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August 8, 2005

Honorable John G. Roberts, Jr.
E. Barrett Prettyman Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Roberts:

I write to give you advance notice of some of the issues I will be asking 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.

In addition to the commentaries of scholars and others about the Supreme Court's judicial activism and the Court's usurping Congressional authority, members of Congress are irate about the Court's denigrating and, really, disrespectful statements about Congress' competence. In *U.S. v. Morrison*, the Court rejects Congressional findings because of "our method of reasoning". As the dissent notes, the Court's judgment is "dependent upon a uniquely judicial competence" which implicitly criticizes a lesser quality of Congressional competence.

In *Morrison*, the Court invalidated, by a 5-4 vote, legislation on gender-motivated crimes of violence involving three Virginia Polytechnical Institute football players who were accused of raping a fellow student.

Chief Justice Rehnquist's opinion, interpreting the Commerce Clause, held Congress cannot regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Court acknowledged the "contrast with the lack of Congressional findings that we faced in *Lopez*" and the Act was "supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families."

Writing for four dissenters, Justice Souter referred to "the mountain of data assembled by Congress here showing the effects of violence against women on interstate commerce." Citing longstanding precedents, the dissent said:

"The business of the courts is to review the Congressional assessment not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact."

Noting the obvious advantage Congress has in its fact-finding procedures contrasted with the Court's limitations, the Souter dissent said:

“The fact of such a substantial effect is not an issue for the courts in the first instance...but for the Congress where institutional capacity for gathering evidence and taking testimony far exceeds ours.”

The Souter dissent further specified:

“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.”

From the New Deal Court in 1937 to the abrupt reversals in Lopez and Morrison, Congressional authority under the Commerce clause had gone unchallenged based on Justice Harlan’s rationale in the 1968 case Maryland v. Wirtz:

“But where we find the legislators...have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”

In the face of decades of precedents and a “mountain of data,” Chief Justice Rehnquist rejected Congress’ findings because of our “method of reasoning.”

To this Senator, who has labored through 25 years of intense legislative hearings and fact-finding plus prior public service and experience in the real world, my immediate reaction is to wonder how the Court can possibly assert its superiority in its “method of reasoning” over the reasoning of the Congress.

The Souter dissent attacks the majority’s “method of reasoning” dictum questioning the Court’s judgment is “dependent upon a uniquely judicial competence.” The dissent then points out:

“...these formalistic contrived confines of commerce power in large measure provoked the judicial crisis of 1937” so that “one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before NLRB v. Jones & Laughlin Steel Corporation which brought the earlier and nearly disastrous experiment to an end.”

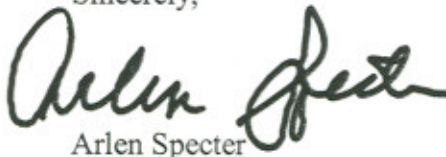
The Souter dissent further notes the categorical formalism “...is useful in serving a conception of Federalism.” A reinvigoration of Federalism is, of course, the hallmark agenda of the judicial activism of the Rehnquist Court.

Even with the Souter dissent referencing the crisis of 1937, I do not suggest any move as radical as President Roosevelt's attempt to pack the Court. I do see a great deal of popular and Congressional dissatisfaction with the judicial activism; and, at a minimum, the Senate's determination to confirm new justices who will respect Congress' constitutional role.

My questions are:

- (1) Is there any real justification for the Court's denigrating Congress' "method of reasoning" in our constitutional structure of separation of power where the elected Congress has the authority to decide public policy on issues such as gender-based violence effecting interstate commerce?
- (2) Is there any possible basis for the Court's characterization of "uniquely judicial competence" implicitly criticizing a lesser quality of Congressional competence?
- (3) Do you agree with Justice Harlan's jurisprudence concerning legislation on the "rational basis" test as embraced by the dissent contrasted with the majority opinion?
- (4) What is your thinking on the jurisprudence of U.S. v. Lopez and U.S. v. Morrison which overturned almost 60 years of Congress' power under the Commerce Clause?

Sincerely,



Arlen Specter

AS/ph

cc: Honorable Patrick J. Leahy

Via Facsimile and Mail (202) 273-0689