QUESTIONS AND ANSWERS

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, DC 20001-2866

JOHN G. ROBERTS, JR.
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September 21, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

Enclosed are my responses to the written questions of Senators Biden, Brownback, Feingold, Feinstein, Kennedy, Kyl, Leahy, Mikulski, and Schumer, in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

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

Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Joseph R. Biden, Jr.

The deference courts give to precedent – *stare decisis* – is a key issue in the confirmation of any Supreme Court Justice. During his testimony before this Committee, then-Judge Clarence Thomas said:

> ***stare decisis* provides continuity to our system, it provides predictability, and in our process of case-by-case decision making, I think it is a very important and critical concept.**

After saying that – and being confirmed – Justice Thomas has gone on, in more than 35 cases, to express a willingness to reexamine a breathtaking range of well-settled constitutional law. As we've come to learn and as Justice Scalia has explained recently, Justice Thomas "doesn't believe in *stare decisis*, period."

1. **What can you tell the American people to convince us that what you've said about the importance of *stare decisis* at your confirmation hearings will, if confirmed, actually guide you when you are faced with deciding whether or not to follow a particular precedent?**

RESPONSE: I have placed my views concerning stare decisis in the context of a broader conception of the proper role of a judge in our constitutional system of government. That broader conception focuses on what I regard as essential judicial humility — the humility to appreciate the limited nature of the judicial office, the humility to be open to the considered views of colleagues on the bench, and the humility to appreciate that judges operate within a system of precedent shaped by other judges over the centuries. The fact that my views on stare decisis are grounded in a broader view of the proper judicial role helps substantiate their significance.

At his confirmation hearing, Judge Souter had this to say on *stare decisis* and the factors to consider when contemplating overruling a previous case:

> **Some such doctrine or some such rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed to simply random decisions on a case-by-case basis....**
>
> **One of the factors which is very important I will throw together under the term reliance. Who has relied upon that precedent, and what does that reliance count for today?**
>
> **We ask in some context whether private citizens in their lives have relied upon it in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now....**

We look to whether legislatures have relied upon it, in legislation which assumes the correctness of that precedent....

We look to whether the court in question or other courts have relied upon it in developing a body of doctrine.

2. Do you agree with Justice Souter's analysis?

a. If not, what parts do you not agree with?

b. Specifically, do you agree with Justice Souter's characterization of the importance of considering reliance interests?

c. How important do you personally think it is to take into account the reliance interests of private citizens?

d. How important do you personally think it is to take into account the reliance interests of legislatures?

e. How important do you personally think it is to take into account the reliance interests of courts?

RESPONSE: I agree with Justice Souter that stare decisis is an important legal principle; it embodies basic rule of law values such as reliance, fairness, predictability, and judicial integrity. See Payne v. Tennessee, 501 U.S. 808, 827 (1991). The doctrine also serves as an important check on judges. As Alexander Hamilton explained in Federalist No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

Stare decisis analysis takes into consideration a number of factors, including whether the precedent in question has proven workable over time, whether it has been eroded by subsequent developments in the law, and the extent to which it has given rise to settled expectations. As a general matter, the reliance of both private citizens and legislatures are recognized as important factors in determining how much weight to give prior precedent under principles of stare decisis. See generally Payne v. Tennessee, 501 U.S. 808, 827–28 (1991). Additionally, considerations of stare decisis have special force in the area of statutory interpretation because Congress is free to alter the Court's prior interpretation if Congress disagrees with it. See Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197 (1991).

The Supreme Court has explained that it approaches the reconsideration of its decisions "with the utmost caution." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). I am, however, unaware of any particular case that counsels such caution because of a court's reliance. Stare decisis promotes a policy of consistent, even-handed, and predictable decision-

making, but the reliance interests to which the Court typically looks are those of individual citizens, of legislatures, or of society more generally.

3. Do you agree that different types of cases and issue areas generally have stronger reliance interests at stake and the Supreme Court should be especially hesitant to overrule cases in those areas?

a. How strong a factor do you think the reliance interest should be in contract-commercial cases?

b. How strong a factor do you think the reliance interest should be in free speech cases?

c. How strong a factor do you think the reliance interest should be in Establishment Clause cases?

d. How strong a factor do you think the reliance interest should be in liberty clause privacy cases?

RESPONSE: Reliance is among the many factors that a court considers in determining whether to revisit a prior holding. As a general matter, stare decisis does apply with greater force to particular types of cases. The Court has frequently explained that stare decisis is at its strongest when the Court is dealing with a statutory, as opposed to constitutional, decision. See, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989).

The Court has also held that "considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)). See also State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

As in any case, the reliance interest present in any "free speech," Establishment Clause, or "liberty clause privacy case" is a factor that a court considers under principles of stare decisis. Even though the Court has explained that the doctrine of stare decisis generally applies with less force in constitutional cases as compared to statutory interpretation cases, "any departure from . . . stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984); see also Vasquez v. Hillery, 474 U.S. 254, 266 (1986) ("[T]he careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons.").

One of the Justices you've mentioned in the past that you've most admired, Justice Robert Jackson said this in 1944:

> **I suppose we would not much disagree about the theoretical significance of the doctrine of *stare decisis*, however sharply we might divide about applying it to specific cases. (Decisional Law and *Stare Decisis*, 30 ABA J. 334 (1944)).**

4. Do you agree with this statement?

RESPONSE: I certainly agree that stare decisis is a doctrine of theoretical significance. The principle embodies essential rule of law values: reliance, fairness, predictability, and judicial integrity. I also regard it as significant in a practical sense, and am confident that Justice Jackson did, too: no legal system could function in a coherent way if basic questions were revisited at the start of each new day. As with other legal principles, the Justices from time to time reach different conclusions concerning the application of stare decisis in particular cases; I understand that to be the essence of Justice Jackson's point.

During your hearing, you discussed the relationship between the Supreme Court's decision in *Brown v. Board of Education* and the doctrine of *stare decisis*. You noted that John W. Davis argued for the Board, as you put it: "You need to be worried about the social consequences of upsetting this decision. People have lived their lives this way. If you overturn this, it's going to be disruptive, the consequences are going to be bad." You said you agree with the outcome of *Brown*, which rejected Davis's arguments, in favor of, as you put it, the rule of law.

5. In your opinion, why did the "rule of law" in *Brown* outweigh these reliance interests?

a. Speaking generally, in cases that call into question longstanding precedents, how will you know when the "rule of law" should demand the disruption of the settled expectations surrounding those precedents?

RESPONSE: The principles of stare decisis look at a number of factors, including the settled expectations stressed by Davis during his argument. On the other side of the ledger there may be competing considerations such as whether a particular precedent has proven to be unworkable; whether the doctrinal bases of a decision have been eroded by subsequent developments; and whether the factual premises have so far changed as to render the prior holding unjustifiable.

Several of these factors were present in Brown. The "separate but equal" approach of Plessy v. Ferguson was unworkable; it was in fact not leading to equal treatment. In addition, intervening precedents of the Court, most prominently Sweatt v. Painter, 339 U.S. 629 (1950), on which Thurgood Marshall heavily relied, had begun eroding the precedential force of Plessy. There is no categorical rule for when such considerations

justify the impact on settled expectations of overruling a prior precedent under principles of stare decisis; the Court's stare decisis precedents highlight the pertinent factors that must be weighed in the context of particular precedents.

In 1923, the Supreme Court in the *Adkins* case ruled that the liberty clause outlawed Congress from providing women a minimum wage. In 1937, the Court in *West Coast Hotel v. Parrish* overruled *Adkins*.

6. **Judge Roberts, do you agree with the decision in *Parrish* to overrule *Adkins*?**

   a. **If so, what justified not following precedent in that 1937 case?**

RESPONSE: I agree that West Coast Hotel Co. v. Parrish correctly overruled Adkins. Lochner era cases — Adkins in particular — evince an expansive view of the judicial role inconsistent with what I believe to be the appropriately more limited vision of the Framers. As Justice Frankfurter observed, the Court must give "due regard to the fact that [the] Court is not exercising a primary judgment but is sitting in judgment upon those who have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 122, 164 (1951) (Frankfurter, J., concurring). The Lochner era Court wrongly re-weighed legislative determinations, striking down laws that entitled women to minimum wage, Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923), and laws that prohibited bakers from working more than ten hours, Lochner v. New York, 198 U.S. 45 (1905). Overruling Adkins, the West Coast Hotel Court adopted an approach more consistent with judicial restraint, recognizing that Washington State's minimum wage laws for women were a reasonable "exercise of the protective power of the state." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937). The Court in West Coast Hotel found several additional reasons for reexamining the prior decision in Adkins, including "[t]he importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened." Id.

7. **At her hearing, Justice Ginsburg said: "The discussion of *stare decisis* in the central part of the [*Casey*] opinion is excellent." Do you agree with *Casey*'s analysis of *stare decisis* – specifically the analysis and application of *stare decisis* by the joint opinion of Justices O'Connor, Thomas, and Souter? How would you characterize the application of *stare decisis* made by the *Casey* opinion of Justices O'Connor, Kennedy, and Souter?**

RESPONSE: As a precedent on the significance of precedent, Casey is entitled to weight under the principles of stare decisis as is any other precedent of the Supreme Court. Several of the Court's opinions have set forth an analysis of stare decisis and I would look to all of these cases. For me to say whether I agree with the analysis of stare decisis in Casey, however, would plainly constitute a comment on the correctness of a decision in an area that could come before the Court in the future.

The majority and dissenting opinions in *Jackson v. Birmingham Board of Education* took very different approaches to statutory interpretation. The majority stressed the importance of interpreting the word "discrimination" in Title IX "broadly." The dissenters, in contrast, wrote that Congress had not included causes of action for retaliation "unambiguously" in Title IX.

8. Putting aside how you would have voted in that case, which general approach to statutory interpretation – the majority or the dissent – is closer to your reading of statutes?

RESPONSE: For the reasons mentioned in response to Question 7, I do not believe that it is appropriate for me to discuss my approach to statutory interpretation in the context of Jackson v. Birmingham Board of Education — a case decided just last term.

I can, however, comment on the general question of how I approach issues of statutory interpretation — and in particular the issue of whether terms should be construed broadly or narrowly. As a general matter, statutory interpretation, "begins with the statutory text, and ends there as well if the text is unambiguous." BedRoc Ltd. v. U.S., 541 U.S. 176, 183 (2004); see Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). The "preeminent canon of statutory interpretation" requires a judge to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." BedRoc, 541 U.S. at 183 (citing Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)). The Supreme Court has repeatedly instructed that statutes written in broad, sweeping language should be given broad sweeping application. In some situations, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." See, e.g., Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998). Statutes should therefore be interpreted broadly when a broad interpretation is consistent with congressional intent and interpreted narrowly when a narrow interpretation is consistent with congressional intent. When the text itself is ambiguous on the question, I employ the traditional judicial tools of statutory construction to divine congressional intent. See, e.g., Consumer Elecs. Ass'n v. FCC, 347 F.3d 291 (D.C. Cir. 2003).