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November 30, 2005

Honorable Samuel A. Alito, Jr.
c/o The Department of Justice
Washington, DC

Dear Judge Alito:

I write to give you advance notice of some of the issues I intend to ask at your confirmation hearing. In addition to identifying topics, I think it is helpful to outline the background for the questions to save time at the hearing.

Affirmative action is an area of law that has undergone many major changes in the last 25 years. During the late 1970s and early 1980s, when the Supreme Court first began grappling with affirmative action programs, it appeared to have considerable difficulty elucidating clear standards as to determining the constitutionality of such programs. The decisions in Regents of University of California v. Bakke in 1978, Fullilove v. Klutznick in 1980, and Wygant v. Jackson Board of Education in 1986, failed to develop a clear test.

In 1989, in City of Richmond v. Croson, a majority of the Court held that state and local government affirmative action programs are subject to strict scrutiny and thus struck down a Richmond, Virginia affirmative action program that set aside construction contracts for minority-owned businesses. Only a year later, however, the court upheld a federal affirmative action program, applying a lower standard of review in Metro Broadcasting v. FCC.

In 1995, the Court again considered a federal affirmative action program in Adarand v. Peña. In that case, the Court reviewed the Department of Transportation's policy of awarding extra compensation to contractors who hired minority-owned subcontractors. Overruling Metro Broadcasting, decided just five years earlier, the Court concluded that federal affirmative action programs, like state and local affirmative action programs, must be subject to strict scrutiny.

Most recently, the Court considered two higher education affirmative action programs. In Grutter v. Bollinger and Gratz v. Bollinger, the Court rendered a split verdict on the University of Michigan's undergraduate and law school admissions policies. It held that the law school's admission policy was constitutional because it was narrowly tailored and considered race only "a 'plus' factor in the context of individualized consideration of each and every applicant." It did not award "mechanical, predetermined diversity 'bonuses' based on race or ethnicity." In contrast, Michigan's undergraduate admission policy was struck down because it "automatically distribute[d] 20 points, one one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race." The Court held that such rigid policy was "not narrowly tailored to achieve the interest in educational diversity."

My questions are:

- (1) The Supreme Court's views on affirmative action have evolved considerably over the last three decades. How have your views evolved on this issue?
- (2) Justice O'Connor, writing for the Court in Grutter, expressed the idea that racial diversity was important in higher education because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." Do you agree with this view?
- (3) Justice O'Connor also wrote that she "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved" in that case. Do you agree with that statement? Can changing societal circumstances impact the constitutionality of race-conscious programs?
- (4) Following Grutter, it is clear that the Court insists that affirmative action programs be "narrowly tailored." It would seem that this could be a very fact-based and subjective determination. What jurisprudential factors would you consider in determining whether an affirmative action program is "narrowly tailored"?
- (5) The dissenting justices in Richmond v. Croson said that affirmative action is a "benign" form of discrimination which is intended to help minorities. They say that "benign" affirmative action is qualitatively different from "invidious" discrimination. On the other hand, Justice O'Connor in Croson and Adarand said that the equal protection clause does not establish a double-standard depending on which race benefits and which race is burdened. Indeed, she said that strict scrutiny is required to determine whether a racial classification is "benign" or "invidious." Which argument do you find more convincing?
- (6) Justice Thomas in his dissenting opinion in Grutter warned about the unintended effects of affirmative action. It "provokes resentment among those who believe that they have been wronged by the government's use of race," and racial minorities "are tarred as undeserving" and are stamped "with a badge of inferiority." Do you think Justice Thomas's jurisprudence should be considered determinative in deciding whether such programs are constitutional?

Turning to other issues in which racial concerns have long been considered, I would note that twelve years ago, in Shaw v. Reno, Justice O'Connor described "the meaning of the constitutional 'right' to vote" and the propriety of race-based districting as "two of the most complex and sensitive issues [the Supreme] Court has faced in recent years." I would venture to say that this still holds true today.

In Baker v. Carr, the Court first articulated the principle of "one man one vote." As you know, that case has been instrumental to ensuring that all people's votes are weighted equally in our representative democracy. As a consequence of this shift in our electoral system, the drawing of voting districts has become ever more important. In Shaw, for example, the state of North Carolina created a majority-black voting district, in the hopes that the state would see more black representatives elected. The district was oddly shaped, to put it mildly – 160 miles long and for much of its length, no wider than the I-85 corridor. One legislator quipped that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district."

Writing for a 5-4 Court, Justice O'Connor ruled that this racial gerrymandering violated the Constitution's guarantee of equal protection. She held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' demands the same close scrutiny [as any other] state laws that classify citizens by race." Justice O'Connor worried that redistricting plans designed to separate voters into different districts on the basis of race "bear an uncomfortable resemblance to racial apartheid" and further "impermissible racial stereotypes" "that members of the same racial group . . . think alike."

Justice Stevens's dissent, on the other hand, insisted that drawing voting districts for racial groups was no different than drawing districts "for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans." He argued that "[p]oliticians have always relied on assumptions that people in particular groups are likely to vote in a particular way when they draw new district lines." Justice Ginsburg echoed these sentiments two years later in her dissent in Miller v. Johnson, when she wrote, "Ethnicity itself can tie people together If Chinese-American and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated."

The Justices seem to have split into three camps on the constitutionality of racial redistricting. Justices Thomas and Scalia have indicated that states may never consider race in drawing districts. Justices O'Connor, Kennedy, and Rehnquist have asserted that strict scrutiny does not apply just because a district is drawn with "consciousness of race;" race must have been a "predominant factor" and other considerations must have been "subordinated to race." Justices Stevens and Ginsburg, however, have argued that states are free to consider race, so long as the resulting district benefits a minority group.

Surveying these splintered precedents, Justice Souter argued in Bush v. Vera that the Court's jurisprudence was unworkable. He suggested it should exit this field altogether and "allow for some faith in the political processes."

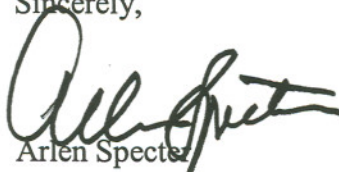
My questions are:

- (1) Recent press reports suggest that you view the principle of "one person one vote" as "bedrock" to American law. Is that a correct characterization of your views regarding that important principle?
- (2) Do you agree with Justice O'Connor's view that race is qualitatively different and classifying voters based on race is inherently dangerous and divisive? Or do you believe, like Justices Stevens and Ginsburg, that race can be a proxy for voters' viewpoints, just like union membership, rural background, or religion? Which view best reflects your jurisprudence on this issue?
- (3) Does the Constitution permit Justice O'Connor's position that race-conscious districting is permissible so long as it is not the "predominant factor"? What basis is there for a court to say *some* consideration of race is permissible, but not "too much"?
- (4) How does the Court go about deciding how much consideration is "too much"? Given the notorious difficulties with discerning legislative intent, is there a practicable way for the Court to measure how much consideration a legislature gave to race?

(5) What are your thoughts on Justice Souter's argument that these issues should be left to the political process? Is it ever appropriate for the Supreme Court to withdraw from its role as final arbiter of constitutional issues?

I have also attached copies of the letters I sent to then-Judge John Roberts and Ms. Harriet Miers on questions which I may ask at your confirmation hearing.

Sincerely,



Arlen Specter

Cc: Honorable Patrick J. Leahy

Via Facsimile