February 5, 2014

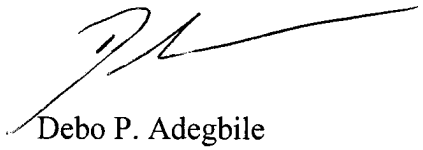
The Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you once again for giving me the opportunity to appear before the Committee on January 8, 2014. I enclose my responses to additional Questions for the Record that I received from Ranking Member Grassley.

Sincerely,



Debo P. Adegbile

Enclosure

Senator Chuck Grassley
Follow-up Questions for the Record
Debo P. Adegbile
Nominee, Assistant Attorney General for Civil Rights

1. You provided identical, non-responses answers to Questions 2(a)-(d). Instead of stating whether, if confirmed, you will implement the recommendations made in the 2013 Inspector General's Report, you state that you will assess "current hiring practices" in the Civil Rights Division. Please indicate whether you intend, if confirmed, to implement the recommendations made in the 2013 Inspector General's Report. If you will not commit to implementing them, explain why with respect to each recommendation enumerated in Questions 2(a)-(d).

   ANSWER: In further response, if confirmed, I would expect position announcements to focus on skills, experience and duties, consistent with federal civil service laws, and I would commit to undertake a review of the Division's hiring practices, and to carefully consider the 2013 Inspector General's Report together with all other relevant internal DOJ considerations. I note that because I am not currently at the Department, I do not have a comprehensive understanding of the Division's current hiring practices and the extent to which the recommendations made in the 2013 Inspector General's Report already may have been implemented or considered. I believe it would be appropriate, if confirmed, for me to first make a careful assessment of existing hiring practices and procedures before making decisions or commitments about how job announcements will be drafted in the future.

2. In each of your responses to Questions 2(a)-(d) you repeat your intention to "ensure a strong and broad pool of candidates." What does the term "broad" mean in the context in which you used it?

   ANSWER: I understand "broad" in this context to embrace efforts to cast the net widely so as to reach and encourage applications from qualified potential candidates with a range of backgrounds, skills, and prior work experience relevant to a particular position.

3. Will you commit to ensuring that the Civil Rights Division hires a strong and *ideologically diverse* pool of candidates and work to eliminate hiring practices in the Division that the Inspector General found "resulted in a pool of select candidates that was overwhelmingly Democratic/liberal in affiliation?"

   ANSWER: As I have stated previously, if confirmed, I will assess the Division's current hiring policies and practices, and, consistent with applicable laws and policies, determine if any additional modifications are appropriate to ensure a broad and strong pool of candidates for any open positions. It is my understanding, however, that federal civil service laws require that hiring be based on merit and prohibit the consideration of political affiliation in making hiring decisions for career positions.

4. In your response to Question 6a, you cite a passage from *Miller-El* in which Justice Breyer describes "Justice Marshall's concerns" that *Batson*'s burden-shifting framework was insufficiently effective at eliminating race discrimination in jury selection. As the passage indicates, Justice Marshall advocated abolition of peremptory strikes altogether. Considering that you cite to the passage that explains Justice Marshall's position in your answer, do you agree that *Batson*'s burden-shifting framework is insufficient at preventing discriminatory strikes against racial minorities?

   ANSWER: The *Batson* burden-shifting standard is binding precedent. I have not had the opportunity to make a detailed study of the complex criminal procedure question about whether the *Batson* burden-shifting framework is sufficient beyond the applicable precedents.

5. Do you agree with Justice Marshall's position that peremptory strikes should be eliminated?

   ANSWER: Justice Marshall's view in *Batson* did not prevail. Peremptory strikes remain permissible provided that they are exercised within constitutional limits. I have not had the opportunity to make a detailed study of this complex criminal procedure question beyond the applicable precedents.

6. In your response to Question 6c, you state that your former client, Mumia Abu-Jamal, presented "probative" *Batson* evidence that was rejected by the courts. Please indicate whether you still believe that the jury-selection process in Mr. Abu-Jamal's trial was characterized by "flagrant[ly]" racially discriminatory conduct by the prosecutor.

   ANSWER: I filed a number of briefs as an attorney at NAACP LDF on behalf of various clients or on behalf of my former employer. In some of those cases my client or employer's side prevailed; in some the opposing party prevailed. However, the positions articulated in each of these briefs should not be reflexively equated with statements of the personal views of the filing counsel. That said, the probative evidence of *Batson* violations offered in LDF's filings speaks for itself. As I have noted, however, the courts rejected the *Batson* claim in the case**.**

7. You did not answer Question 7(b). Instead, your answer summarizes *Batson*'s burden-shifting framework but fails to address the sufficiency issue. Please state whether you consider a bare allegation of a "culture of discrimination" to be sufficient to support a *prima facie* showing under *Batson*'s first step.

   ANSWER: In further response to this question as posed: No, a bare allegation would be insufficient under Supreme Court precedent.

8. Your response to Question 13 cites only the single example of applying strict scrutiny to governmental decisions that confer benefits to individuals based on race. Please specifically state under what circumstances – in addition to government decisions to

confer race-based benefits – you believe that governmental use of racial preferences would fall short of the strict-scrutiny standard of review.

ANSWER: Although this does not purport to be an exhaustive list, the Supreme Court has held that race conscious decision-making or racial classifications failed strict scrutiny in the following circumstances: *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Regents of University of California v. Bakke*, 482 U.S. 265 (1978) (medical school admissions); *Batson v. Kentucky*, 476 U.S. 79 (1986) (juror strikes*); Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989) (municipal contracting); *Miller v. Johnson*, 515 U.S. 900 (1995) (redistricting); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (college admissions); *Parents Involved in Seattle School District v. Seattle School District No. 1*, 551 U.S. 701 (2007) (K-12 school assignments).

9. Your response to Question 14 cites a single example from *Ricci v. DeStefano*. Please identify under what circumstances – in addition to the case you cite – you believe that race preferences violate Title VII of the 1964 Civil Rights Act.

   ANSWER: Employers' affirmative action programs that consider race or sex for the purposes of remedying the underrepresentation of minorities or women in traditionally segregated job categories violate Title VII if they do not meet the standard set forth in *Johnson v. Transportation Agency, Santa Clara, County*, 480 U.S. 616 (1987).

10. Your response to Question 15 summarizes the holding of *Grutter v. Bollinger*, but fails to answer the question. Is it your view that consideration of racial membership and economic status are valid criteria in determining whether to give college applicants special consideration?

    ANSWER: In further response to this question, the Supreme Court has determined that the educational benefits of diversity constitute a compelling governmental interest sufficient to justify a narrowly tailored race conscious college admissions policy, and many higher educational institutions and scholars have determined that efforts to encourage diversity are pedagogically valid. I am not aware of a Supreme Court case on the issue of economic status in context of higher education but believe that many higher education institutions and scholars recognize the value of socio-economic diversity and access to colleges and universities as a positive contributor to employability and upward mobility.

11. Do you agree with Justice O'Connor's statement that "25 years from now" – i.e., by 2028 – "the use of racial preferences will no longer be necessary?" *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

    ANSWER: Time and the real world circumstances within higher educational institutions will be the best determinants of Justice O'Connor's prediction. I do not believe that the answer is knowable at present, which is perhaps why Justice O'Connor reflected upon her statement from *Grutter* in this way in a subsequent essay: "That 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a

challenge to an affirmative-action program in 2028." The Justice further recognized that a future Court will be called upon to "apply[] abstract constitutional principles to concrete educational endeavors."

12. In your response to Question 16, you state your belief "that stereotyping is unfair and counterproductive," but you fail to answer the question. Under what circumstances do you believe ethnic profiling in the context of the War on Terrorism is *unconstitutional*?

    ANSWER: As I have explained, it is vital that we ensure our nation's security consistent with the Constitution. Because I am not at the Department, however, and have not worked in the area of national security, I am not familiar with the details of applicable federal policies or the various circumstances in which those polices are applied. As a general matter, stereotypes used in place of indicia of reasonable suspicion do not aid law enforcement efforts, but instead tend to erode trust between the law enforcement officials and the communities they work tirelessly to protect.

13. You respond to Question 18 by indicating that you "do not read *Rothe* as a blanket prohibition on such programs if there is sufficient, methodologically valid evidence set before Congress," but you do not answer the question. Will you urge the federal government to end the use of preferences based on race, ethnicity, and sex in its contracting practices?

    ANSWER: These programs are contemplated by federal statutes, duly passed by Congress. Accordingly, I will follow the applicable precedents, including *Adarand*, with respect to such programs.

14. Do you share the Federal Circuit's view, enumerated in *Rothe*, that a preferential contracting program is unconstitutional if Congress lacked a strong basis in evidence that previous discrimination justified the program?

    ANSWER: I accept the Federal Circuit's ruling in *Rothe* where it concluded that a contracting program that assists minority-owned small businesses requires Congress to have a strong basis in evidence "to conclude that remedial action is necessary." 545 F.3d 1023 at 1036 (quoting *Croson).* One of the ways this may be shown is through evidence that the entity was a passive participant in racial discrimination. I accept the Federal Circuit's ruling in *Rothe* where it concluded that a contracting program that assists minority-owned small businesses requires Congress to have a strong basis in evidence "to conclude that remedial action is necessary." *Rothe* at 1036 (quoting *Croson*). Under the decision, one must have a strong basis either in previous discrimination or passive participation in discrimination. In *Rothe*, the Federal Circuit held that neither of these criteria had been met.

15. Do you believe that any remedial program for which Congress lacks a strong basis in evidence for the necessity of remedial action can be constitutional?

ANSWER: To the extent that this question relates, like the prior two questions, to the contracting context, "the strong basis" in evidence standard controls.

16. Your response to Question 19 addresses the *selection* of individuals based on race, but does not address the constitutionality of maintaining race-based scholarships and other benefits. Do you believe that the Constitution permits public universities to maintain racially exclusive internships, scholarships, or summer programs?

    ANSWER: The Supreme Court has made clear that strict scrutiny applies to governmental decisions that select applicants based on race. This standard would apply to admissions as well as to the maintenance of internships, scholarships, or summer programs that are race conscious as well.

17. In your answer to Question 20, you state that you are unaware of the "details of this litigation." The litigation referenced in Question 20 refers to a complaint the Department of Justice filed on February 8, 2006, in the District Court for the Southern District of Illinois, Benton Division, in which the Department alleged that Southern Illinois University maintained paid fellowships that established quotas on the basis of race, national origin, or sex. Will you continue to pursue litigation against public universities that maintain such fellowships, irrespective of the race of the beneficiaries of the fellowships?

    ANSWER: Determinations about future litigation by the Department would be made based upon an assessment of the facts and the law in specific circumstances. If confirmed, I will apply the facts to the applicable law in evaluating such fellowship programs without regard to the race of the beneficiaries.

18. Your response to Question 23 says that you "would act in the best interests of the United States." Do you regard the continued application of the disparate-impact theory by the federal courts to be "in the best interests of the United States"?

    ANSWER: Congress has determined that the disparate impact framework was in the best interests of the United States in enacting Title VII, as amended, for example.

19. Your response to Question 26(a) states that the "congressional record…supports [your] quotes." Given your belief that Congress had a sufficient evidentiary basis to justify the 2006 reauthorization of the Voting Rights Act, do you believe that the Supreme Court wrongly decided *Shelby County v. Holder* when it held that "[t]here is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done." *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612, 2630-31 (2013).

ANSWER: The Supreme Court held that Section 4(b) of the Voting Rights Act was invalid as a coverage formula for the preclearance regime, and that ruling is binding. I will accord the ruling the respect due to every constitutional ruling of the Supreme Court.

20. Your answer to Question 26(d) is not responsive. You previously stated that racial discrimination in voting poses a "unique threat to our democracy." What steps will you take, if confirmed, to combat the "unique threat" you identify?

ANSWER: In further response, I note that more than one hundred years ago the Supreme Court recognized that voting is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Similarly, in *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964), the Court explained: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." In *Reynolds v. Sims*, the Court stated: "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. 533 (1964). And in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court declared that "[t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." The Court noted further that "[a]fter enduring nearly a century of systematic resistance to the 15th Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." Separately and together, these words from Supreme Court opinions illustrate that abridgements or denials of the right to vote pose a unique threat. In the face of this threat where it exists, the Division must use its enforcement authority. Accordingly, if confirmed, I will enforce the laws within the Civil Rights Division's authority that protect voters against discrimination.

21. In your view, does the "unique[ness]" of the "threat to democracy" that you previously identified depend on the race of the victim of racial discrimination?

ANSWER: Although voting discrimination historically has been targeted largely against particular groups, the unique injury associated with voting-related violations is not limited to racial discrimination claims or to claims by members of any particular race or ethnicity.

22. Your answer to Question 29 is not responsive and does not indicate whether you believe that a voter ID requirement is the equivalent of a poll tax. Please indicate whether this is your view.

ANSWER: I note that it is certainly true that not all voter ID requirements could properly be characterized as the equivalent of a poll tax. As I previously explained, under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, courts ask whether "based

on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Thus, it is difficult to provide categorical guidance regarding the content of a particular law without examining how the law would operate in a particular jurisdiction.

23. Do you share the opinion of Deputy Assistant Attorney General for Voting Rights, Pamela S. Karlan, that poll-tax cases "parallel voter identification cases in that, as a technical matter, voters were being required to present a government-issued document – namely, a poll tax receipt – in order to vote?"

    ANSWER: I am not familiar with the context of Ms. Karlan's quote excerpted above. My understanding is that the thrust of poll tax claims is that a fee has been required in order to vote.

24. Do you share Attorney General Holder's view, expressed at a 2012 NAACP Convention in Houston, that Texas's voter ID requirement is the modern-day equivalent of a poll tax?

    ANSWER: It would not be appropriate for me to comment on ongoing litigation in Texas. More generally, some have drawn a parallel because various voter ID requirements impose direct or indirect costs associated with compliance that exceed, in today's dollars, the amount of the poll tax invalidated in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (invalidating $1.50 poll tax and concluding: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process… To introduce wealth or payment of a fee as a measure of one's voter qualifications is to introduce a capricious or irrelevant factor. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause.")

25. Your answer to Question 33 is not responsive. Please enumerate the specific "substantive or procedural protections" that in your view, if violated, would render imposition of the death penalty unconstitutional.

    ANSWER: In further response I note that the Supreme Court has invalidated death sentences in the following, non-exhaustive list of cases based upon certain substantive or procedural protections: *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 585 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Mills v. Maryland*, 486 U.S. 367 (1988)*; Atkins v. Virginia*, 536 U.S. 304 (2002); *Kennedy v. Louisiana.* 554 U.S. 307 (2008); *Roper v Simmons*, 543 U.S. 551 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008).

26. Your response to Question 34 states that you "would not oppose the ability for employers to perform reasonable criminal background checks on potential employees." What, in your view, constitutes a "reasonable" criminal background check?

ANSWER: As I understand the EEOC's guidance on this subject, it requires some reasonable inquiry into the nexus between the conviction and the job responsibilities involved in the particular position.

27. Do you believe that the Civil Rights Division has jurisdiction to challenge or abridge the ability of a private employer to conduct a criminal background check on potential employees? If so, please state the basis of such jurisdiction.

ANSWER: No, it is my understanding that the EEOC, rather than the Civil Rights Division, has jurisdiction to enforce federal anti-discrimination statutes with respect to potential employees in the private sector.

28. With respect to your response to Question 36, why did you withdraw your nomination for a seat on the D.C. Circuit?

ANSWER: I was never nominated for a seat on the U.S. Court of Appeals for the D.C. Circuit. I withdrew myself from consideration for a nomination to the U.S. Court of Appeals for the D.C. Circuit based upon my personal, professional and practical assessment that my family's best interests were served by my decision to remain in my position at the NAACP LDF in New York at that time.

29. With respect to your response to Question 37, if you are confirmed, what role do you envision for the Civil Rights Division in the enforcement of Affordable Care Act's minimum coverage provision?

ANSWER: I do not envision a role. Cases referred to the Civil Rights Division are evaluated on the merits.

30. Given your response to Question 38a that *Heller* is binding law, do you still believe that recognition of an individual right to "keep and bear [a]rms" under the Second Amendment is a "radical departure" from precedent?

ANSWER: Prior to its decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court had previously interpreted the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939), in which the Court observed that the Second Amendment's "purpose [was] to assure the continuation and render possible the effectiveness of [organized militias]," and that the "guarantee of the Second Amendment . . . must be interpreted and applied with that end in view." 307 U.S. at 178. In *Heller*, however, the Court stated that the Second Amendment protects "an individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court's holding in *Heller* is binding and extended its previous Second Amendment ruling.

31. Your response to Question 39 indicates your belief that juvenile defendants may be subjected to adult punishments "[t]o the extent adult treatment of juveniles falls within the boundaries of the Constitution." Please specify the circumstances under which such "adult treatment" would not fall within the boundaries of the Constitution.

    ANSWER: To the extent adult treatment of juveniles falls within the boundaries of the Constitution, as interpreted by the United States Supreme Court, such treatment is an available penalogical policy decision for legislators who grapple with the most effective approaches to sentencing and deterrence. Among other protections, the boundaries of the Constitution require that the right to counsel, the right against self-incrimination, the right to confront witnesses, the right to a jury empaneled in a way that comports with the Constitution, the right to constitutionally acceptable jury instructions, the right to a voluntary, intelligent and knowing waiver of rights, the right against coerced confession, the right against cruel and unusual punishment, among others, must be observed. Additionally, those under 18 may not be executed, sentenced to life without parole for non-homicide offenses, or sentenced to mandatory life without parole, consistent with the Constitution. *See Roper v Simmons,* 543 U.S. 551 (2005); *Graham v. Florida,* 560 U.S. 48 (2010); *Miller v. Alabama,* 132 S.Ct. 2455 (2012).

32. With respect to your response to Question 41a, please state the basis for your contention that "race continues to have an impact on sentencing outcomes" and explain how your citation to a joint Department of Justice/Department of Education study on school discipline supports your contention.

    ANSWER: As Senator Rand Paul recently testified before the Senate Judiciary Committee, the war on drugs has had a dramatic impact on minority incarceration rates: "The majority of illegal drug users and dealers nationwide are white, but three-fourths of all people in prison for drug offenses are African American or Latino... at virtually every stage of pretrial negotiation, whites are more successful than non-whites." Similarly, the above-referenced Department of Justice/Department of Education document states that "[t]he Civil Rights Data Collection (CRDC), conducted by OCR, has demonstrated that students of certain racial and ethnic groups tend to be disciplined more than their peers. For example, African-American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended." The document notes that "research suggests that the substantial racial disparities of the kind reflected in the CRDC data are not explained by more frequent or more serious misbehavior by students of color." *See Dear Colleague Letter: Nondiscriminatory Administration of School Discipline,* January 8, 2014, 3-4, fn 7 (listing studies).

33. Your answer to Question 45 is not responsive. Please identify which specific civil-rights provisions, in your view, can be applied post-*Hosanna-Tabor* to religious institutions if the employee of the institution in question falls within the ministerial exception.

    ANSWER: The Court in *Hosanna-Tabor* held that anti-discrimination laws cannot be applied to regulate a religious institution's employment of a minister. Under this ruling,

once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be barred. If I am confirmed, I will ensure that the Civil Rights Division assesses cases on the facts and the applicable law, including the Court's holding in *Hosanna-Tabor*, but I am not in a position to predict every circumstance in which the ministerial exception may be at issue.

34. Your answer to Question 47a is not responsive. Assuming that an employee of a religious institution falls within the ministerial exception, in your view would the First Amendment permit a suit against the institution under either the FMLA or the Equal Pay Act?

    ANSWER: The Court in *Hosanna-Tabor* held that anti-discrimination laws cannot be applied to regulate a religious institution's employment of a minister. Under this ruling, once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be barred. If I am confirmed, I will ensure that the Civil Rights Division assesses cases on the facts and the applicable law, including the Court's holding in *Hosanna-Tabor*, but it is my understanding that the Department of Justice does not enforce the FMLA or the Equal Pay Act.

35. Your answer to Question 47b is not responsive. Assuming that an employee of a religious institution falls within the ministerial exception, in your view would the First Amendment permit a lawsuit against the institution alleging discrimination based on the employee's sexual orientation or gender identity? If so, please state the basis for such a lawsuit under federal law.

    ANSWER: The Court in *Hosanna-Tabor* held that anti-discrimination laws cannot be applied to regulate a religious institution's employment of a minister. Under this ruling, once such an institution has shown that a claimant is a "minister," a lawsuit for employment discrimination would be barred. *Hosanna-Tabor's* analysis applies regardless of the protected category of discrimination alleged by the individual.

36. With respect to your answer to Question 53a, given Supreme Court's holding in *Marion County*, do you believe that a state-law that requires a voter to display photo identification prior to voting violates Section 2 of the Voting Rights Act if the state promulgating the law provides photo identification to citizens of the state free of charge?

    ANSWER: It is my understanding that the Division is currently litigating related issues. Accordingly, I am not in a position to offer legal conclusions on this topic.