

July 14, 2005

The Honorable Arlen Specter  
Chairman  
United States Senate Judiciary Committee  
711 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Patrick Leahy  
Ranking Member  
United States Senate Judiciary Committee  
433 Russell Senate Office Building  
Washington, D.C. 20510

Dear Senators Specter and Leahy,

As interpreters of the Constitution, the federal courts play a central role in safeguarding our liberties, upholding the rule of law against governmental intrusions and excesses, and ensuring that every person is accorded due process and the equal protection of the law. The judiciary is able to play this vital role precisely because it is not a political branch of government. Under Article III of the Constitution, federal judges are given life tenure so as to be free of political influences that would interfere with their ability to exercise their duties fairly and impartially.

Because federal judges do not serve fixed terms of office, we believe it is critical that the Senate, in giving its Advice and Consent, undertake a searching inquiry to assure itself that judicial nominees meet the highest standards of character and integrity; that they will consider each case with an open mind; and that their views are within the constitutional mainstream.

We believe that the Senate's explicit authority to give its Advice and Consent to judicial nominations includes the power to consider nominees' beliefs about the Constitution and the role of the courts in interpreting it. We further believe that, in evaluating nominees, the Senate should be especially skeptical of nominees who approach questions of constitutional meaning from extreme, rigid, and divisive perspectives.

We respectfully urge that the following questions be asked of each nominee who comes before the Judiciary Committee so that the Senate can determine whether the nominee would uphold these principles.

*In order to approach constitutional questions as consistently as possible, jurists often adopt a particular "canon of construction," i.e., a method of interpreting the Constitution. Some are "textualists" or "strict constructionists" who limit themselves to applying the black and white text of the Constitution. Some are "originalists" who rely on the writings of the Framers and the laws in place at the time the Constitution was written to inform the meaning of the text when it is unclear. Still others employ "structural reasoning," which requires an analysis of how different parts of the Constitution and the governmental branches relate to one another.*

1. Do you believe in employing a canon of construction? If so, is there a particular canon to which you subscribe?

*Many constitutional principles that Americans now take for granted—such as freedom of association and one person, one vote—are not expressly written in the Constitution and were never considered by the Framers but were articulated by the Supreme Court in landmark decisions.*

2. Do you believe it is appropriate for the Supreme Court to recognize constitutional principles that were not expressly written in the Constitution or explicitly recognized by the Framers?

*The Constitution provides that the government may not deprive a person of life, liberty, or property without due process of law. The Due Process Clause has been interpreted to include "procedural" elements, such as the right to be given notice and a hearing before the government may take certain actions, and "substantive" elements that provide constitutional protection for fundamental rights, such as the right to marry and the right to contract.*

3. What rights, if any, do you believe are protected by substantive due process?

*The Supreme Court has declared that the Constitution contains a right to privacy.*

4. Do you believe there is a constitutionally protected right to privacy, and, if so, under what circumstances does it apply?

*The Supreme Court has established a framework for determining when certain classes of people are protected by the Equal Protection Clause. For instance, when the government makes classifications based upon characteristics such as race and sex, those classifications are subject to heightened scrutiny and more likely to be found unconstitutional. Classifications based on economic distinctions, on the other hand, have been subjected to only limited judicial scrutiny.*

5. Do you agree with the tiers of review currently employed under Equal Protection jurisprudence and the way they have been applied? Explain.

*The Constitution provides that Congress has power to pass laws only for certain purposes. Over the last 50 years, Congress has routinely invoked its power under two constitutional provisions—the Commerce Clause and section 5 of the 14th Amendment—to ensure that employers, schools,*

*and neighborhoods would not discriminate against people because of their race, sex, age, religion, or disability. Recent decisions of the Court, however, have limited the breadth of these powers.*

6. What in your view are the limits on the scope of Congress' power under the Commerce Clause and section 5 of the Fourteenth Amendment?

*The text of the Eleventh Amendment provides only that a state may not be sued in federal court by individuals who do not reside in that state. The Supreme Court has broadened this to say that a state cannot be sued by its own citizens under federal law in federal court, state court, or before a federal agency without the state's consent.*

7. What do you believe is the appropriate scope of state sovereign immunity and the Eleventh Amendment?

*The phrase "judicial activism" has often been used to critique the approach of judges on both ends of the ideological spectrum.*

8. Define "judicial activism" and describe your views on it.

*The attacks of September 11 have prompted a constitutional debate over the limits of government power and the scope of presidential authority in a time of national crisis.*

9. Do you believe there are judicially enforceable limits to the President's power as Commander-in-Chief in times of national crisis? If so, what are those limits?

10. In *Korematsu v. United States*, the Supreme Court upheld the constitutionality of evacuating Japanese-American citizens on the West Coast from their homes during World War II. What lessons do you believe the Court should draw from *Korematsu* and the World War II experience?

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