coordinate branches," as it would merely involve the interpretation of constitutional text — a well-established judicial role. Id. (citing Baker, 369 U.S. at 217).

Regarding Bush v. Gore, I do not feel it is appropriate to comment on the propriety or merits of the decision, or on the propriety of considering challenges to disputed state election law in any particular situation. But I certainly agree, and believe it is well-settled, that federal courts may entertain challenges to disputed state election law when those challenges raise federal questions. For example, it is appropriate for a court to consider a challenge claiming that a state election law unlawfully discriminates on the basis of race, see, e.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960) (entertaining a Fourteenth and Fifteenth Amendment challenge to redrafting of municipal boundaries). I believe the Supreme Court should play the same role in federal claims arising from disputed elections as it does in any other area — that of the final arbiter of federal law.

17. You spoke several times at the hearing about *Griswold v. Connecticut*. I have several follow-up questions:

a. You have said that you support the Court's conclusion in *Griswold v.*

***Connecticut*, but I would like to know why. There is no right to privacy in the text of the Fourteenth Amendment. I understand that there are privacy rights inherent in the Fourth Amendment and the First Amendment, and I would like you to avoid focusing on those in your answer. Please explain why you think that the Fourteenth Amendment includes a right to privacy that extends to contraception between married couples? Moreover, would you have reached the result the *Griswold* Court reached in the same way the majority opinion did?**

b. Given the precedent prior to *Griswold*, do you think that the Court's decision in that case was akin to playing umpire in a baseball game? Critics of the decision have repeatedly chastised the Court for inventing a free-standing right to privacy, or fashioning a Fourteenth Amendment right to privacy out of Amendments – such as the First Amendment and Fourth Amendment – that previously had no application to those particular circumstances. For instance, the relationship between the parental right to control a child's education and the right to privacy from state interference in intimate relationships is not obvious on first glance. If the proper role of a judge really is not to *make* law, but simply to interpret it, how was the Court's decision in *Griswold* consistent with the proper judicial role?

c. Do you, moreover, agree with the following line from *Griswold*: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Is this reasoning consistent with a philosophy of judicial restraint and modesty?

d. Finally, the Court stated as follows: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Do you agree with that reasoning? After all, we do not allow married couples to use illegal narcotics in the privacy of the bedroom, and police may well search bedrooms for cocaine or methamphetamines if they obtain a search warrant. Please explain what it is, precisely, about contraception that in your view places it outside of the reach of the state, and explain what exactly it is in the text or history of our founding document that leads you to this conclusion.

RESPONSE: The word "privacy" is not mentioned in the Constitution, but the word "liberty" appears in the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court's earliest precedents articulating privacy interests under the Due Process Clause, such as Meyer and Pierce, grounded those interests in the "liberty" protected by the Clause, and the Court's more recent precedents have done so as well. In some sense,

this effort to determine the meaning of "liberty" is not qualitatively different from the effort to interpret other terms. For example, the Court has interpreted the Speech and Press component of the First Amendment to cover areas — such as the right of association, see NAACP v. Alabama, 357 U.S. 449 (1958) — and specific activities — such as the wearing of armbands, see Tinker v. Des Moines School District, 393 U.S. 503 (1969) — that are not specifically listed in the Amendment itself. Such decisions need not be viewed as atextual; rather, they reflect the judicial interpretation of what constitutes "speech" under the First Amendment.

That said, I believe that any interpretation, and especially that of broadly-worded provisions, requires judges to guard against the incorporation of their personal preferences into the law. In the area of due process, I believe such restraint can best be achieved 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.

I do not think decisions in this area undermine the umpire analogy. A judge who did not regard his role as that of an umpire, but instead as that of a player, would feel free to decide such questions on the basis of his own social policy preferences. I do not.

As my answer indicates, I view privacy interests as being protected as part of the liberty specified in the Due Process Clauses of the Fifth and Fourteenth Amendments (as well as in the First and Fourth Amendments, as referenced in the question). That is not the precise analysis used by the Griswold majority, but it has since become the framework of the Court in considering the right to privacy.