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United States Senate
WASHINGTON, DC 20510–3802
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The Honorable Sonia Sotomayor
c/o The Department of Justice
Washington, D.C.

Dear Judge Sotomayor:

When we concluded our meeting which lasted more than an hour, I commented that I would be writing to you on other subjects which I intended to cover at your hearing, and I appreciated your response that you would welcome such advance notice.

In the confirmation hearing for Chief Justice Roberts, there was considerable discussion about the adequacy of congressional fact finding to support legislation. This issue is again before the Supreme Court on the re-authorization of the Voting Rights Act where the legislation is challenged on the ground that there is an insufficient factual record. At our hearing, I would like your views on what legal standards you would apply in evaluating the adequacy of a Congressional record. In the 1968 case Maryland v. Wirtz, Justice Harlan's rationale would uphold an act of Congress where the legislature had a rational basis for reaching a regulatory scheme. In later cases, the Court has moved to a "congruence and proportionality standard.".

In advance of the hearing for Chief Justice Roberts by letter dated August 8, 2005, I wrote him in part:

> "members of Congress are irate about the Court's denigrating and, really, disrespectful statements about Congress's competence. In U.S. v. Morrison, Chief Justice Rehnquist, speaking for five members of the Court, rejected Congressional findings because of "our method of reasoning". As the dissent noted, the Court's judgment is "dependent upon a uniquely judicial competence" which implicitly criticizes a lesser quality of Congressional competence.

In Morrison, there was an extensive record on evidence establishing the factual basis for enactment of the Violence Against Women legislation. In dissent, Justice Souter noted "...the mountain of data assembled by Congress here showing the effects of violence against women on interstate commerce," and added:

> "The record includes reports on gender bias from task forces in 21 states and we have the benefit of specific factual finding in eight separate reports issued by Congress and its committees over the long course leading to its enactment."

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In a subsequent letter to Chief Justice Roberts dated August 23, 2005, I wrote concerning Alabama v. Garrett where Title I of the Americans with Disabilities Act was based on task force field hearings in every state attended by more than 30,000 people including thousands who had experienced discrimination with roughly 300 examples of discrimination by state governments.

Notwithstanding those findings, the Garrett Court concluded in a five to four decision:

> "The legislative record of the Americans with Disabilities Act, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."

In another five to four decision, the Court in Lane v. Tennessee concluded Title II of the Americans with Disabilities Act met the "congruence and proportionality standard". There, Justice Scalia dissented attacking the "congruence and proportionality standard" calling it a "flabby test" and an "invitation to judicial arbitrariness and policy driven decision making" adding:

> "Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy constitutional and proportional. As a general matter, we are ill-advised to adopt or adhere to constitutional rules that bring us into conflict with a coequal branch of Government."

During the confirmation hearing of Chief Justice Roberts, he testified extensively in favor of the Court's deferring to Congress on fact finding. In response to questions from Senator DeWine, he testified:

> "...The reason that congressional fact finding and determination is important in these cases is because the courts recognize that they can't do that. Courts can't have, as you said, whatever it was, the 13 separate hearings before passing particular legislation. Courts–the Supreme Court can't sit and hear witness after witness after witness in a particular area and develop that kind of a record. Courts can't make the policy judgments about what type of legislation is necessary in light of the findings that are made"..."We simply don't have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the fact finding that is made. It's institutional competence. The courts don't have it. Congress does. It's constitutional authority. It's not our job. It is your job. So the defense to congressional findings in this area has a solid basis."

In response to my questioning, Chief Justice Roberts said:

> "And I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development

of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record"

"...as a judge that you may be beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings, because that doesn't look like a judicial function."

The Supreme Court heard oral argument in Northwest Austin Municipal Utility District v. Holder on April 29, 2009 involving the sufficiency of the Congressional record on reauthorizing the Voting Rights Act. While too much cannot be read into comments by justices at oral argument, Chief Justice Roberts' statements suggested a very different attitude on deference to Congressional fact finding than he expressed at his confirmation hearing. Referring to the argument that " ...action under Section 5 has to be congruent and proportional to what it's trying to remedy," Justice Roberts said that:

"...one-twentieth of 1 percent of the submissions are not precleared. That, to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment."

Chief Justice Roberts went on to say:

"Well, that's like the old – you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that's silly. Well, there are no elephants, so it must work. I mean if you have 99.98 percent of these being precleared, why isn't that reaching far too broadly."

As a factual basis for the 2007 Voting rights Act, Congress heard from dozens of witnesses over ten months in 21 different hearings. Applying the approach from Chief Justice Roberts' confirmation hearing, that would appear to satisfy the "congruence and proportionality standard".

My questions are:

1. Would you apply the Justice Harlan "rational basis" standard or the "congruence and proportionality standard"?

2. What are your views on Justice Scalia's characterization that the "congruence and proportionality standard" is a "flabby test" and "an invitation to judicial arbitrariness and policy driven decision making"?

3. Do you agree with Chief Justice Rehnquist's conclusion that the Violence Against

Women legislation was unconstitutional because of Congress's "method of reasoning"?

4. Do you agree with the division of constitutional authority between Congress and the Supreme Court articulated by Chief Justice Roberts in his responses cited in this letter to questions posed at his hearing by Senator DeWine and me?

Sincerely,

Arlen Specter

AS/ph

cc: Chairman Patrick J. Leahy, Senate Judiciary Committee
Ranking Member Jeff Sessions, Senate Judiciary Committee
All Members of the Senate Judiciary Committee