SUITE THIRTEEN HUNDRED
WEST TOWER
555 THIRTEENTH STREET NW
WASHINGTON, DC 20004-1109

February 5, 2003

BY MESSENGER

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to the written questions I received from Senators Biden, Feingold, Feinstein, and Kennedy in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR JOSEPH R. BIDEN, JR.

1. As a lawyer for the Reagan Administration, you were in the position of enforcing its policy of "color blindness" with regard to addressing problems of discrimination and segregation, which were then, and remain today, a serious problem in this country, and one that you are very likely, as a D.C. Circuit judge, to address. At that time, you supported a policy that rejected busing as a way to resolve the problem of segregated schools, indicating that it was a poor remedy and did not effectively deal with the underlying goal of improving educational opportunity for all. Is that your personal belief today? If so, how do you reconcile the country's extreme disparities in funding between poor and rich (and often, minority and white) school districts, even within the same state, with that position?

RESPONSE: I served as a Special Assistant to Attorney General William French Smith from 1981-1982, and Associate Counsel to the President from 1982-1986. I would not describe my responsibilities in those positions as "enforcing [a] policy of 'color blindness.'" I had no enforcement responsibilities in those positions. It was Attorney General Smith's view that busing had in many instances failed to achieve its intended goal of desegregating public schools and eradicating the consequences of segregation, and that other means -- including magnet schools, proper drawing of attendance zones, and considered location of new school construction -- should be tried instead. I do not recall that this was grounded in any "color blindness" view, because race certainly may be taken into account in devising remedies for de jure segregation.

I do not think it would be appropriate for me to discuss my personal beliefs concerning the relative effectiveness of particular desegregation remedies. As you note, issues in this area may come before the D.C. Circuit. For example, I am aware that there is extensive litigation across the country addressed to the concern noted in the last sentence of the question -- the disparity in funding levels between different school districts. If I am confirmed and am presented with such issues, I would be guided by applicable Supreme Court precedent and not any personal beliefs.

2. You were also involved in the Reagan Administration's response to the Supreme Court's decision in Bolden, which made it significantly harder for plaintiffs to bring successful claims that their rights under the Voting Rights Act had been violated. The Court had said that, even though the statute contained no language suggesting it, Voting Rights plaintiffs had to show discriminatory intent. Congress, which had not intended such a barrier for plaintiffs, was working to amend the Act, but the Reagan Administration was at odds with Congress. In one memo you wrote to Assistant Attorney General Brad Reynolds, you mention "the difficulties involved in switching to an effects test under Section 2." What were the difficulties? And why, if Congress had not intended it, did you think the Administration should insist on a showing of discriminatory intent in order for a plaintiff to prevail?

RESPONSE: I do not recall the memorandum to which this question refers, nor do I have a copy of it. At the time I served as a Special Assistant to Attorney General William French Smith, and was involved in certain assignments for him with respect to legislative reactions to the decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). The plurality opinion in City of Mobile v. Bolden stated that Section 2 of the Voting Rights Act was coterminous with the Fifteenth Amendment, a statement with which dissenting Justice Marshall agreed. 446 U.S. 55, 61 (1980); id. at 105 n.2 (Marshall, J., dissenting). The Bolden plurality further stated that "[o]ur decisions * * * have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." Id. at 62 (citing Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960); Guinn v. United States, 238 U.S. 347, 359, 365 (1915)).

When legislation was proposed to overturn Bolden, I recall that one concern Attorney General Smith had was that an "effects test" might -- no matter how strong the disclaimers -- be applied in such a way as to lead to proportional racial representation, a result he considered contrary to democratic principles. Justice O'Connor referred to such concerns in her concurring opinion in Thornburgh v. Gingles, 478 U.S. 30, 84 (1986) (noting that, in amending Section 2, Congress intended to allow vote dilution claims but to avoid proportional representation, but that "[t]here is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some

reference to the proportion between the minority group and the electorate at large."). The issues with which Attorney General Smith was concerned involved what form the legislative response to Bolden should take, not any effort to oppose Congressional intent.

3. The original, unamended Section 2 opposed by the Reagan administration, which was passed by the House by a vote of 389 to 24 and cosponsored by 62 senators, promoted the "totality of the circumstances" test that the Court had used until Bolden to determine whether or not a measure was discriminatory. What, if anything, was wrong with that standard?

RESPONSE: The "totality of the circumstances" test was introduced by Congressional amendment into Section 2 in 1982, and was explained and applied by the Supreme Court in Thornburgh v. Gingles, 478 U.S. 30, 36-38, 43-45 (1986). As a D.C. Circuit judge I would be obligated to, and would, apply the controlling authority of Thornburgh. I therefore do not believe that it would be appropriate for me to offer my personal view on the "totality of the circumstances" test.

4. In Rust v. Sullivan (1990), even though the only question before the Supreme Court involved whether the government could censor recipients of government funding for family planning services from discussing abortion, you argued in a brief as Deputy Solicitor General that "[w]e continue to believe that Roe was wrongly decided and should be overruled." You further argued that "the Court's conclusions in Roe ... find no support in the text, structure, or history of the Constitution." Intervening in a case such as this is at the discretion of the Solicitor General. Were you involved in the decision to intervene? If so, what role did you play and what position did you advocate?

RESPONSE: Rust v. Sullivan did not involve a discretionary decision to intervene. The respondent in the case was Dr. Louis W. Sullivan, Secretary of Health and Human Services. Petitioners had succeeded in securing Supreme Court review of a decision in the Secretary's favor by the Second Circuit, and it was the obligation of the Office of the Solicitor General to represent the Secretary before the Supreme Court.

5. In Bray v. Alexandria, you argued on the Bush Administration's behalf that Operation Rescue protestors, who acknowledged that their goal was to "rescue" fetuses by

physically preventing women from entering family planning clinics that provided abortions, could not possibly be considered to be engaging in invidious discrimination. Do you believe that to be true? If so, at what point do acts that affect only one segment -- a protected segment -- of the population, count as such discrimination?

RESPONSE: Bray concerned the scope of 42 U.S.C. § 1985(3). In Griffin v. Breckinridge, 403 U.S. 88, 102 (1971), the Supreme Court had previously held that § 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." As the brief for the United States explained, that issue implicated the interests of the United States, both because various Acts of Congress excluding abortion services from federal programs would be subject to equal protection challenge if the Court were to rule that opposition to abortion is a form of gender-based discrimination, and because federal officers and employees are sued under 42 U.S.C. § 1985(3). See Brief at 1-2 & n.1.

The Federal Government argued that abortion protestors' actions were not driven by animus against women as a class, but instead were aimed at the abortion process itself, and accordingly could not be the basis for a § 1985(3) claim. The Supreme Court agreed that the actions of the protestors were not the result of animus against "women in general." Bray, 506 U.S. 263, 269 (1993). The Court explained, in language responsive to the last sentence of the question:

> [The animus requirement] does demand * * * at least a purpose that focuses upon women by reason of their sex -- for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law. The record in this case does not indicate that petitioners' demonstrations are motivated by a purpose (malevolent or benign) directed specifically at women as a class * * * . Given this record, respondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect. Neither proposition is supportable.

Id. at 270. The Court further explained the distinction between targeting a certain class, and targeting an activity that only that class can engage in:

> The approach of equating opposition to an activity (abortion) that can be engaged in only by a certain class (women) with opposition to that class leads to absurd conclusions. On that analysis, men and women who regard rape with revulsion harbor an invidious antimale animus. Thus, if state law should provide that convicted rapists must be paroled so long as they attend weekly counseling sessions; and if persons opposed to such lenient treatment should demonstrate their opposition by impeding access to the counseling centers; those protesters would, on the dissenters' approach, be liable under § 1985(3) because of their antimale animus.

Id. at 273 n.4. If confirmed as a circuit judge, I would be bound to follow Supreme Court precedent in this area, without regard to my personal views. Nothing about my personal views would prevent me from doing so.

6. You also argued that such acts did not violate women's right to freely travel from state to state, even though many of the women involved had come from other states only to obtain abortions at the blocked clinics. Do you personally agree with this position? What is your reason for taking such a position? At what point would that type of activity cross the line into violating the right to travel freely? Would you take the same position if a group of KKK members physically blocked the entrance to a hotel on the border of Mississippi, preventing African Americans from Alabama from staying there? Why?

RESPONSE: In Bray, the brief for the Federal Government argued that the right to interstate travel is not violated simply because the actions of a private individual incidentally affect a party who has engaged in interstate travel. Instead, the brief explained that the right to travel is implicated only where there is an unequal distribution of rights and benefits among residents and nonresidents, or where it is proven that "a defendant intended to violate [the right to travel] as one of his principal goals." Because the abortion protestors attempted to disrupt the abortion activities related to residents and nonresidents alike, the Federal Government argued that the right to interstate travel was not implicated in that case.

The majority of the Supreme Court accepted the government's view on this issue, recognizing that the "federal guarantee of interstate travel * * * protects interstate travelers against two sets of burdens: 'the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers.'" Bray, 506 U.S. at 276-277. The Court held that the right to interstate travel is not implicated simply because an interstate traveler is "incidentally affected" by the acts of a group of private individuals. Id. at 275.

If I were to be confirmed as a circuit judge, I would follow the Supreme Court precedent in this area. Nothing about my personal views would prevent me from doing so. I do not think I should answer hypothetical questions in areas that may come before me were I to be confirmed.

7. I'd like to ask you about the Freedom of Access to Clinic Entrances Act, passed by Congress on the heels of the Bray decision to protect clinics from the sort of harassment at issue in the Bray decision. At the time FACE passed, about a year after the Supreme Court decision in Bray, did you have an opinion as to its constitutionality? If so, what was that opinion?

RESPONSE: I do not recall having any opinion concerning the constitutionality of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, at the time that it was passed. I do note, however, that the Supreme Court's decision in Bray was concerned with the scope of 42 U.S.C. § 1985(3), rather than with any constitutional issue per se, and that the FACE Act differs from Section 1985(3) in critical respects. In particular, nothing in the FACE Act would appear to require any showing of "class-based, invidiously discriminatory animus," unlike Section 1985(3), as interpreted by the Supreme Court in Griffin v. Breckinridge, 403 U.S. 88, 102 (1971). Moreover, I am aware that several federal courts of appeal have held that the enactment of the FACE Act was a valid exercise of Congress's authority under the Commerce Clause. See, e.g., Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002); Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995). Furthermore, I am aware that the FACE Act has been upheld against a variety of other constitutional challenges. See, e.g., United States v. Wilson, 154 F.3d 658 (7th Cir. 1998)

(rejecting First Amendment challenge); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996) (rejecting overbreadth challenge to FACE Act); United States v. Unterburger, 97 F.3d 1413 (11th Cir. 1996) (rejecting First and Tenth Amendment challenges). However, given that particular constitutional challenges to the FACE Act could come before me as a judge if I were to be confirmed, I do not believe I should express any views on the Act other than to note that I would apply the binding precedent of the Supreme Court in assessing any such challenge.

8. Do you continue to believe that Roe was wrongly decided? Why or why not?

RESPONSE: I do not believe that it is proper to infer a lawyer's personal views from the positions that lawyer may advocate on behalf of a client in litigation. To the extent the question about my "continuing" belief is based on the Federal Government's brief in Rust v. Sullivan, nothing about what my personal views were or are should be inferred from the fact that my name appears on the Federal Government's brief, as one of nine lawyers, in that case.

The Supreme Court's decision in Roe is binding precedent, and if I were to be confirmed as a circuit judge, I would be bound to follow it, regardless of any personal views. Nothing about my personal views would prevent me from doing so.

9. In one case for which you wrote an amicus brief while in private practice, Bragg v. West Virginia, you represented the National Mining Association. This case centered on the practice of "mountaintop removal," a term describing a certain type of mining for coal. The Fourth Circuit panel held that after the states had approved a plan to implement the statute, the federal government was no longer involved. Do you agree with that argument? The court also held that the state was immune from suit under the Eleventh Amendment. Do you agree with that argument?

RESPONSE: As you note, the amicus brief prepared in Bragg v. West Virginia was submitted on behalf of a client, the National Mining Association. My role as an attorney in that case -- as it has been in all cases in which I have served as counsel -- was to advocate my clients' positions, not to express my personal views. I do not believe I should express any personal views about the correctness of the Fourth Circuit's decision in Bragg, since the issues raised in that case continue to be actively litigated in the other circuits, see, e.g.,

Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310 (3d Cir. 2002), and could come before me in some form were I to be confirmed. I would note, however, that the amicus brief on behalf of the National Mining Association in Bragg did not raise the Eleventh Amendment argument that the Fourth Circuit adopted there.

10. You represented the United States as amicus curiae in Withrow v. Williams, arguing that a state prisoner should not be able to raise a claim of a violation of the Miranda rule in a habeas corpus proceeding. The Court rejected this argument, holding that Miranda claims may be raised in habeas proceedings. What was your reasoning in arguing that Miranda should not apply to habeas corpus proceedings? Did you personally agree with this argument?

Response: The brief of the Solicitor General in Withrow v. Williams, 507 U.S. 680 (1993), argued that the Supreme Court's reasoning in Stone v. Powell, 428 U.S. 465 (1976) -- which held that a federal court should not entertain a Fourth Amendment claim raised by a state prisoner in a habeas petition where the petitioner had been afforded a full and fair opportunity to present the claim in State proceedings -- applied with equal force when a prisoner raised a Miranda claim in a habeas petition. The Stone Court weighed "the utility of the [Fourth Amendment's] exclusionary rule against the costs of extending it to collateral review," and concluded that the benefits of extending the rule to the habeas forum were "small in relation to the costs." 428 U.S. at 489, 493.

The Solicitor General's Withrow brief argued that the same result should obtain when a prisoner sought to raise Miranda claims on habeas review. Quoting the Supreme Court's decision in Duckworth v. Eagan, 492 U.S. 195, 209 (1989), the brief noted that the Miranda rule "'is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself.'" The brief further argued that, just like the Court's decisions weighing the benefit of the exclusionary rule against its costs, decisions interpreting the scope of the Miranda requirements engaged in much the same cost-benefit assessment. The Solicitor General's brief accordingly argued that the cost-benefit analysis the Court had performed in Stone should be applied to Miranda, and with the same outcome.

That argument won four votes. The Withrow majority rejected the Solicitor General's argument that Stone's reasoning applied with equal force when Miranda claims were raised on

habeas review. See 507 U.S. at 687-695. As a D.C. Circuit judge I would be obligated to, and of course would, apply Withrow as controlling precedent. I therefore do not believe that it would be appropriate for me to comment on whether I personally agree with the argument raised by the Solicitor General in his brief, but ultimately rejected by a majority of the Supreme Court.

11. What was your view as to the recent Dickerson case, which upheld the constitutional support for Miranda, and how do you square it with your views in Withrow?

RESPONSE: If I am confirmed as a D.C. Circuit judge I would be obligated to, and would, apply Dickerson as controlling precedent. I therefore do not believe that it would be appropriate for me to offer my personal view on the case. The Dickerson Court affirmed the constitutional basis of the Miranda decision, while "conced[ing] that there is language in some of our opinions" supporting the contrary view. 530 U.S. 428, 438 (2000). That language formed, of course, the basis for the Federal Government's argument in Withrow and the attempted analogy to Stone v. Powell. I do not see how Dickerson can be squared with the Government's brief in Withrow; the argument in that brief would not have been plausible had Dickerson been on the books.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR RUSSELL D. FEINGOLD

1. As a student, you wrote a law review note on the takings clause that was published in the Harvard Law Review in 1978. One of your arguments was that the emotional attachment property owners have for their property should be considered in determining the appropriate level of compensation. Do you still hold that view on the takings clause?

RESPONSE: I have reviewed the note in question, 91 Harv. L. Rev. 1462-1501 (1978), and can find no place where I argued that the emotional attachment property owners have for their property should be considered in determining the appropriate level of compensation. I do not recall thinking that then and do not believe now that the law requires considering emotional attachment in determining just compensation. The note stated that "current rules regarding what constitutes just compensation are fairly well established and uniformly applied. Generally, the state must pay the property holder the fair market value of the property taken." Id. at 1498. In any event, I would, if confirmed as a circuit judge, follow Supreme Court precedent in this area, as in any other. I would not follow my student note; no one else has.

2. Could you please discuss your assessment of the current state of the law on the takings clause? Could you include a discussion of what factors a court must consider in determining if a takings has occurred and in determining an appropriate level of compensation.

RESPONSE: The current state of the law on the Takings Clause is comprehensively set forth in the Supreme Court's recent decision in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002). I was retained in that case by the Tahoe Regional Planning Agency to argue before the Supreme Court that the agency's moratorium on development to preserve the pristine character of Lake Tahoe did not constitute a taking of property. Development interests on the other side argued that the moratorium was a per se taking for which

compensation was automatically required. The Court agreed, 6-3, with the agency's position.

In Tahoe, the Supreme Court reaffirmed that there are essentially two classes of takings: those in which the "government physically takes possession of an interest in property," id. at 1478, and those in which the government enacts "regulations prohibiting private uses" of property. Id. at 1479. In the first category of outright physical takings, the government "has a categorical duty to compensate the former owner." Id. at 1478. In the latter category of regulatory takings, the Supreme Court has consistently held that government action constitutes a taking only "if regulation goes too far." Id. at 1480. The Supreme Court in Tahoe emphasized that it has resisted adopting "any set formula for determining how far is too far, choosing instead to engage in essentially ad hoc, factual inquiries." Id. at 1481 (quotations omitted). Among the ad hoc, factual inquiries the Court considers are "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

The Court in Tahoe also explained that "the separate remedial question of how compensation is measured once a regulatory taking is established" was first addressed in a dissenting opinion by Justice Brennan and then later endorsed by the Court in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987): "[O]nce a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 122 S. Ct. at 1482 (quotation omitted). Just compensation is typically measured by fair market value. See, e.g., Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

3. Based on your extensive review of the history of the takings clause, do you think the courts should be more or less accepting of environmental regulation under the takings clause?

RESPONSE: I would of course follow Supreme Court precedent in the takings area, as in any other, if I were to be confirmed as a circuit judge. I would be bound to follow that precedent whether I personally regarded it as overly accepting or insufficiently accepting of environmental regulation. The Supreme Court's recent decision in Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002), in which I argued for the government agency against a takings claim brought by property developers, shows a robust regard for the need for government regulators to be afforded broad flexibility in undertaking vital environmental measures. In other cases the Court has found that regulatory efforts have triggered the constitutional prohibition on uncompensated takings of private property. The Court's "regulatory takings jurisprudence * * * is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'" Tahoe, 122 S. Ct. at 1478 (citation omitted). Because the analysis is so heavily dependent on the specific facts of particular cases, generalizations about the state of the jurisprudence in this area are ill-advised.

4. In your note you wrote, "On the other hand, where the zoning measure is seen as making changes of only minimal or dubious advantage, the property holder sacrificed will take small comfort in the social benefits his burden has created." Could you provide examples of zoning changes of a minimal or dubious advantage?

a. Is there a difference between zoning rules which are enacted because of environmental concerns versus zoning rules that enacted because of other concerns like housing and transportation? If so, what are the differences?

b. As a judge, how would you determine if a zoning measure is of "minimal or dubious" advantage?

RESPONSE: The note did not provide specific examples of regulations with "minimal or dubious" benefits, although at a later point it did reference one possible category of such regulations, "where a zoning board prohibits without cause a given use while permitting identical uses in the immediate vicinity." 91 Harv. L. Rev. 1493. The passage quoted in the question was intended to convey the notion

currently embodied in the Court's multi-factor balancing test, that one of the "complex of factors" to be considered in answering whether regulation gives rise to a taking is the "character of the government action." Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2457 (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)). The purposes of the challenged regulation are one factor to be considered in the balancing test, and a more compelling purpose -- such as preserving the pristine nature of Lake Tahoe, see Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002) -- may permit even very strict regulation without compensation, where a less compelling purpose would not. This is not to say that some areas of regulation are more important than others, but that the purposes of the regulation have to be considered in the analysis.

The point of the passage was not to suggest intrusive judicial scrutiny of the public benefits underlying particular regulations. Indeed, the note specifically expressed the concern that, in a balancing test, "the scope of the public benefit may be insufficiently appreciated" and that "courts that apply the balancing analysis often slight the public need for regulatory measures." 91 Harv. L. Rev. 1482 n.105. The note concluded that "[t]o bring vitality to the balancing analysis, courts might assume a greater willingness to recognize the compelling weight of the public concerns behind challenged regulations." Id.

5. You also wrote that "the regulated party may even regard himself as sharing in the social benefits of the regulation."

a. How would you determine if the regulated party shares in the social benefits of the regulations?

b. What, if any, obligations should be imposed on the government when the regulated party does not share in the social benefit of the regulation? For example, if the regulated party does not share in the government's desire through zoning regulation to protect a wetlands area from being turned into a parking lot should the government face a higher burden to justify the regulation?

RESPONSE: The Supreme Court's recent decision in Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional

Planning Agency, 122 S. Ct. 1465 (2002), captures to a considerable extent the point I was trying to make in the quoted passage from the note. Excessive development in the Lake Tahoe basin gave rise to what was called a "race to develop," as landowners rushed to develop their property before the imposition of what were anticipated to be stricter controls to preserve the unique character of the Lake, which was particularly vulnerable to run-off caused by development. The government agency imposed a moratorium on development, while a comprehensive land use plan was being developed. When the moratorium was challenged as a taking, one of the arguments I advanced for the agency opposing the takings claim was that the very parties challenging the regulation benefited from it in a direct way. What made their property so desirable and valuable was the pristine character of the Lake. Without the moratorium, that would have been irretrievably lost, and all the property holders would have suffered.

Justice Stevens, in his opinion for the Court in Tahoe, accepted this contention. He explained that the moratorium "protects the interests of all affected landowners" and that "property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state." Id. at 1489.

This is not to say, of course, that regulation must benefit affected property owners to avoid a requirement of compensation. That is not the law. It is instead to recognize that, in some cases, the most compelling argument against a takings claim is to show that the value of the affected property itself depends to some extent on the regulatory regime.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR DIANNE FEINSTEIN

1. In Griswold v. Connecticut, the Supreme Court recognized the constitutional right to privacy. It went on to reaffirm and expand this right in Eisenstadt v. Baird. Following from these decisions, the Supreme Court then recognized constitutional protections for a woman's right to choose in Roe v. Wade.

(a) Do you believe in and support a constitutional right to privacy?

(b) Please explain your understanding of a constitutional right to privacy?

(c) Do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?

RESPONSE: If confirmed as a circuit judge, I would be bound by Supreme Court precedent recognizing the constitutional right to privacy. Nothing in my personal views or beliefs would prevent me from applying that precedent fully and faithfully.

The Supreme Court's cases have recognized the right to privacy in a variety of contexts. The Court explained in Griswold v. Connecticut that the First Amendment "has a penumbra where privacy is protected from governmental intrusion." 381 U.S. 479, 482 (1965). Even before Griswold the First Amendment had been construed to protect, among other things, the "'freedom to associate and privacy in one's associations.'" NAACP v. State of Alabama, 357 U.S. 449, 462 (1958). Griswold further observed that other constitutional amendments -- the Third, Fourth, and Fifth, supported by the Ninth -- similarly created "zones of privacy" protected from "governmental invasions." Id. at 484. The Griswold Court held that the state law at issue there -- which forbade the use of contraceptives -- concerned "a relationship lying within the zone of privacy created by several constitutional guarantees," and improperly "sought to achieve its goals by means having a maximum destructive impact upon that relationship." Id. at 485. The Court accordingly held the law unconstitutional. Id.

The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), invoked Griswold in striking down, as a violation of the Equal

Protection Clause, a state law permitting married couples to obtain contraception but forbidding single people to do the same. The Court stated in Eisenstadt that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

In Roe v. Wade, the Court stated that "[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." 410 U.S. 113, 152 (1973). The Roe Court further observed that "the right has some extension to activities relating to marriage, * * * procreation, * * * contraception, * * * family relationships, * * * and child rearing and education." Roe, 410 U.S. at 153 (citing cases). The Court concluded in Roe that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or * * * in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id.

And in Planned Parenthood v. Casey, the Court observed that "[i]t is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." 505 U.S. 833, 849 (1992) (citing cases).

2. In Rust v. Sullivan, even though the question before the Supreme Court involved government funding for family planning services, you argued in a brief as Deputy Solicitor General that "[w]e continue to believe that Roe was wrongly decided and should be overruled." You further argued that "the Court's conclusions in Roe ... find no support in the test structure, or history of the Constitution."

(a) Mr. Roberts, do you continue to believe that Roe was wrongly decided?

(b) Do you continue to believe that Roe should be overruled?

(c) Do you continue to believe that the Supreme Court's decision in Roe have no support in the text, structure or history of the constitution?

(d) Do you believe the holding of Roe v. Wade is the settled law of the land?

RESPONSE: I do not believe that it is proper to infer a lawyer's personal views or beliefs from the arguments advanced by that lawyer on behalf of a client. The argument advanced in the Rust brief reflected the existing position of the Federal Government, as reflected in briefs filed in five previous cases. The Rust brief noted that the views expressed in those briefs continued to be the position of the administration. If that position were accepted, the challenge to the federal program in Rust would fail, which was why the position was noted in that case by the attorneys charged with the responsibility to defend the challenged federal program.

Roe is the settled law of the land. If I am confirmed as a circuit judge, I would be bound to follow it. Nothing about my personal beliefs would prevent me from doing so.

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR EDWARD M. KENNEDY

1. In recent years, Supreme Court decisions have undermined key aspects of our anti-discrimination laws that protect state employees. There is grave concern that the Family and Medical Leave Act may suffer the same fate -- just a few weeks ago, the Court heard a case on implementation of the FMLA, which has been so important to women and their families.

In a June 1999 interview on NPR's Talk of the Nation, you said the following about similar "federalism" cases:

> "What these cases say is, just because Congress has the power to tell individuals and companies that this is what you're going to do, and if you don't do it, people can sue you, that doesn't mean they can treat the states the same way."

Mr. Roberts, if you are confirmed, you will be called upon to review federal statutes. I am concerned that you believe Congress has very narrow authority in this area and in many other areas. Here's what you also said:

> "You know, we've gotten to the point these days where we think the only way we can show we're serious about a problem is if we pass a federal law, whether it's the Violence Against Women Act or anything else. The fact of the matter is, conditions are different in different states and state laws can be more relevant is I think exactly the right term - more attuned to the different situations in New York as opposed to Minnesota. And that's what the federal system is based on."

Mr. Roberts, in your opinion, when may Congress pass legislation binding on the states?

RESPONSE: In its seminal decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), the Supreme Court established the bounds of Congress's legislative authority: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are

appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Congress's lawmaking authority is accordingly very broad, including its authority to pass legislation binding on the States.

That broad authority is subject, as the quoted language from Chief Justice John Marshall confirms, to the other provisions of the Constitution. In a series of recent cases, the Supreme Court has ruled that the Eleventh Amendment precludes Congress from subjecting States to certain private rights of action for money damages. As noted in the question, the Court just recently heard argument in Nevada Department of Human Resources v. Hibbs, No. 01-1368, which presents the question whether the States are immune from damages awards under the Family Medical Leave Act. I participated in a moot court under the auspices of the Georgetown Law School Supreme Court Institute to help prepare counsel for the private party, plaintiff Hibbs, for her Supreme Court argument defending the FMLA against the assertion of state immunity under the Eleventh Amendment. If I were to be confirmed as a circuit judge, I would of course be bound to follow the Supreme Court's precedents, both on the breadth of Congress's power to legislate and on the Eleventh Amendment.

2. Mr. Roberts, many believe that although the Supreme Court is trying to limit congressional authority, the Spending Clause can be used to support federal civil rights legislation. I know you are quite familiar with this area of law because you represented the National Beer Wholesalers' Association and filed a brief in the Dole v. South Dakota case, which guides Congress' Spending Clause authority. The central argument in your brief focused on the 21st Amendment, but you also wrote:

> "Amicus recognizes that this Court, like the court below, has stated that broad proposition that a condition on the grant of Federal funds does not deny rights to the States, because the States may decline the funds . . . while the proposition in its most general terms may have been valid when first announced, it requires reexamination in light of present-day realities. Federal spending practices and state budgets have changed dramatically in the half century and today many if not all States are no longer "entirely free" to turn down funds absolutely

> essential to their economies. Congress knows this to be true. The States know it to be true. This Court need not be blind to the realities that shape the conduct of the other actors in the constitutional scheme, and need not characterize conditions on the receipt of Federal funds as "coercive" before recognizing that a State may well be forced to forfeit constitutional prerogatives . . ."

Mr. Roberts, every nominee that comes before the Judiciary Committee pledges to follow Supreme Court precedent. Accordingly, I assume you'll follow Dole, but given your concern that the "coercion" standard may not be the best way to determine when Congress can condition the States' receipt of federal money, please describe the manner in which you will *interpret* this element of the Dole test?

RESPONSE: The counsel of record on the brief to which this question refers was E. Barrett Prettyman, Jr. At the time the brief was filed, I was an associate working with Mr. Prettyman. In addition, I do not believe it is proper to infer a lawyer's personal views from the views he has advanced in litigation on behalf of a client.

In any event, you are correct that I would follow the Supreme Court precedent of South Dakota v. Dole, 483 U.S. 203 (1987), and not the arguments advanced in the amicus brief. I would also follow Supreme Court precedent on how the coercion element discussed in Dole should be interpreted. Dole stated that "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). The facts that Steward -- the only case cited by the Dole Court in its discussion of this issue -- rejected a coercion claim, and that the amicus brief quoted in the question could cite no more favorable authority, suggest the heavy burden one advancing such a claim would bear.

3. In Rust v. Sullivan, although the only question before the Supreme Court pertained to government funding for family planning services, as Deputy Solicitor General, you argued in a brief that "[w]e continue to believe that Roe was wrongly decided and should be overruled." You went on

to argue that "the court's conclusions in Roe . . . find no support in the text, structure, or history of the Constitution."

Mr. Roberts, the question of Roe's constitutionality was not before the Court -- the issue was the constitutionality of implementing regulations governing Title X grant recipients put forth by the Secretary of Health and Human Services. It appears that you could have addressed the core issue without making the argument that Roe should be overturned.

Why did you feel it necessary to make that argument?

Do you continue to believe that Roe should be overturned?

RESPONSE: I appeared as one of nine government attorneys on the brief for the federal respondent in Rust v. Sullivan. The purpose of that brief was to defend the challenged Health and Human Services program. The program was challenged on the ground that regulations issued under the program impermissibly burdened the abortion right. It was the position of the Federal Government at that time, as expressed in briefs filed in five previous cases cited in the Rust brief, that Roe should be overruled. As explained in the Rust brief, "[i]f Roe is overturned, petitioner's contention that the . . . regulations burden the right announced in Roe falls with it." Br. for Resp. at 13.

I do not believe it is proper to infer a lawyer's personal views from the position taken on behalf of a client. Roe is binding precedent and, if I were confirmed as a circuit judge, I would be bound to follow it. Nothing in my personal views would prevent me from doing so.

4. Mr. Roberts, during a June 24, 1999, interview on NPR's Talk of the Nation, you said the following: "[t]he reason that that's the way it was in 1789 is not a bad one when you're talking about construing the Constitution."

Do you support an "originalist" approach to constitutional interpretation?

If not, would you describe the underlying theory that guides your approach to constitutional interpretation?

RESPONSE: I would of course follow any applicable Supreme Court precedent if called upon to interpret a particular provision of the Constitution. In some areas, for example interpretation of the Seventh Amendment right to a jury trial, the Court has taken what might be described as an "originalist" approach -- whether the right attaches has much to do with historical practice at the time the Seventh Amendment was adopted. See, e.g., Feltner v. Columbia Pictures Television, Inc., 523 U. S. 340 (1998). In other areas the Court's analysis is not so tightly tied to historical practice. I do not have an all-encompassing approach to constitutional interpretation; the appropriate approach depends to some degree on the specific provision at issue. Some provisions of the Constitution provide considerable guidance on how they should be construed; others are less precise. I would not hew to a particular "school" of interpretation but would follow the approach or approaches that seemed most suited in the particular case to correctly discerning the meaning of the provision at issue.