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February 11, 2003

VIA FACSIMILE TRANSMISSION
AND OVERNIGHT MAIL

Senator Orrin G. Hatch
Committee on the Judiciary of the U.S. Senate
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am forwarding with this letter my answers to the questions from Senator Schumer.

Sincerely,

J. S. Sutton

Jeffrey S. Sutton

Enclosure

CGI-1225583v2

Questions for Jeffrey Sutton from Senator Charles E. Schumer

1. In Morrison v. United States, a 5-4 Supreme Court held that despite years worth of hearings and well-substantiated findings proving that violent crime against women costs the country between $5-$10 billion each year in health care, criminal justice, and other social costs, Congress did not adequately establish the effect of violence against women on interstate commerce to justify the use of Commerce Clause powers. The four justice minority disagreed, arguing that the Court should show deference to Congress' ample findings and uphold the Violence Against Women Act as a rational response to the national threat posed by gender-motivated violence.

At your confirmation hearing, you stated that you were insufficiently familiar with the record of Congress's VAWA findings to tell us whether you agree with the majority's conclusion that Congress' findings were insufficient and were not due deference by the Court or with the minority's conclusion that Congress' findings were sufficient and were due deference. Please review Congress' findings and tell us whether you agree with the majority's conclusion or the minority's and why.

Please do not answer merely by restating the holding of Morrison. I understand that no matter what position you state here, you will follow the law as defined by the Supreme Court. I am asking this question to better understand the legal and judicial philosophy you will bring with you to the bench if you are confirmed.

As I have written before, the Court's decision in *Morrison* appears to be a reasonable one. That view, it bears emphasizing, comes not from the perspective of a disinterested judge or lawyer or from the perspective of a dispassionate scholar but from the perspective of someone who was involved in representing a client in the case (and accordingly could not later publicly disavow his client's position). That vantage point is informed by three observations.

First, all nine members of the Court agreed that a substantial presumption of constitutionality is accorded to Commerce Clause legislation and that great respect is given to Congress's superior fact-finding capacity in this area. *See Morrison*, 529 U.S. at 607; *City of Boerne*, 521 U.S. at 535-36; *United States v. Lopez*, 514 U.S. at 563. Because Congress is the branch of the Federal Government that is best equipped to gather evidence about effects on interstate commerce and to make these kinds of findings, the Court has long shown great deference to these factual determinations.

Second, all nine members of the Court agreed that the Judicial Branch nonetheless retains the *Marbury* power to review extensive congressional findings of fact to determine whether a law affects interstate commerce; otherwise, the Court has suggested, Congress's fact-finding capacity would trump the *Marbury* power. *See Morrison*, 529 U.S. at 614 ("whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court") (quotations omitted); *Id.* at 628 (Souter, J., dissenting). *See also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under

the Constitution.").

Third, that takes us to the most difficult part of *Morrison* -- the application of these bookend principles to VAWA. While fair-minded people can assuredly disagree about its conclusion, the Court reasonably determined that this single provision of VAWA was not constitutionally connected to interstate commerce. That is not, however, because the factual findings did not establish a but-for connection to interstate commerce. They did. It is rather because the findings were at such a level of generality that similar findings could be made about any matter of traditionally local concern. And such an analysis would effectively eliminate the Court's "independent evaluation of constitutionality under the Commerce Clause." *Lopez*, 514 U.S. at 562.

Reasonable minds, to be sure, can disagree about these matters. Indeed, I do not know whether this is the view I would have taken of the matter as a lower-court judge before the Supreme Court reached its decision in *Morrison*, and as noted I am not in a position publicly to disavow a legal argument that I previously advanced on behalf of a client. Either way, if confirmed, I would follow current and future Supreme Court precedent in this area.

2. Please describe in detail what role you played, if any, in litigating *Nevada Department of Human Resources v. Hibbs*, including any role you played in preparing briefs, preparing advocates for oral argument, or assisting in the representation of any party or amicus, or any other involvement.

I have not played a role in litigating the *Hibbs* case.

3. Thank you for discussing at your hearing cases where you are critical of the court's holding or reasoning. I appreciate as well your agreeing to discuss additional cases in writing. Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning and please discuss the reasons for your criticism.

As a court-of-appeals judge, one is required to follow Supreme Court precedent, whether one agrees with those decisions or not. And in that capacity, one is required to go through a decision-making process that I have not gone through in thinking about any prior decision of the Supreme Court or for that matter any lower-court decision. One aspect of that decision-making process is occasionally to reconcile Supreme Court precedents that may be in tension with each other. While I have not thought through this issue in the way that a court-of-appeals judge would think through it, I can think of two opinions that at first blush do not seem consistent with the reasoning of later decisions of the Supreme Court.

In *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the Court construed an Act of Congress that prevented "any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, in the United States . . . under contract or agreement, . . . to perform labor or

service of any kind in the United States." *Id.* at 457 (quotations omitted). After reviewing the competing arguments of the parties, the Court concluded that the legislation did not apply to a contract between a New York City church and a rector in England. *Id.* at 458. While there may be legitimate explanations for this result, the Court's reasoning does not seem consistent with portions of other Court opinions indicating that the plain language of a statute generally will control the outcome of a statutory-interpretation case.

In *Korematsu v. United States*, 323 U.S. 214 (1944), a 6-3 majority of the Court upheld the forcible detention of a class of law-abiding American citizens based solely on their race. Fifty-nine years after that decision, it is doubtful whether anyone fairly can appraise the national-security risks that led the military to issue this decision or the historical context in which the Court addressed the constitutionality of the military order. Still, the reasoning of the majority decision does not seem consistent with two constitutional assumptions established by other decisions of the Court -- namely, that guilt cannot be determined based on race and that even the most compelling governmental interests require the use of lesser alternatives in the context of suspect racial classifications.

In commenting about these decisions, I am describing the process that a lower-court judge occasionally would need to follow in reconciling different Supreme Court precedents. I am not prejudging what I would do in these areas or in any other area.

4. Please describe in detail how you came to be involved in litigating the following cases: *Sandoval*, *Garrett*, *Kimel*, and *City of Boerne* and how you decided what arguments to advance in each of those cases. To the extent a client or supervisor instructed you to take any position, for each of these cases, please describe whether you had previously advised your client or supervisor to take that position?

In the first of these cases, *City of Boerne*, I was the State Solicitor of Ohio when the Fifth Circuit issued its ruling in that case. By that time, the Ohio state corrections department (through the corrections section of the Ohio Attorney General's office) was defending many claims filed against it by prison inmates under the Religious Freedom Restoration Act (RFRA). In light of those pending claims, the Attorney General and her clients made the decision to raise the defense that RFRA exceeded congressional power. Separately, and in view of that pending litigation, the Attorney General authorized me to file *amicus curiae* briefs on behalf of Ohio and 15 other states in the United States Supreme Court. The merits *amicus* brief was joined by both Democratic and Republican Attorneys General, and also noted that at least four other states independently had challenged the validity of RFRA. *See, e.g.*, *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996); *Rouser v. White*, 944 F. Supp. 1447 (E.D. Cal. 1996); *Bass v. Grottoli*, 94 Civ. 3220, 1995 U.S. Dist. LEXIS 13916 (S.D.N.Y. Sept. 22, 1995); *Van Dyke v. Washington*, 896 F. Supp. 183 (C.D. Ill. 1995).

In *Kimel*, the Florida Attorney General's office and the Alabama Attorney General's office asked me to make a proposal to represent them in three consolidated cases that had been accepted for review in the Supreme Court. I did, and was engaged by both offices to represent the state defendants in these three consolidated cases. In *Sandoval* and *Garrett*, presumably as a result of my prior work for Alabama, I was asked by the Alabama

Attorney General's office to represent the state clients in those cases.

In all four of these cases, I did not become involved in them until they reached the United States Supreme Court. As a result, the positions of my clients -- constitutional challenges in *City of Boerne*, *Kimel* and *Garrett*, and a statutory-interpretation challenge in *Sandoval* -- had already been developed, established and preserved by the time the cases reached the Supreme Court. As their lawyer in the Supreme Court, I did my best to continue to articulate and advance these legal positions on behalf of my clients. In preparing these legal arguments, I did what I generally would do in this setting -- look for and develop all reasonable arguments that would advance my client's position. My clients in these cases ultimately were responsible for taking these legal positions and for approving the contents of these briefs.

It may be worth adding that I have been asked by States whether I would be willing to represent them in other settings -- including in *Rice v. Cayetano*, 528 U.S. 495 (2000) (Fifteenth Amendment challenge to Hawaii voting-requirements law), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (takings challenge to environmental restrictions of state agency). I was asked to make a formal proposal to represent the State in one case and was informally asked whether I would be interested in representing the State in the other. While I conveyed my willingness to represent each State, I ultimately was not hired in either case.