QUESTIONS AND ANSWERS

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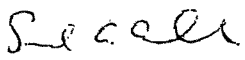
January 20, 2006

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

Enclosed please find my responses to your written questions as well as those of Senators Biden, Durbin, Kennedy, Levin, and Schumer. I am also providing my response to Senator Feingold's hearing question to which I indicated that I would respond in writing.

Sincerely,



Samuel A. Alito, Jr.

Enclosures

cc:
The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Joseph R. Biden, Jr.

1. **In 1985, you expressed past disagreement with the Warren Court's decisions in the area of criminal procedure. Perhaps the best known Warren Court decision on criminal procedure is *Miranda v. Arizona*, the case that led to police officers reading people their rights, as we so often see on television and elsewhere. Were you referring to this opinion?**

   RESPONSE: Since Miranda was decided in 1966, both our legal system and law enforcement have adapted to and have come to rely on Miranda. As best I can recall, Miranda was a decision that caused me concern when I was in college. Miranda had been sharply criticized by respected legal figures, see FRED P. GRAHAM, THE SELF-INFLICTED WOUND 61-62 (1970), and I was concerned about its effect on law enforcement at a time when the crime rate was rising noticeably. As discussed in response to question two, developments since my college years have allayed these concerns.

2. **When the issue of *Miranda* came back up to the Supreme Court in 2000, it was upheld in an opinion by Chief Justice Rehnquist, a former critic, who wrote that *Miranda* warnings "have become part of our national culture." Justices Scalia and Thomas dissented. Do you agree with Rehnquist, or Scalia and Thomas?**

   RESPONSE: When Miranda was handed down nearly 40 years ago, many important questions were left unanswered, and this uncertainty was a cause for concern. Since then, however, the Supreme Court has issued numerous decisions clarifying Miranda's scope. See, e.g., Mathis v. United States, 391 U.S. 1 (1968) (Miranda applies when the purpose of the custody is unrelated to the purpose of the investigation); Harris v. New York, 401 U.S. 273 (1971) (statement obtained in violation of Miranda may be used for impeachment); Calandra v. United States, 414 U.S. 330 (1974)(evidence obtained in violation may be introduced before grand jury); Beckwith v. United States, 425 U.S. 341 (1976) (full Miranda warnings not required where the petitioner is the focus of a criminal investigation but not in custodial interrogation); Oregon v. Mathiason, 429 U.S. 492 (1977) (defining custody for Miranda purposes); North Carolina v. Butler, 441 U.S. 369 (1979) (explicit waiver of Miranda rights not always required); Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (explaining that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."); New York v. Quarles, 467 U.S. 649 (1984) (recognizing "public safety" exception); Oregon v. Elstad, 470 U.S. 298 (1985) (allowing the admission of a suspect's properly warned statement even though it had been preceded and arguably induced by an earlier inculpatory statement taken in violation of Miranda); Colorado v. Connelly, 479 U.S. 157 (1986) (waiver must be proved by preponderance of evidence); Illinois v. Perkins, 496 U.S. 292

(1990) (undercover officer posing as inmate not required to give warnings to inmate); Missouri v. Seibert, 542 U.S. 650 (2004) (clarifying Oregon v. Elstad); United States v. Patane, 542 U.S. 830 (2004) (admission of derivative evidence). A large and complex body of case law implementing Miranda has been worked out over the course of nearly four decades. If Miranda had not been decided, it is likely that comparable judicial resources would have been devoted to the development of a different body of case law dealing with the problem of interrogation.

In addition, law enforcement agencies have devoted substantial resources to training officers to comply with Miranda. If different rules regarding interrogation had been developed, either by the courts or by legislative bodies, officers presumably would have been trained differently. In these and other ways, the country has come to rely on Miranda, and reliance is a factor that counsels in favor of adherence to prior precedent.

3. **Perhaps the next most widely known criminal procedure case from the Warren Court was *Gideon v. Wainright*, the case saying that every person charged with a serious crime is entitled to a lawyer, whether or not he or she can afford one. Were you referring to this opinion in your 1985 application?**

RESPONSE: As best I can recall, I was not referring to Gideon in the 1985 statement.

4. **Judge Alito, in talking to Senator Kohl you identified areas where you disagreed with Judge Bork. You also said, though, that there were some areas where you agreed with them. In what areas do you agree with him? Please be as specific as possible.**

RESPONSE: When President Reagan announced that he was nominating Judge Bork, President Reagan described him as a "powerful advocate of judicial self-restraint" and as a jurist who shared President Reagan's "view that it is essential that judges' personal preferences and values should not be part of their constitutional interpretations." I also share the view that it is essential for a federal judge to subordinate his or her private opinions, and to consider only the dictates of the Constitution and the laws of the United States. As Justice Felix Frankfurter once said, "[t]he highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."

5. **Why did you think Judge Bork should have been confirmed?**

RESPONSE: I was serving in non-career positions in the Reagan Administration at the time of Judge Bork's nomination and at the time when I commented on his nomination. I supported President Reagan's decision and agreed with the stated purpose of the decision, namely, to select a nominee who was dedicated to judicial self-restraint.

6. **In that interview, you said that *"if the public had accurately understood the positions***

***that he holds ... he would have been overwhelmingly confirmed.*" What do you think people misunderstood about Judge Bork?**

RESPONSE: It was my view at the time that some of the publicity surrounding the nomination was misleading. When legal issues are reduced to sound bites, distortion is almost inevitable.

7. **In a case you briefed while in the Solicitor General's Office, the *Wygant* case, you argued that a school system could not lay off employees in a way that avoids disproportionately firing minorities. Your brief said the argument against this diversity program was "*the same*" as the argument in favor of diversity in *Brown v. Board of Education*. Please explain this to me.**

RESPONSE: Wygant involved a school district layoff plan that the Supreme Court held violated the Equal Protection Clause. The brief on which I worked as an Assistant to the Solicitor General did not equate this plan with the invidious racial discrimination at issue in Brown. Rather, the Wygant amicus brief simply stated that the starting point of the argument in both cases was the fundamental proposition that the Equal Protection Clause guarantees equal treatment under the law for persons of all races. The Wygant amicus brief then went on to explain why the particular layoff plan at issue in that case was unconstitutional. Thus, while the government's amicus briefs in the two cases started by asserting the same fundamental equal protection principle, the Wygant amicus brief did not suggest that the argument in Wygant was the same as the argument in Brown.

8. **You compared that same case to *Plessy v. Ferguson*, the infamous 1896 case that validated "separate but equal." Are you saying that ejecting a black man from a railroad coach in order to separate the races is equivalent to requiring a school to maintain diversity?**

RESPONSE: The Wygant amicus brief referred to Plessy in a passage that recounted how the true meaning of the Fourteenth Amendment was distorted in the late nineteenth century, and the brief noted that Plessy involved a flagrant violation of the fundamental principle embodied in the Equal Protection Clause. While the Wygant amicus brief argued that the layoff plan at issue in that case was unconstitutional (as the Supreme Court later held), the Wygant brief never suggested that the racial segregation in Plessy was "equivalent" to the Wygant plan.

9. **You had a very interesting exchange with Senator Specter on when the courts should or should not second-guess congressional reasoning. You said, "*I think Congress's ability to reason is fully equal to that of the judiciary.*" Could you elaborate for me on this statement, especially keeping in mind Congress's ability to, among other things, hold hearings and confer with outside experts – things that the Court can't do by its very nature?**

RESPONSE: In responding to Senator Specter's question, I understood the term "reasoning" to mean the exercise of logic. The term "reasoning" is defined as "the process of forming conclusions, judgments, or inferences from facts or premises," RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1197 (1967), and I think that Congress and the judiciary are fully equal in their ability to reason in this sense.

The Congress has a decided advantage in being able to evaluate empirical information. Congress can hold hearings and is much freer than the judiciary to receive information from outside organizations and individuals. For these reasons, there is no inconsistency between my view that Congress and the judiciary are equal in reasoning ability but that Congress is better situated to gather data and make empirical judgments.

10. **In discussing the Independent Counsel case this week, you started to say that it's "a settled precedent of the Court," but then corrected yourself and said it's "a precedent of the Court." Why did you do that? In your response, please explain the difference between a settled Supreme Court precedent and one that's merely "a precedent".**

RESPONSE: The term "settled precedent" does not have a precise meaning in the law, and for that reason I generally tried (albeit not always successfully) to avoid using the term in responding to questions during the hearing. This was the reason for the correction to which the question refers.

11. **Under the theory of the "unitary executive" as you have previously espoused, which specific, existing federal agencies (and terms of service of agency heads, commissioners, etc.) would need to be eliminated or restructured?**

RESPONSE: I understand this question to refer to the constitutionality of laws relating to the removal of officers who head federal agencies. "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." Bowsher v. Synar, 478 U.S. 714, 726 (1986). In addition, Congress may not impose restrictions on the President's ability to remove executive officers if the "restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." Morrison v. Olson, 487 U.S. 654, 691 (1988). In Morrison, the Court reaffirmed its decisions in Humphrey's Executor v. United States, 295 U.S. 602 (1935), which held that it was constitutional for Congress to place restrictions on the removal of commissioners of the Federal Trade Commission, and Weiner v. United States, 357 U.S. 349 (1958), which reached the same conclusion with respect to members of the War Claims Commission.

In the talk that I gave about the "unitary executive," I did not suggest that any existing removal restrictions were unconstitutional. I merely suggested that, in future separation

of powers cases, it would be advisable to keep in mind the objectives that the Founders had in mind in deciding to place a single officer, the President, at the head of the Executive Branch. These objectives, I explained, were to ensure, first, that the Executive Branch would have "energy," i.e., that it would be able to get things done, second, that the Executive would be accountable to the electorate, and third, that the Executive would represent the interests of the entire country and not just some narrow factions.

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Richard J. Durbin

1. **In your 1985 application essay, you wrote that it was "an honor and source of personal satisfaction" to serve in the Reagan Justice Department and "to advance legal positions in which I personally believe very strongly." During your employment there, the Reagan Justice Department produced a publication entitled "Guidelines of Constitutional Litigation" that was highly critical of the *Griswold* decision. The publication stated: "The so-called 'right of privacy' cases provide examples of judicial creation of rights not reasonably found in the Constitution. The Supreme Court first articulated a constitutional right to privacy in *Griswold v. Connecticut*."**

   A. Question: Judge Alito, do you now, and did you during the 1980s, agree with this position of the Reagan Justice Department – that the right of privacy was an example of "judicial creation of rights not reasonably found in the Constitution"? Please explain.

RESPONSE: In my view, provisions of the Constitution do provide protection for privacy. For example, the Fourth Amendment protects against government intrusion into a place where a person has a legitimate expectation of privacy. See Rakas v. Illinois, 429 U.S. 128, 143-44 (1978). The Fifth Amendment protects privacy by forbidding compelled self-incrimination; the First Amendment protects privacy in certain circumstances relating to the freedom of speech, see NAACP v. Alabama, 357 U.S. 449 (1958). In Washington v. Glucksberg, 521 U.S. 702 (1997), the Court synthesized its longstanding precedents, and stated that the Due Process Clauses of the Fifth and Fourteenth Amendments provide protection for privacy rights that are "deeply rooted in this Nation's history and traditions" and "'implicit in the concept of ordered liberty.'" Id. at 721 (citations omitted). Insofar as the Justice Department during the 1980s took the view that the Constitution is not properly interpreted to protect privacy interests, I did not endorse that view at the time and it is not my present view.

   B. Question: What was the basis for your belief, in 1985, that "the Constitution does not protect a right to an abortion"?

RESPONSE: In the 1985 statement that you cite I was referring to my work in the Solicitor General's office, and in particular, my work on the memorandum that I wrote concerning the Thornburgh case. My view on this question was influenced by Supreme Court opinions criticizing Roe, the most recent of which was Justice O'Connor's dissent in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452-74 (1983), as well as the scholarly publications to which I referred in footnote 10 of the memorandum that I wrote in the Thornburgh case.

2. **You have been a member of the Federalist Society for 23 years. You highlighted**

your membership in this group when you applied for the 1985 promotion at the Justice Department. The speech you gave to the Federalist Society in 2000 about executive power is now well known, but according to your Senate questionnaire, you have given at least ten other speeches to the Federalist Society over the years.

The Federalist Society's mission statement contains the following assertion: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."

Question: Do you agree with this mission statement? Please explain your answer with regard to both law schools (you have taught several law school classes and delivered many lectures to law school audiences) and the legal profession.

RESPONSE: It is generally believed that the majority of professors at most law schools would describe their political beliefs as liberal or on the left side of the political spectrum. I do not have an impression about this statement with respect to the legal profession as a whole.

3. **In our discussion about the Establishment Clause, I asked you whether you thought it was appropriate to provide "financial support from a government agency to a school that is a religious school, where the money is used for the purpose of teaching religion or proselytizing." You responded that according to Supreme Court precedents, a government body cannot supply money to a school for the purpose of conducting religious education.**

A. **Question: Consider a situation in which religious or faith-based social service providers as well as non-religious social service providers receive direct government aid to provide services to those in need. In your opinion, is it constitutionally permissible for the government to allow these religious providers to use this aid to subsidize social service programs that include religious instruction, proselytizing, worship or other religious content?**

RESPONSE: Cases presenting questions of this type may come before the Supreme Court in the near future. See, e.g., Freedom From Religion Found. v. Chao, 2006 U.S. App. LEXIS 811 (7th Cir. 2006) (involving a challenge to the "Faith-Based Initiatives" program). The Supreme Court has handed down numerous cases dealing with government aid to religiously affiliated institutions, and I would consult this body of case law if confronted with an issue such as the one presented in the question. Two of the most recent cases in this line are Agostini v. Felton, 521 U.S. 203 (1997), and Mitchell v. Helms, 530 U.S. 793 (2000). In Agostini, the Supreme Court upheld the constitutionality of a program that sent public school teachers into religiously affiliated schools for the purpose of providing remedial education to disadvantaged children. In

an opinion written by Justice O'Connor, the Court held that the requirements of the Lemon test were met in light of the safeguards provided by the program in question. In Mitchell, the Court again applied the Lemon test, as clarified by Agostini, and upheld a program under which the federal government provided funds to state and local government agencies and these agencies in turn loaned educational materials and equipment to religiously affiliated schools. Justice O'Connor's concurrence in Mitchell maintained that "actual diversion of government aid to religious indoctrination" would violate the Establishment Clause. Id. at 840 (O'Connor, J., concurring).

B. **Question:** **In your opinion, is it constitutionally permissible for the government to allow religious social service providers to discriminate on the basis of religion in hiring with respect to jobs funded by direct government aid?**

RESPONSE: Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. See also 42 U.S.C. § 604a(f). In Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987), the Court held that the application of this provision to a religious organization's secular activities did not violate the Establishment Clause. It has been argued, however, that this precedent is not controlling when the government provides funding to religious organizations. See Note, Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation, 37 Harv. C.R. - C. L. Law Rev. 389 (2002). Because this is a question that may well come before the Third Circuit or the Supreme Court, it would be inappropriate to comment further.

C. **Question:** **In a report published by the Department of Justice in 1988, the Reagan Administration suggested that religious institutions that receive government aid have a constitutional right to resist certain regulation that follows the aid when such regulation violates the institutions' religious beliefs. In your opinion, is there any constitutional basis upon which religious institutions could refuse to abide by government regulations that condition the receipt of financial aid provided to those religious institutions? If so, what are the legal reasons?**

RESPONSE: Though the Supreme Court has not directly addressed this question, such cases are pending in the lower federal courts. See, e.g., Teen Ranch v. Udow, 389 F. Supp. 2d 827 (W.D. Mich. 2005) (party argued that the regulations violated the Free Exercise and Free Speech guarantees of the First Amendment). Because these are issues that may well come before my court or the Supreme Court, it would be inappropriate to comment further.

4. **You told Senator Leahy, "I think that the considerations that inform the theory of**

the unitary executive are still important in determining and deciding separation of powers issues that arise in this area." You had an exchange with Senator Grassley that seems somewhat inconsistent with your statement to Senator Leahy. Senator Grassley asked:

> **"But is it not right that you are a person that is bound by the Constitution to only hear cases and controversies that come before the Supreme Court? ... So any theories you might have about - what was it called, unitary executive or something - what's that got to do with your deciding a case?"**

You responded:

> **"Senator, you are exactly right. If cases involving this area of constitutional law come before me, I will look to the precedents of the Supreme Court. And that's what I think I've been trying to emphasize. And there are governing precedents in this area."**

Question: How do you reconcile your statement to Senator Leahy with your statement to Senator Grassley? Will you pledge that you will not apply the unitary executive theory in deciding cases if you are confirmed?

RESPONSE: The answers to the two questions are consistent. In response to Senator Grassley's question, I said that the Supreme Court addresses separation of power issues only in the context of deciding actual cases and controversies and that, if confirmed, I would look to the governing precedents of the Supreme Court in analyzing such cases.

An important precedent of the Court in this area is Morrison v. Olson, 487 U.S. 654 (1988), which recognizes that a law violates separation of powers principles if it "unduly interfer[es] with the role of the Executive Branch." Id. at 693. Similarly, Morrison held, among other things, that separation of powers principles allow Congress to place restrictions on the removal of an executive officer provided that the restrictions do not "impede the President's ability to perform his constitutional duty." Id. at 691. The point that I made in my response to Senator Leahy was that, in following a precedent such as Morrison and in determining whether a law impermissibly interferes with the Executive's ability to carry out its constitutional role, a court should keep in mind the role that the Founders intended for the President to play when they "decid[ed] to vest Executive authority in one person rather than several." Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., dissenting). As Justice Breyer elaborated, the Founders "did so in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability. They also sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." Id. As I said to Senator Leahy, a separation of powers argument relating to an

alleged infringement of the role of the Executive should be informed by the Founders' reasons for structuring the Executive as they did.

5. **I asked you whether you agreed with Justice Thomas' dissent in *Hamdi v. Rumsfeld*. You told me: "Well, I'm not coming down -- I don't recall that Justice Thomas uses the term of unitary executive in his dissent. It doesn't stick out in my mind that he did. If he did, he's using it there in a sense that's different from the sense in which I was using the term."**

In his *Hamdi* dissent, Justice Thomas said: "The Founders intended that the President have primary responsibility - along with the necessary power - to protect the national security and to conduct the Nation's foreign relations. ... It is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."

Question: Do you agree with Justice Thomas' *Hamdi* dissent? Do you agree with his interpretation of the unitary executive theory?

RESPONSE: As I explained during the hearings, my understanding of the concept of the unitary executive relates to the question of control over the Executive Branch and not to the scope of the powers possessed by the Executive Branch. In my view, the Framers could have created a unitary executive with only very narrow powers, e.g., a unitary executive whose only power was to act as the ceremonial head of state. By the same token, they could have created a plural executive, headed, for example, by a multi-member council or commission. Thus, to my mind, the concept of the unitary executive relates to the power to control the Executive Branch and not to the scope of the powers held by that branch. If others use the term "unitary executive" in a different way, their views should not be confused with mine. I note that in the talk that I gave in November 2000, I stated expressly that I was not addressing the issue of the scope of the power conferred on the President by the language of Article II, sec. 1, which says that "[t]he Executive power" is vested in the President. Rather, I stated clearly that the only power that I was discussing was the power "to take Care that the Laws be faithfully executed," which is specifically conferred on the President by Art. II, sec. 3.

The question quotes Justice Thomas's statement in his Hamdi dissent that "the Founders intended that the President have primary responsibility – along with the necessary power – to protect the national security and to conduct the Nation's foreign relations." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2674 (2004) (Thomas, J., dissenting). I understand this conclusion to be based on the powers that the Constitution gives the President – in Justice Thomas's words, the fact that "the Constitution vests in the President '[t]he executive Power,' Art. II, § 1, provides that he 'shall be Commander in Chief of the' armed forces, § 2, and places in him the power to recognize foreign governments, § 3." Hamdi, 124 S.Ct. at 2675 (Thomas, J., dissenting). Justice Thomas does add that the Framers chose to vest these powers in the President because they believed that a unitary executive would be better able than Congress to perform these

functions, id. at 2675, but I do not read Justice Thomas's opinion to mean that the decision to create a unitary, rather than a plural executive, gives rise to the inference that the Framers intended for the executive to have broad war powers. The issue presented in Hamdi is one that may come before the Court and therefore it would not be appropriate for me to comment on any of the opinions in that case.

6. **In response to one of my questions, you stated:**

> **"When I talk about the unitary executive, I'm talking about the president's control over the executive branch, no matter how big or how small, no matter how much power it has or how little power it has. To me, the issue of the scope of executive power is an entirely different question and it goes to what can you read into simply the term executive. That's part of it. Of course, there are some other powers that are given to the president in Article II, commander-in-chief power, for example, and there can be a debate, of course, about the scope of that power, but that doesn't have to do with the unitary executive."**

Question: What specific constitutional provisions grant power to the President? Some scholars argue that the President's powers are limited to those enumerated in Article II, Section II of the Constitution. Do you agree?

RESPONSE: The Supreme Court has sent mixed signals regarding the existence of inherent executive powers. In the seminal case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), Justice Black's majority opinion stated that "[t]he President's power, if any, to issue the order [seizing the steel mills] must stem either from an act of Congress or from the Constitution itself." Id. at 585. Given the absence of express statutory or constitutional authorization for the seizure, Justice Black reasoned, President Truman's order was unconstitutional. See id. at 585, 87 (noting that "[t]here is no statute that expressly authorizes the President to take possession of property as he did here," and that "it is not claimed that express constitutional language grants this power to the President"). Justice Jackson's concurring opinion contemplated a less restrictive view of executive power, but he stated that he could not "accept the view that this clause [Art. II, § 1, cl. 1, providing that "[t]he executive power shall be vested in a President of the United States of America"] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."). 343 U.S. at 641 (Jackson, J., concurring). See also William Howard Taft, Our Chief Magistrate and His Powers 139-40 (1916) ("The true view of the Executive functions is ... that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power ... either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.").

In other cases, however, the Court has spoken more broadly of presidential power. In United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936), for example, the Court upheld a broad delegation of power to the President to restrict arms sales to two Latin American countries. Explaining its holding, the Court referred in dicta to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." Id. at 319-20. Moreover, the Court noted, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution ... is categorically true only in respect of our internal affairs." See, e.g., United States v. Belmont, 301 U.S. 324 (1937) (giving effect to an executive agreement between the United States and the Soviet Union even though no constitutional provision expressly authorized the president to enter into non-treaty compacts); see also Laurence Tribe, American Constitutional Law 649-50 (3d ed. 2000) ("If this unenumerated power to enter non-treaty agreements exists within the federal government, it seems clear that it is the President, not Congress, who has the authority to exercise this power on behalf of the nation. ... Because of the broad delegation in Article II, the President is widely thought to have inherent power to perform all executive acts–subject, of course, to the specific limitations of Articles I and II and other constitutional provisions.").

I have not addressed this question in connection with any work that I have done either before or after becoming a judge. If the issue were to come before me, either on the court of appeals or the Supreme Court, if I am confirmed, I would carefully study the briefs and the supporting authorities cited and would reach a conclusion only after fully considering the arguments of counsel and the views of the other judges or justices.

7. **You told Senator Feingold: "the President must take care that the statutes of the United States that are consistent with the Constitution are complied with."**

Some advocates of the unitary executive argue that the "take care" clause of Article II of the Constitution gives the President power to refuse to execute laws that he believes are unconstitutional. However, the non-partisan Congressional Research Service has concluded, "the President's duty under Article II to 'take care' that the laws are faithfully executed vests in him no supervening substantive power."

Question: Do you agree with the Congressional Research Service's conclusion or do you believe the "take care" clause of Article II of the Constitution gives the President power to refuse to execute a law that he believes is unconstitutional?

RESPONSE: Scholars differ sharply on this question, see Dawn E. Johnsen, Presidential Non-enforcement of Constitutionally Objectionable Statutes, 63 SPG Law & Contemp. Probs. 7, 14-23 (2000) (describing controversy), and up to this point, I have not encountered this question in

my work. If the issue is presented in a case that comes before me, either on the court of appeals or the Supreme Court, if I am confirmed, I would carefully study the briefs and the supporting authorities cited and would reach a conclusion only after fully considering the arguments of counsel and the views of the other judges or justices.

8. **In determining whether the President has the authority to refuse to execute a law that believes is unconstitutional, you indicated that you would refer to the three-part framework laid out in Justice Jackson's influential concurring opinion in the *Youngstown Steel* case.**

   A. **Question:** **Would not a case where the President refuses to abide by a law always fall into the third area laid out in Justice Jackson's opinion "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"?**

RESPONSE: Such a case would fall into category three.

   B. **Question:** **Once you determine that the President's refusal to enforce a law falls into the third area, what analytical framework would you apply in deciding whether the President has such a power? To what constitutional provisions would you refer to answer this question?**

RESPONSE: I would first attempt to ascertain the scope, if any, of the constitutional power claimed by the President and would then inquire whether the statute unconstitutionally infringed on that power.

9. **Senator Hatch asked you how you ruled in *Fatin v. INS*, 12 F.3d 62 (3d Cir. 1993), an asylum case. Senator Hatch asked: "In the landmark case *Fatin v. INS*, this involved Iranian women who refused to conform to their government's gender-specific laws and social norms; whether or not they should be granted asylum in America. How did you rule in that case?"**

You responded:

> **"I think that was one of the first cases in the federal courts to hold that requiring a woman to be returned to a country where she would have to wear a veil and conform to other practices like that would amount to persecution if that was deeply offensive to her, and that subjecting a woman to persecution in Iran or any other country to which she would be returned based on feminism would be persecution on the basis of political opinion."**

Question: **You did not respond to Senator Hatch's question regarding how you ruled in the *Fatin* case. Did you rule for the government or Ms. Fatin, the Iranian woman who sought asylum in this case?**

RESPONSE: Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993), held that the broad category of "gender" could constitute a "particular social group," a statutory requirement for refugee status. Further, the court recognized that a narrowly defined social group, comprised in this case of Iranian women who rejected the social norms and the government's gender-specific laws, could also satisfy the definition of a particular social group. The Fatin court's attempt to understand Ms. Fatin's motives and the social and societal consequences of her conduct was a departure from historically rigid analysis of gender-based asylum claims. See, e.g., Pamela Goldberg, Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context, 66 Brooklyn L. Rev. 309, 330 (2000); John Hans Thomas, Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in Lwin v. INS, 1999 B.Y.U.L. Rev. 799, 817 (1999). The court concluded, however, that Ms. Fatin did not produce enough evidence to qualify for asylum based on either the broader or the narrower definition of social group. Since 1993, it has been argued that, more than any other case in the United States, Fatin supports the claim that gender is a particular social group for purposes of asylum. See, e.g., Anjana Bahl, Home is Where the Brute Lives: Asylum Law & Gender-Based Claims of Persecution, 4 Cardozo Women's L.J. 33, 58-60 (1997).

10. **On January 10, 1986, in your capacity as Deputy Assistant Attorney General of the Justice Department's Office of Legal Counsel, you sent a letter to then-FBI Director William Webster in which you concluded that the Constitution "grants only fundamental rights to illegal aliens within the United States."**

The only case you cited in support of this proposition was *Mathews v. Diaz*, 426 U.S. 67 (1986), which you said suggests that "illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights." *Mathews v. Diaz* held that it does not violate the Due Process Clause to condition an immigrant's eligibility for Medicare on five years of continuous residence in the United States. Justice Steven's opinion, for a unanimous Court, said that all immigrants, legal and illegal, have rights under the Fifth and Fourteenth Amendments, but it did not say or suggest that those are the only rights that immigrants have.

Question: **Did you misinterpret *Mathews v. Diaz* in your letter?**

RESPONSE: The letter in question accurately cited Mathews v. Diaz, 526 U.S. 67, 77 (1976), as "suggesting that illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights." The Court in that case upheld the constitutionality of a provision conditioning an alien's eligibility to participate in a federal medical insurance program on continuous residence in the United States for five years and admission for permanent residence. While stating that illegal aliens have the right not to be deprived of life, liberty, or property

without due process, the opinion also stated that illegal aliens need not be treated the same as citizens or aliens who are in this country legally. See id. at 80, 82. The Court thus held that Congress could constitutionally draw a distinction between the class of aliens made eligible for the program and those, including illegal aliens, who were not.

The letter did not provide a longer and more comprehensive treatment of the issue of the constitutional rights of illegal aliens because it was not necessary in order to answer the question that was submitted to the Office of Legal Counsel. The question submitted was whether it was lawful for the FBI to place fingerprint identification and criminal identification information relating to certain aliens into the Bureau's own files. The letter concluded that the Bureau was authorized by Executive Order and regulation to undertake this activity and that doing so would not be inconsistent with circuit court decisions concerning the dissemination of inaccurate stigmatizing information. In this connection, the letter noted that the information would merely be placed in the Bureau's files and would not be routinely disseminated. In a footnote, the letter provided additional reasons why the proposed actions would not violate the Constitution, namely, that fingerprint identification information is not stigmatizing and that the subjects of the identification were either outside the United States or present in this country illegally. Thus, the issue of the rights of illegal aliens in this country was very much a subsidiary matter, and it was for this reason that the subject was addressed only in passing.

11. **In your January 10, 1986 letter to then-FBI Director Webster, you did not cite *Plyler v. Doe*, 457 U.S. 202 (1982), a case that speaks directly to the issue of nonfundamental rights for illegal aliens. In *Plyler*, the Court held that illegal immigrant children have the constitutional right to an elementary education, even though education is not a fundamental right.**

A. Question: Do you believe that illegal immigrant children have the constitutional right to an elementary education? Should you have cited *Plyer* in your letter?

RESPONSE: Plyler so held, and it is a Supreme Court precedent that has been in force for more than 20 years and is entitled to respect under the doctrine of stare decisis. If the request from the FBI had required a discussion of the constitutional rights of illegal aliens, it would have been appropriate to discuss Plyler. However, for the reasons explained above in response to question 10, there was no need to discuss this issue, and the footnote merely touched on the issue in passing. Under these circumstances, it was not necessary to discuss or cite Plyler.

B. Question: What is your view of *Plyler* today? Is it well-settled law?

RESPONSE: Please see above response to question 11.A.

C. Question: What are your views on the constitutional rights of immigrants, including illegal immigrants?

RESPONSE: The Supreme Court has stated that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens. ... [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). State laws discriminating against aliens are generally "inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971) (striking down state law denying welfare benefits to aliens who have not resided in the United States for a specified number of years). This is because "[a]liens as a class are a prime example of a 'discrete and insular minority' for whom heightened judicial solicitude is appropriate.'" Id. (citing United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)); see also Nyquist v. Mauclet, 432 U.S. 1 (1977) (striking down state law limiting financial aid for higher education to citizens and certain resident aliens); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (invalidating Puerto Rico law permitting only U.S. citizens to engage in private practice of engineering); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating state law preventing aliens from holding civil service jobs); In re Griffiths, 413 U.S. 717 (1973) (holding that state law excluding aliens from being licensed as attorneys was unconstitutional).

Although state discrimination against aliens is generally subject to strict scrutiny, rational basis review applies when alienage classifications relate to self-government and the democratic process. Foley v. Connelie, 435 U.S. 291, 296 (1978) (upholding state law providing that police officers must be citizens). Thus, the Court has permitted states to deny aliens the right to vote or hold political office, see Sugarman v. Dougall, 413 U.S. 634, 647 (1973), to serve on juries, see Perkins v. Smith, 426 U.S. 913 (1976), or to be employed as an elementary or secondary school teacher, see Ambach v. Norwick, 441 U.S. 68 (1979). But rational basis review will not be applied when discrimination on the basis of alienage does not involve the protection of state interests essential to representative government. See Bernal v. Fainter, 467 U.S. 216 (1984) (holding that state law making citizenship a requirement for a person to serve as a notary public violated the equal protection clause).

Because Congress has plenary power to regulate immigration, the Court applies a narrow, deferential standard of review when a federal law discriminates on the basis of alienage. See Mathews v. Diaz, 426 U.S. 67 (1976) (upholding federal statute denying Medicaid benefits to aliens unless they were admitted for permanent residence and lived in the United States for at least five years). But while such review applies to alienage classifications imposed by Congress and the President, it may not apply to distinctions made by federal administrative agencies that are not charged with administering the immigration laws. See Hampton v. Wong, 426 U.S. 88 (1976) (invalidating federal civil service regulation denying employment to aliens).

One of the Court's leading cases on the constitutional rights enjoyed by illegal immigrants is Plyler v. Doe, 457 U.S. 202 (1982), which held that a state statute that withheld from local school districts state funds for the education of children not legally admitted into the United

States, and which authorized local school districts to deny enrollment to such children, violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Id. at 210.

Response of Judge Samuel A. Alito, Jr.
to the Hearing Question of Senator Russell D. Feingold

Senator Feingold: If you are confirmed to the Supreme Court, how would you analyze a possible recusal motion if an appeal on a case from one of those sitting judges testifying on your behalf were to come before you? Will you have to recuse yourself from any case where one of these judges was involved in the decision?

RESPONSE: I would continue to consider recusal issues very seriously if confirmed to the Supreme Court. As I mentioned in my testimony, the recusal standard for Supreme Court Justices is in some ways different from that for lower court judges. Supreme Court Justices have less latitude to err on the side of recusal, because recusal can lead to decisions that are evenly divided or that involve less than an absolute majority of the Court. Lack of a definitive resolution to a case when the litigants have no higher court that could resolve their cases undermines the judicial process.

If confirmed I would apply the relevant legal and ethical standards of Supreme Court recusal to the facts of each situation that I face. I would scrupulously abide by 28 U.S.C. § 455, which, among other things, requires recusal if the judge's "impartiality might reasonably be questioned." I would also consider past recusal decisions and practice of other Justices, lower court opinions related to recusal, and other relevant ethical standards.

In considering the particular issue that you raised during the hearings, it would be important to determine whether Justices have in the past recused themselves in analogous situations, including cases in which a party was represented by an attorney who testified either in favor of or against the Justice during the Justice's confirmation hearings. I am aware that United States District Judge Walter E. Craig testified on behalf of Chief Justice Rehnquist's 1971 nomination to be an Associate Justice. Shortly thereafter, then-Justice Rehnquist authored United States v. Fuller, 409 U.S. 488 (1973), a 5–4 decision reversing a judgment of Judge Craig. I am not aware of any case in which Chief Justice Rehnquist recused himself from appeals of cases decided by Judge Craig, who served in the District of Arizona until 1986.

A court of appeals judge whose decision is reviewed by the Supreme Court, unlike an attorney representing a party before the Court, has no personal stake in the outcome of the case. Federal judges at all levels know each other very well, and I do not know of a case where friendship between a lower and a higher court judge caused recusal. The Second Circuit rejected the suggestion that circuit judges "would be reluctant to reverse . . . a sentence imposed by a judge who now serves on this Court." United States v. Colon, 961 F.2d 41, 44 (2d Cir. 1992).

Based on what I know at this time, I do not think that the testimony of the court of appeals judges should require me to recuse myself in cases on which they sat, but if confirmed, I would undertake a thorough review of the past practices of Justices in any analogous situations, and if a recusal motion is filed in a case on which one or more of the testifying judges sat, I would carefully consider the arguments presented.

Response of Judge Samuel A. Alito, Jr.
To the Written Question of Senator Edward M. Kennedy

Court records provided to us show that Vanguard entries were made or edited on your recusal list on December 10 and 23, 2003, and January 5, 2004. If you have or can obtain or access any additional records relating to those entries, please provide them to us.

a. In particular, have you searched your own records to see whether you have or can access any records or communications relating to any of the recusal list activity with respect to Vanguard during that period that have not already been provided in full? If not, please do so, and if there are any such materials, please provide them with your response. If there are additional such materials in the possession of the court, please obtain them and provide them to us.

RESPONSE: I have searched my records, and I have not found any additional records relating to recusal list activity with respect to Vanguard during the period in question. As far as I am aware, all information in the possession of the court relating to recusal list activity on my part with respect to Vanguard during this period has been provided to the Committee.

b. Your questionnaire response attached a listing of cases you had been disqualified from with brief explanations as to the reason for each disqualification. Did you determine the reasons yourself, and did you do so based on your copies of your recusal lists or other contemporaneous materials, or did the clerk's office do so, and on what basis? Please provide all materials you or the clerk's office relied on to determine those explanations in each recusal shown as involving "Vanguard."

RESPONSE: I attempted to reconstruct the reasons for recusal in all cases where the recusal was not based on the computerized checking system. The recusals since 2003 in cases involving Vanguard were triggered by the computerized recusal checking system.

In almost all other instances, with the assistance of my clerks, I attempted to ascertain the reason for recusal based on the parties and attorneys in the case. In the great majority of cases, my office records did not contain any information regarding the reason for recusal in particular cases. The clerk's office likewise does not possess such information because, when judges decide to recuse, they rarely inform the clerk's office of the reason for the recusal.

Response of Judge Samuel A. Alito, Jr.
to the Written Question of Senator Patrick J. Leahy

During this week's hearing, you testified that "the considerations that inform the theory of the unitary Executive are still important in determining and deciding separation of powers issues." I attach an article by Professor Steven Calabresi, a former colleague of yours from the Reagan administration. He writes: "My ultimate conclusion is that the changed circumstance of the way in which the incentives created by the electoral system combine with a larger federal pie virtually mandates the creation of a much stronger and more unitary presidency than President Reagan and his legal advisors ever thought to ask for."

Please review this article and tell me whether you agree with the theory of the unitary Executive as set out by Professor Calabresi. To the extent you disagree with any of his conclusions or reasoning, specify which ones and why you disagree.

RESPONSE: As a judge, my approach to separation of powers questions is based on the Constitution and the case law interpreting the Constitution. By contrast, Professor Calabresi's article takes a theoretical approach and does not focus on the Constitution, much less case law. He explains:

> My project in this article is to consider normatively some of the contemporary arguments about how changed circumstances may bear on the case for and against presidential power. That is (*leaving aside what the text of the Constitution actually says about these matters*), do changed circumstances require an increase or decrease in the present scope of presidential entitlements.

Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 29 (1994) (emphasis added). Thus, much of the article is not relevant to my work as a judge and addresses questions that are outside my area of responsibility and expertise.

Part II of the article provides a summary of the Framers' reasons for placing a single officer, the President, at the head of the Executive Branch. I note that Justice Breyer cited this portion of the article in his opinion in Clinton v. Jones, 520 U.S. 681, 712 (1997), and this portion of the article is similar to portions of my talk about the unitary executive in 2000. As I mentioned during the hearings, however, my understanding of the concept of the unitary executive relates solely to the President's control over the Executive Branch and not to the scope of the powers possessed by that branch. If there is any suggestion to the contrary in part II of Professor Calabresi's article, I do not agree with that suggestion.

Part III of Professor Calabresi's article sets out and evaluates the merits of "three possible 'paradigmatic' institutional structures for the execution of the laws in late twentieth century America." Calabresi, supra, at 48-49. These are, first, "America's quasi-parliamentary 'executive,' the congressional committee system," second, "the federal judiciary, when its power is invoked in lawsuits brought, in modern times, by public interest law groups with diverging agendas for law execution," and third, "the traditional, textually mandated, executive structure

headed up, at least nominally, by the President of the United States." Id. at 49. The matters discussed in this part of the article are not matters that I have previously had occasion to consider, and I am not in a position to voice any opinion about them.

Part IV of Professor Calabresi's article applies his normative analysis of the proper scope of presidential power to a number of contemporary issues, including legislative vetoes, line-item vetoes, presidential control over administrative agencies, presidential power in the fields of foreign policy and defense, and law enforcement. Professor Calabresi approaches these issues from a political science, rather than a legal, perspective. For example, in discussing legislative vetoes, he makes no mention of INS v. Chadha, 462 U.S. 919 (1983), and in discussing line-item vetoes, the article is unable to take into account Clinton v. New York, 524 U.S. 417 (1998), which was decided after the article was written. As a member of the judiciary, my approach to issues such as these would necessarily be grounded in case law rather than political science.

Part V discusses the implications of Professor Calabresi's normative analysis for other presidential regimes around the world. This discussion is even farther afield from my areas of responsibilities and expertise. While the discussion is interesting, I do not think it relates to my work, and I am not in a position to evaluate its merits.

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Patrick J. Leahy
Submitted on behalf of Senator Carl Levin

1. **According to your Senate Questionnaire, you were interviewed for possible nomination to the Supreme Court at various times by President Bush, Vice President Cheney, Alberto Gonzales, Andrew Card, Harriet Miers, Karl Rove, I. Lewis Libby and Timothy Flanigan.**

   1) **Did you discuss your views on the following subjects with any of those individuals (or other persons who you believed would likely be commenting on your views to the Administration):**

      a. **abortion related issues;**
      b. **powers of the President, including, but not limited to, the President's ability to authorize domestic surveillance;**
      c. **constitutionality of allowing prayer or displays of religious objects in public places;**
      d. **the scope of the right of habeas corpus for prisoners or detainees;**
      e. **the extent of congressional authority under the Commerce Clause of the Constitution;**
      f. **affirmative action; or**
      g. **the constitutionality of "court stripping" legislation aimed at denying Federal courts the power to rule on the constitutionality of specific activities or subject matter.**

   RESPONSE: I did not discuss any of the listed subjects during any of the interviews or with any person whom I believed would likely be commenting on my views to the Administration.

2. **If the answer to Question 1 is yes, did your comments differ from what you told the Senate Judiciary Committee?**

   RESPONSE: Not applicable.

3. **Do you believe that the duty of the Supreme Court is to interpret the words of the Constitution only according to the meaning they had when the Constitution was adopted, when that meaning is ascertainable?**

   RESPONSE: Most of the constitutional questions that arise today fall within areas in which there is a body of case law, and the questions are properly resolved by applying and building upon that body of precedent. When novel questions are presented, all of the members of the Supreme Court customarily consult the original understanding of the

constitutional provisions at issue. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). When this is done, however, it is important to note that the original meaning of a broadly worded provision does not necessarily correspond to popular expectations at the time of adoption about the way in which the provision would apply to particular factual situations.

4. **You said in a 1986 memo that the President's understanding of a bill when he signs it "should be just as important as that of the House or Senate." You told the Judiciary Committee that the memo in question was a rough first effort and that the "theoretical issues" involved have yet to be explored.**

What possible theoretical relevance does a President's signing statement have in ascertaining the Congressional intent of legislation?

RESPONSE: A later and much more detailed memorandum prepared by the Office of Legal Counsel addressed this issue and set out the competing theoretical arguments regarding the significance of presidential signing statements in interpreting statutes. Walter Dellinger, Memorandum For Bernard N. Nussbaum Counsel to the President (1993), reprinted in 48 Ark. L. Rev. 333 (1994). The memo states in relevant part:

> We do not attempt finally to decide here whether signing statements may legitimately be used [as an aid in interpreting statutes]. We believe it would be useful, however, to outline the main arguments for and against such use.
>
> In support of the view that signing statements can be used to create a species of legislative history, it can be argued that the President as a matter both of constitutional right and of political reality plays a critical role in the legislative process. The Constitution prescribes that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const., art. II, s 3, cl. 1. Moreover, before a bill is enacted into law, it must be presented to the President. "If he approve it he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated." U.S. Const., art. I, s 7, cl. 2. Plainly, the Constitution envisages that the President will be an important actor in the legislative process, whether in originating bills, in signing them into law, or in vetoing them. Furthermore, for much of American history the President has de facto been a sort of prime minister or "third House of Congress."
>
> > . . . [H]e is now expected to make detailed recommendations in the form of messages and proposed bills, to watch them closely in their tortuous progress on the floor and in committee in each house, and to use every

> honorable means within his power to persuade . . .
> Congress to give him what he wanted in the first place.

Clinton Rossiter, The American Presidency, 110 (2d ed. 1960). It may therefore be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress. And in fact several courts of appeals have relied on signing statements when construing legislation. See United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989) (Newman, J.) ("though in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent, . . . President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation."); Berry v. Department of Justice, 733 F.2d 1343, 1349 -50 (9th Cir. 1984) (citing President Johnson's signing statement on goals of Freedom of Information Act); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661- 62 (4th Cir. 1969) (relying on President Truman's description in signing statement of proper legal standard to be used in Portal-to-Portal Act).

On the other side, it can be argued that the President simply cannot speak for Congress, which is an independent constitutional actor and which, moreover, is specifically vested with "[a]ll legislative powers herein granted." U.S. Const., art. I, sec. 1, cl. 1. Congress makes legislative history in committee reports, floor debates and hearings, and nothing that the President says on the occasion of signing on a bill can reinterpret that record: once an enrolled bill has been attested by the Speaker of the House and the President of the Senate and has been presented to the President, the legislative record is closed. See Field v. Clark, 143 U.S. 649, 672 (1892). A signing statement purporting to explain the intent of the legislation is, therefore, entitled at most to the limited consideration accorded to other kinds of post-passage legislative history, such as later floor statements, testimony or affidavits by legislators, or amicus briefs filed on behalf of members of Congress. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974)("[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the act's passage. . . . Such statements 'represent only the personal views of these legislators . . . .'"). Finally, it is arguable that "by reinterpreting those parts of congressionally enacted legislation of which he disapproves, the President exercises unconstitutional line-item veto power." Garber and Wimmer, supra, at 376. See also Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 30 (1985) ("under the system of checks and balances established by the Constitution, the President has the right to

approve or reject a piece of legislation, but not to rewrite it or change the bargain struck by Congress in adopting a particular bill").

48 Ark. L. Rev. 338-41.

The brief 1985 memo that I signed was prepared at the request of a Justice Department Working Group that was given the task of implementing the Reagan Administration's policy of using signing statements and contained a section labeled "Theoretical problems" that outlined some of the same problems set out in Mr. Dellinger's later, more detailed memo. My memo did not attempt to resolve these problems.

5. **You have said that, in analyzing a statute, you would first look to the text of the statute then you would "look to anything that would shed light on the way in which the provision would have been understood by people reading it at the time." You also said that specific provisions of the Constitution are set out in principle, and "then it is up to the judiciary to apply that principle to the facts that arise during different periods in this history of our country."**

In his book, Active Liberty, Justice Breyer states that, "since law is connected to life, judges, in applying a text in light of its purpose, should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'" [emphasis added]

Do you agree with Justice Breyer?

RESPONSE: My statements cited in the question were made with respect to the interpretation of a Constitutional provision in a case of first impression, an event that, as I explained at the hearings, does not occur very often.

I have not read Justice Breyer's book and therefore could not comment in particular on his statement. However, as I explained during the hearing, there are important provisions of the Constitution that are not cast in specific terms. Those provisions set forth broad principles that the judiciary must apply to the facts that arise during different periods in the history of our country. The example I gave was the Fourth Amendment's prohibition against unreasonable searches and seizures. The Framers could not have foreseen the advances in technology that today can have implications under the Fourth Amendment. The Constitution sets forth the principle in the Fourth Amendment and a judge must apply it to contemporary conditions. For example, in determining whether a new type of search is reasonable, the Supreme Court has balanced private and governmental interests as they exist under present conditions in our society. See, e.g., Vernonia School District 47J v. Acton, 515 U.S. 646, 651 (1995); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619 (1989); New Jersey v. TLO, 469 U.S. 325, 341 (1985). In other situations, however, the Court has adhered to its

understanding of the original meaning of the Constitution despite the argument that a novel procedure was needed to deal with a new and pressing problem. See, e.g., Bowsher v. Synar, 478 U.S. 714, 736 (1986).

Responses of Judge Samuel A. Alito, Jr.
to the Written Questions of Senator Charles E. Schumer

1. **At your hearing you said the following about your method of constitutional interpretation:**

"In interpreting the Constitution ... I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption."

a. **Can you please explain why a judge should look to the meaning of the text at the time it was adopted, rather than the meaning of the text as it is understood today?**

b. **When is it appropriate to base an interpretation of the Constitution on the common understanding of the Constitution's text at the time it was adopted?**

c. **Do you believe that considering the original meaning of the Constitution's text is constitutionally required for a judge, or is it a matter of discretion?**

d. **Why is it that you have argued that some ambiguous constitutional phrases, such as "unreasonable search" in the Fourth Amendment, must be understood as they evolve over time, while other ambiguous constitutional phrases, such as "due process," must be understood as they were understood at the time they were written, as you argued in Alexander v. Whitman?**

RESPONSE TO ALL PARTS: In the exchange that is cited in the question, I went on to explain that for many provisions of the Constitution the Founders intentionally used broad language so that the principles could be applied to changing times. I did not suggest that for all provisions of the Constitution, a judge should look solely to the understanding at the time the Constitution was adopted.

In addition, most of the constitutional questions that arise today fall within areas in which there is a body of case law, and the questions are properly resolved by applying and building upon that body of precedent. When novel questions are presented, all of the members of the Supreme Court customarily consult the original understanding of the constitutional provisions at issue. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). When the Court does this, it obviously proceeds on the basis of the belief that the provision in question has an enduring meaning. As I noted, it is important to recognize that some provisions of the Constitution set out broad principles that were plainly meant to be applied by the judiciary to new situations that would develop over time.

In my testimony, I never meant to suggest that only the Fourth Amendment should be read broadly. The Due Process clause also uses broad language and has been read as such. In Alexander v. Whitman, 114 F.3d 1392 (1997), the court was presented with the question whether a woman had a substantive right under the Due Process Clause to maintain a state-law tort action for fatal prenatal injuries. The pertinent constitutional standard is whether the claimed right is "deeply rooted in this Nation's history and traditions" and "'implicit in the concept of ordered liberty.'" Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted). In addressing this question in relation to the right claimed in Alexander, my concurrence stated that "our substantive due process inquiry must be informed by history" and that it was "significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized." 114 F.3d at 1409. This represented a straightforward application of the standard prescribed by the Supreme Court and recognized in Washington v. Glucksberg and prior related cases.

2. **The Eighth Amendment of the Constitution protects against "cruel and unusual punishments." Under your theory that "in interpreting the Constitution ... I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption," we should look to what someone would have considered cruel and unusual at the time of the adoption of the Eighth Amendment in 1790 in order to understand this term. So please explain the following:**

   a. **In 1790, it was considered acceptable to execute even young minors at common law. Is that therefore Constitutional today?**

RESPONSE: As I stated at the hearing, the Constitution was adopted to endure throughout the history of our country. The Founders recognized that times would change and issues that could not be anticipated would arise. They set forth principles that could be applied to changing circumstances. I provided an example of searches and seizures, but there are of course other examples. The Supreme Court has established that the Eighth Amendment's prohibition of "cruel and unusual punishment" is not confined to the "'barbarous' methods that were generally outlawed in the 18th century," Gregg v. Georgia, 428 U.S. 153, 171 (1976), but calls for the application of a standard that looks to the conception of decency held by modern America as a whole. See, e.g., Hudson v. McMillian, 503 U.S. 1, 6 (1992). The Supreme Court has declared that the forms of punishment described in questions 2.a. and b. are unconstitutional. See, e.g., Roper v. Simmons, 543 U.S. 541 (2005) (Eighth Amendment prohibits execution of persons under eighteen); Thompson v. Oklahoma, 487 U.S. 815 (1988) (Eighth Amendment prohibits execution of persons under sixteen); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (Eighth amendment intended to outlaw "torture(s)" and other "barbar(ous)" methods of punishment) (citations omitted).

b. In 1790, it was considered acceptable to hack off the arms and legs of convicts, and torture prisoners, as a form of punishment at common law. Is that therefore Constitutional today?

RESPONSE: Please see above response to question 2.a.

c. In 1790, it was perfectly acceptable for states (though not the federal government) to declare an official religion. Is that therefore Constitutional today?

RESPONSE: The Establishment Clause originally applied only to the federal government, but now applies to the States as well because the Supreme Court has held it to be incorporated by the Due Process Clause of the Fourteenth Amendment. See Everson v. Bd. of Educ., 330 U.S. 1 (1947).

The Eighth Amendment is not the only Constitutional provision implicated by your interpretive approach. Please respond to the following:

d. According to a famous law review article by Alexander Bickel, a man you described as very influential in your academic awakening to constitutional law, it was acceptable to pass explicit segregationist laws at the time of the adoption of the 14th Amendment. Is that therefore Constitutional today?

RESPONSE: "[E]xplicit segregationist laws" are plainly unconstitutional and violate the fundamental principle embodied in the Equal Protection Clause. Notably, moreover, the historical conclusions reached in Professor Bickel's article have been disputed. See McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995).

e. For many years, it was argued that the federal government did not have the power to regulate manufacturing practices or agriculture under the Commerce Clause. Are we in Congress therefore prohibited from exercising those powers today?

RESPONSE: In the past, the Supreme Court interpreted "commerce" as including trade but not other commercial activities such as manufacturing and agriculture. See United States v. Morrison, 529 U.S. 598, 642 (2000) (Souter, J., dissenting) (listing various cases). Culminating with several New Deal cases, however, the Court rejected distinctions between categories of commercial activity, instead interpreting commerce as encompassing any activity that "exerts a substantial economic effect on interstate commerce." Wickard v. Filburn, 317 U.S. 111, 125 (1942). The Court continues to follow Wickard. Gonzales v. Raich, 125 S. Ct. 2195 (2005). Under the current standard Congress's power to regulate commerce is quite broad, reflecting the tremendous growth of domestic and foreign economic activity that our society has experienced.

3. **You said at your hearing that your statement in 1985 that the "Constitution does not protect a right to an abortion" was an accurate reflection of your view at the time. You refused, however, to expand on what that meant because you said it was a brief statement that did not contemplate specific situations. I understand that your written statement was brief, but you clearly had a well-formed view at the time, given your involvement in the Thornburgh case. Please elaborate on the contours of your 1985 view and please include responses to the following questions:**

   a. **Under your 1985 view, would the Constitution protect the right to an abortion when the life of the mother is in danger?**

   b. **Under your 1985 view, would the Constitution protect the right to an abortion when the health of the mother is in danger?**

   c. **Under your 1985 view, would the Constitution protect the right to an abortion if the pregnancy was the result of rape? Of incest?**

   d. **Under your 1985 view, would the Constitution protect the right to use the emergency contraception method known as "the morning after pill"? How would you have determined whether the morning after pill falls under the category of Griswold-protected contraception?**

   e. **Under your 1985 view, would the Constitution allow states to criminalize abortion?**

   f. **Under your 1985 view, would the Constitution allow the states to send both women and their doctors to jail for ending a pregnancy?**

   RESPONSE TO ALL PARTS: In the 1985 statement that you cite I was referring to my work in the Solicitor General's office, in particular, my view on this matter in 1985 is set out in the memorandum that I wrote concerning the Thornburgh case. None of the specific issues noted in the question were at issue in Thornburgh, and I had no cause to consider them and did not consider them at the time.

4. **A New York Daily News columnist reported that Justice Scalia said the following in reference to Bush v. Gore during a recent speech:**

   "What did you expect us to do? Turn the case down because it wasn't important enough? Or give the Florida Supreme Court another couple of weeks in which the United States could look ridiculous?"

   a. **Do you agree with Justice Scalia's statement?**

   b. **Should international perception ever be a factor in deciding when to take up a case?**

c. What about perception here at home?

d. What about international perceptions regarding the death penalty? Use of torture?

If you refuse to answer these questions because you believe this issue may come before the Court, 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 ALL PARTS: I understand this question to relate to the standards to be applied by the Supreme Court in deciding whether to "take up a case." This matter is addressed by Supreme Court Rule 10. The Rule states that certiorari is a matter of judicial discretion and that a writ will be granted only for "compelling reasons." The Rule does not set out an exhaustive list of such reasons but notes that certiorari *may* be appropriate where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme Court], or has decided an important federal question in a way that conflicts with relevant decisions of this Court." If a case presents an unsettled question of federal law that is truly important, whether or not it is generally perceived to be important, the case would appear to fall within the language noted above. A case that does not present such a question but that is inaccurately perceived to be important would not appear to fall within this language, but it bears emphasis that the list of reasons set out in Rule 10 is not exhaustive.

5. **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.**

a. Was the Schiavo case an example 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 TO ALL PARTS: I do not think that a judge should generally comment on whether a statute is "appropriate" or a "good idea." Those are considerations for Congress. As a judge, I may be called upon to decide whether a statute is constitutional, but otherwise my role with respect to a statute is simply to interpret and apply it.

Legislation aimed at particular litigation is sometimes challenged under United States v. Klein, 80 U.S. (13 Wall.) (1871), on the theory that the legislation violates Article III of the Constitution by mandating a particular result in that litigation. In Klein, the Court held unconstitutional a federal statute enacted after the Civil War that was designed to prevent pardoned ex-Confederates from reclaiming seized property. The act proclaimed that a presidential pardon constituted conclusive evidence that the pardoned individual had been disloyal to the United States. Id. at 143-44. It also provided that a pardon could not be used as evidence of loyalty in a suit to recover confiscated property from the United States, and directed the Court to dismiss all recovery cases pending on appeal in which a pardoned individual had prevailed. Id. The Court found that in enacting the statute, Congress was attempting to prescribe the rule of decision for pending cases in violation of the separation-of-powers doctrine. Id. at 147.

While the Supreme Court has never determined "the precise scope of Klein," Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995), "later decisions have made clear that its prohibition does not take hold when" Congress merely "amend[s] applicable law." Id. (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 419, 441 (1992)). Thus, if a statute "compel[s] changes in the law, not findings or results under old law," it merely amends the underlying law, and is therefore not subject to a Klein challenge. Robertson, 503 U.S. at 438. See Imprisoned Citizens Union v. Ridge, 169 F.3d 178, 187-88 (3d Cir. 1999). These precedents provide a framework for analyzing an Article III challenge to legislation on the ground that it impermissibly targets specific litigation.

6. **We have heard many comparisons of 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: Plessy v. Ferguson represents one of the Court's worst moments, and it did enormous damage by providing constitutional validation for Jim Crow laws. Plessy arose over a century ago and presented a question under the Equal Protection Clause of the 14th Amendment. Roe v. Wade arose much later and presented a question under the

Due Process Clause of the 14th Amendment. Thus, the cases arose at different times and presented different legal questions.

7. **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: As the question notes, Dred Scott and Lochner have been "much-discredited," and are often cited as examples of judicial activism. As I explained during the hearing, I believe that the Fifth and Fourteenth Amendments do protect liberty and agree that there is a substantive component to that protection that protects privacy. There is therefore a clear distinction between the discredited Dred Scott and Lochner lines of cases and the Court's recognition that the Due Process Clauses of the Fifth and Fourteenth Amendments in some circumstances protect privacy interests. Because Roe concerns issues that may well come before the Supreme Court, it would be inappropriate for me to comment directly on it.

8. **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, 376 U.S. 254 (1964), is a venerable precedent that is entitled to respect under the doctrine of stare decisis. The "actual malice" standard applies to "public officials" and "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The Supreme Court has held that the "public official" designation must apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (holding that record was inconclusive as to whether county supervisor of recreation area including ski resort was a public official for purposes of the Sullivan rule). A public official thus encompasses anyone holding a government position, elected or non-elected, of such "apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." Id. at 86. This includes candidates for public office. Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971). Lower courts have concluded that the term public official applies to prosecutors, Crane v. Arizona Republic, 972 F.2d 1511 (9th Cir. 1992), school principals, Stevens v. Tillman, 885 F.2d 394 (7th Cir. 1988), and police officers, McKinley v. Baden, 777 F.2d 1017 (5th Cir. 1985), among others.

The Supreme Court has not offered a precise definition of who is a public figure. "For the most part those who attain [the status of public figure] have assumed roles of special 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." Gertz v. Welch, 418 U.S. 323, 345 (1974). The Court has concluded that the term "public figure" encompasses a well-known state university football coach who was employed by a private corporation that administered the school's athletic programs, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), as well as a former army general who, as a private citizen, allegedly led a violent crowd that obstructed federal marshals enforcing a desegregation order, Associated Press v. Walker, 388 U.S. 130 (1967). The Court's cases indicate that a person who does not thrust himself into some public issue will not be deemed a public figure. See Wolston v. Reader's Digest Association, 443 U.S. 157, 168 (1979) (person convicted of contempt for refusing to appear before a grand jury investigating espionage by the Soviet Union was a private figure where he had "not engaged the attention of the public in an attempt to influence the resolution of the issues involved"); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (person who received substantial federal funding to investigate aggressive monkey behavior was a private figure because he "at no time ... assumed any role of public prominence"); Time v. Firestone, 424 U.S. 448, 453 (1976) (wife of a member of a wealthy family was private figure even though she was prominent in social circles and often mentioned in newspapers, because she "did not assume any role of especial prominence in the affairs of society ... and did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.").

9. **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: In Reno v. ACLU, 521 U.S. 844 (1997), the government sought to uphold restrictions that were aimed at reducing the ability of minors to access sexually explicit material on the Internet. The government did not argue that pornography on the Internet categorically lacks constitutional protection, and the Court did not address that argument. Instead, the Court considered whether the restrictions were narrowly tailored to achieve what the parties challenging the statute did not dispute was the government's compelling interest in protecting minors from "indecent" and "patently offensive" speech. Id. at 863 n.30.

The Court concluded, among other things, that the Communications Decency Act burdened too much adult speech to pass constitutional muster, even considering the government's compelling interest in protecting minors from indecent speech. The Court relied on the technology of the Internet at the time, and recognized that it was a rapidly changing medium. Id. at 868–70. Because cases involving the application of the First

Amendment to electronic speech are likely to come before the Supreme Court in the future, it would be inappropriate for me to comment on the correctness of the Court's decision.

10. **At your hearing, I asked you about your reasoning in the Dillinger case, and you said you would have to review the details of the case. Now that you have had a chance to do so, I hope you will be able to address the question I posed.**

To remind you, we had discussed your opinion in Pirolli, in which you would have exercised your discretion to prohibit a mentally retarded harrasment plaintiff who failed to make an argument below from moving forward. We also discussed your opinion in Smith v. Horn in which you excused the government's failure to raise an argument in a habeas case. Finally, I asked you about your opinion in Dillinger, in which you also would have exercised your discretion to excuse a large company sued by an accident victim, where the company failed to make an argument below.

How do you explain the inconsistency in the exercise of your discretion on what appear to be extraordinarily similar procedural questions?

RESPONSE: In Pirolli, the court reversed a grant of summary judgment for the defendant because the record provided evidence of harassment that a reasonable person could find hostile or abusive. I dissented as to this claim because the appellant's brief failed to raise the issue "in a minimally adequate fashion." In Dillinger, the court reversed a jury verdict for the defendant because the trial court admitted evidence of the plaintiff's negligence. Though both the majority and my dissent recognized that the plaintiff "himself voluntarily brought out these facts during his direct examination," the majority deemed the issue waived by the defendant's failure to raise it both at trial and on appeal. I stated:

> As for Caterpillar's failure in its appellate brief to mention plaintiff's direct testimony as a ground for affirmance, I believe this presents what is essentially an issue of sound judicial administration. Specifically, I believe it requires us to balance concern for the efficient disposition of appeals (which may be furthered by insisting that parties comply strictly with the requirements of Fed.R.App.P. 28(a)(5)) against concern for efficiency in the work of the district courts (which is surely not furthered by requiring a district court and jury to retry a case because of a prior evidentiary ruling that was correct). Considering these countervailing concerns, I believe, under the circumstances here, that requiring a retrial is not justified.

Id. at 449 n.2.

The difference between these cases lies not in the nature of the party that failed to raise an issue properly on appeal but in the different considerations that apply when an

appellee as opposed to an *appellant* fails to raise an issue. When the victor in the lower court fails to raise a ground for affirmance, finding the issue waived would "requir[e] a district court and jury to retry a case because of a prior evidentiary ruling that was *correct*." 959 F.2d at 449 n.2. Thus, Dillinger implicated a rule not at issue in Pirolli: "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" SEC v. Chenery, 318 U.S. 80, 88 (1943) (quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937)); see also N.L.R.B. v. Kentucky River Community Care, Inc., 532 U.S. 706, 722 n.3 (2001); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 384 n.12 (1997).

11. **When you wrote in 1985, twelve years after Roe was decided, that "the Constitution does not protect a right to an abortion," on what did you base that opinion? What led you to that conclusion, other than that it was the position of the Reagan Administration for which you worked, remembering that you authored it as a personal legal opinion?**

RESPONSE: In the 1985 statement that you cite I was referring to my work in the Solicitor General's office, and in particular, my work on the memorandum that I wrote concerning the Thornburgh case. My view on this question was influenced by Supreme Court opinions criticizing Roe, the most recent of which had been Justice O'Connor's dissent in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452-74 (1983), as well as the scholarly publications to which I referred in footnote 10 of the memorandum that I wrote in the Thornburgh case.

12. **When you were in the Solicitor General's office, was it your job to advise your superiors when you thought that a position that the administration had taken was inconsistent with the proper understanding of the Constitution? In other words, do Solicitor General and Department of Justice lawyers have the responsibility to advise the Solicitor General when the President has taken a postition that, in the view of that lawyer, is inconsistent with the guarantees of a statute or the Constitution?**

RESPONSE: When drafting appeal, en banc, certiorari, and amicus recommendations, a lawyer in the Solicitor General's office generally presents an accurate summary of the state of the law and may present arguments that may be advanced on both sides of the questions presented. In addition, insofar as this is possible, a recommendation often includes an assessment of the likely range of possible outcomes of the litigation. A lawyer in the Solicitor General's office should also provide sound and professional advice about the litigation strategy best suited to achieve the legitimate objectives of the government agency or officer involved in the litigation. If it appears that the position advocated by the government agency or officer is inconsistent with the Constitution or another provision of federal law, the Assistant's summary of the state of the law should note this point. No attorney should advance an argument that is frivolous, and attorneys in the Solicitor General's office have always felt that they have a special duty not to

present the Court with inappropriate arguments. However, an advocate may properly advance a reasonable argument, made in good faith, in which the advocate does not personally believe, and in fact may have an ethical obligation to his or her client to do so.

13. **If a President asserted the authority to take all handguns away from Americans, would it be the job of a Department of Justice attorney writing a memo simply to provide the arguments in favor of doing so, or would it also be the job of that attorney to advise the President of the arguments that the President's assertion of authority might violate the Constitution?**

RESPONSE: As noted in response to question 12, a Department of Justice attorney writing a recommendation should provide an accurate summary of the law and the arguments that are likely to be raised on both sides of the question.

14. **In a report in the Washington Post on January 8, 2006, your friend Doug Kmiec is quoted as saying that you have always been particularly fond of Justice Harlan's dissent in Reynolds v. Sims.**

a. **Is that report accurate? If not, in what respect is it inaccurate?**

In that dissent, Justice Harlan argues that the principle of "one person, one vote" has no basis in the Constitution's text or our nation's history.

b. **Did you at any time in your life agree with Justice Harlan's argument that the principle of "one person, one vote" is not supported by constitutional history and text?**

c. **At what point in your life did you conclude that "one person, one vote" was a fundamental part of American constitutional law?**

d. **Had you been on the Court when it decided Reynolds v. Sims, would you have sided with the majority or with Justice Harlan?**

RESPONSE TO ALL PARTS: I have long admired Justice Harlan's legal craftsmanship, which is exhibited in his dissent in Reynolds and in many other opinions, but I do not recall ever sharing his view about the principle of one person, one vote. As far as I can recall, I have always agreed with the principle of one person, one vote. In any event, that is certainly my view today. I explained during the hearings that my concern about reapportionment during my college days related to the application of this principle in later cases to require that all districts be almost exactly equal in population even if this requires disregarding other legitimate factors.

15. **If you were forced to pick one and only one Supreme Court Justice in the last 100 years whose judicial philosophy you believe has been the most influential on the Court, who would it be?**

RESPONSE: In answering this question and question 16, I will limit myself to former members of the Court. Among the most influential Justices of the last century, I would list Chief Justices Earl Warren and William Rehnquist and Justices Frankfurter, Black, and Brennan. This is by no means an exhaustive list, however, and unfortunately, I cannot pick one Justice who has been most influential.

16. **If you were forced to pick one and only one Supreme Court Justice in the last 100 years whose writing style you found most impressive, who would it be?**

RESPONSE: Justice Jackson.

17. **Please name the most poorly reasoned Supreme Court case, in your view, of the last fifty years.**

RESPONSE: In attempting to answer this question, I would have to limit myself to decisions that were handed down within the last 50 years and that relate to matters that are not likely to arise in future litigation. I do not have in mind a list of the opinions that satisfy these criteria, and therefore I am unable to answer the question.

18. **Please name the most influential Supreme Court opinion, in your view, of the last fifty years.**

RESPONSE: While it does not squarely fall within the last fifty years, Brown v. Board of Education.

19. **You spoke a bit at your hearing about the issue of justiciability. Where is the line between questions that are political and questions that are appropriate for a court to decide?**

RESPONSE: Marbury v. Madison, 5 U.S. 137, 177 (1803), set forth the fundamental principle that it is "the province and duty of the judicial department to say what the law is." But Marbury itself recognized that the Constitution submits a narrow band of political questions to the political branches. Id. at 170 ("Questions, in their nature political, or which are by the constitution and laws, submitted to the executive can never be made in this court."). Drawing the line between a justiciable controversy and a nonjusticiable political question requires consideration of whether "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" Nixon v. United States, 606 U.S. 224, 228 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Other relevant factors include whether the case involves a policy question "of a kind clearly for nonjudicial discretion;" whether answering the question

would inappropriately disrespect the other branches; whether there is an "unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

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?

RESPONSE: Yes. Since the issue decided in Baker v. Carr is unlikely to come before either the Third Circuit or the Supreme Court, I feel comfortable expressing my agreement with this case. I share the Court's view that the case did not present a question that the Constitution commits to a coordinate branch, there was no risk of embarrassment abroad or a serious domestic disturbance, and in that case the well-developed standards under the Equal Protection Clause were judicially manageable. See id. at 226.

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?

RESPONSE: In Powell v. McCormack, 395 U.S. 486 (1969), the Court applied Baker's framework for determining whether the case presented a nonjusticiable political question. After examining Article I, § 5, it held that this provision is "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." Id. at 548. Furthermore, the Court held that since deciding the case required no more than an interpretation of the Constitution's text, the case did not involve the potential embarrassment of a "confrontation between coordinate branches." Id. at 548.

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?

RESPONSE: The Court did not discuss justiciability in Bush v. Gore, but after the Court handed down its decision, some scholars argued that the text of the Twelfth Amendment committed the question to Congress. See, e.g., Laurence Tribe, Erog .v Hsub and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors, 115 Harv. L. Rev. 170, 277-78 (2001). I have not studied this question and am thus not in a position to voice an opinion about it.