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BY MESSENGER

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are my responses to the written questions I received from Senator Schumer in connection with my pending nomination.

Respectfully,

John G. Roberts, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

RESPONSES FROM JOHN G. ROBERTS, JR.
TO FOLLOW-UP QUESTIONS FROM SENATOR CHARLES E. SCHUMER

1. When Chief Justice Rehnquist was advising President Nixon on judicial nominations, he said that judges who are strict constructionists are generally hostile to civil rights plaintiffs. Do you agree with Chief Justice Rehnquist's characterization? Why or why not? How do you define strict constructionism? Would you describe yourself as a strict constructionist? How would you describe your legal or judicial philosophy?

RESPONSE: I am not familiar with the quotation or the context in which it was made. Whether it is correct to say that "strict constructionists" are "hostile to civil rights plaintiffs" depends, of course, on the meaning of both quoted phrases. If by "strict constructionist" one means a judge who strictly adheres to what the Framers intended, including by giving a broad and expansive meaning to those provisions the Framers intended to bear such an expansive construction, then there is no reason to suppose such a judge would be "hostile to civil rights plaintiffs." I believe Justice Black, for example, considered himself a strict constructionist when it came to the First Amendment. It was his famous view that when the Framers wrote in that Amendment that "Congress shall make no law," they meant "NO LAW." Such a view is obviously not hostile to First Amendment claims.

But if by "strict constructionist" one means a judge who superimposes on the Constitution a narrow and crabbed reading -- no matter what the interpretive evidence to the contrary -- that is a different story. My concern with such a judge, however, would be that he or she was likely to get it wrong, whether that benefits or disadvantages civil rights plaintiffs in any given case. A narrow and crabbed reading of provisions affording defenses to civil rights claims may be beneficial, not hostile, to civil rights plaintiffs. The question ought to be not whether the reading was strict or broad, but which reading more accurately reflects the intent of the draftsmen in any particular instance.

My own judicial philosophy begins with an appreciation of the limited role of a judge in our system of divided powers. Judges are not to legislate and are not to execute the laws. As Chief Justice Marshall explained in Marbury v. Madison, however, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." That duty arises from the constitutional responsibility to decide particular cases, which Marshall identified as the basis for independent judicial review -- the unique American contribution to political science. My judicial philosophy accordingly insists upon some rigor in ensuring that judges properly confine themselves to the adjudication of the case before them, and seek neither to legislate broadly nor to administer the law generally in deciding that case.

Deciding the case calls for an appreciation of both the strengths and shortcomings of the adversary system, adherence to precedent and reliance on the traditional tools of the judicial craft, and an openness to the wisdom offered by colleagues on a panel. It also requires an essential humility grounded in the properly limited role of an undemocratic judiciary in a democratic republic, a humility reflected in doctrines of deference to legislative policy judgments and embodied in the often misunderstood term "judicial restraint." That restraint does not mean that judges should not act against the popular will -- the Framers expected them "calmly to poise the scales of justice," as Judge William Cranch put it, even "in dangerous times." But it does mean that, in doing so, they should be ever mindful that they are insulated from democratic pressures precisely because the Framers expected them to be discerning the law, not shaping policy. That means that judges should not look to their own personal views or preferences in deciding the cases before them. Their commission is no license to impose those preferences from the bench.

2. If confirmed, what Supreme Court Justice, living or dead, would you most want to emulate in terms of judicial philosophy or approach to constitutional questions?

RESPONSE: There is no Supreme Court Justice I would seek to emulate in terms of judicial philosophy or approach to constitutional questions. As a general matter, I admire the judicial restraint of Holmes and Brandeis, the intellectual rigor of Frankfurter, the common sense and

pragmatism of Jackson, the vision of John Marshall. But I would not say that there is one Justice's judicial philosophy that I would strive to copy. The reason is that I do not believe that beginning with an all-encompassing, categorical judicial philosophy or uniform approach to constitutional questions is the best way of faithfully construing the Constitution. In particular, different approaches may be better suited to different constitutional provisions. To take one extreme example to illustrate the point, it seems clear that a literalist or textualist approach is the only suitable one for construing a provision like Article I, section 7, clause 3, requiring a "two thirds" vote to override a veto. Not even the most ardent believer that changing societal norms should inform constitutional interpretation would suggest that, in light of such changing norms, two-thirds ought to be read as three-fifths. At the same time, an approach focusing solely on the constitutional text sheds only limited light on what constitutes an "unreasonable" search or seizure prohibited by the Fourth Amendment.

In some substantive areas, Supreme Court precedent defines the appropriate approach. The Court has held, for example, that the right to a jury trial under the Seventh Amendment turns significantly on historical practice at the time the Amendment was adopted. See Feltner v. Columbia Pictures, Inc., 523 U.S. 340 (1998). A lower-court judge who generally eschewed a historical approach to constitutional questions would not be free to disregard that precedent.

3. What two current Supreme Court Justices do you believe have the most divergent judicial philosophies? How would you characterize the judicial philosophies of each (e.g., strict constructionist, originalist, etc.)? Of the two you name, in terms of judicial philosophy, which Justice do you anticipate you will more closely approximate and why?

RESPONSE: I do not believe that a nominee should, as part of the confirmation process, compare and critique the judicial philosophies of the sitting Justices. I would be bound to follow decisions of the Court no matter which Justice authored them, and no matter which philosophy they may be said to reflect. Moreover, in that I currently represent several parties with active matters awaiting decision from the Court. My ethical obligation to those clients counsels restraint in anything that might appear to

be criticism of the Court, or adherence to an approach contrary to their interests.

For the reasons set forth in my response to Question 2, I do not think there is any overarching judicial philosophy that I anticipate following if I were to be confirmed as a circuit judge.

4. How do you define judicial activism? Please provide us with an example of judicial activism in either a state or federal case that has not been reversed.

RESPONSE: I understand "judicial activism" to refer to a judge who has transgressed the limited role assigned to the judicial branch under the Constitution, and has either undertaken to exercise the legislative function by imposing his own personal policy preferences under the guise of legal interpretation, or has arrogated to himself the executive function by imposing his policy views of how the law should be administered.

I believe the opinion for the California Supreme Court in Johnson v. Goodyear Mining Company, 127 Cal. 4, 59 P. 304 (1899), is an example of what I consider judicial activism. The question presented was the constitutionality of a state law requiring all corporations doing business in the state to pay their employees at least once a month, and giving the employees a lien for wages owed and for attorney's fees in case of a suit to collect the wages. The court held that the law violated the state constitution:

> The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over 21 years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due.

In my view, the analysis reflects the imposition of the justices' own views of social and economic policy, disregarding the legislative determination that a

particular social problem existed warranting remedial legislation.

5. Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning and please discuss the reasons for your criticism.

RESPONSE: I do not believe that it is appropriate for a judicial nominee to criticize binding Supreme Court precedent as part of the confirmation process. If I were to be confirmed as a circuit judge, I would of course be bound to follow Supreme Court precedent, regardless of whether I personally agree with it.

A judge should come to a case before him unencumbered by any commitments beyond that embodied in the judicial oath. As the ABA Model Code of Judicial Conduct states, a prospective judge "shall not ... make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office ... [or] make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Criticism of Supreme Court precedent that a nominee would be bound to apply fully and faithfully, as part of the confirmation process, is at least in considerable tension with this basic principle. Once it were accepted that a nominee could be asked to criticize binding precedent, he could presumably be asked whether he agrees with particular precedents, all in an effort to attempt to discern how the nominee would decide particular cases. As Lloyd Cutler recently testified, however, "[c]andidates should decline to reply when efforts are made to find out how they would decide a particular case."

6. In Morrison v. United States, a 5-4 Supreme Court held that despite years worth of hearings and well-substantiated findings proving that violent crime against women costs the country between $5-$10 billion each year in health care, criminal justice, and other social costs, Congress did not adequately establish the effect of violence against women on interstate commerce to justify the use of Commerce Clause powers. The four Justice minority disagreed, arguing that the Court should show deference to Congress' ample findings and uphold the Violence Against Women Act as

a rational response to the national threat posed by gender-motivated violence.

Do you agree with the majority's conclusion or the minority's and why?

Please do not answer merely by restating the holding of Morrison. I understand that no matter what position you state here, you will follow the law as defined by the Supreme Court. I am asking this question to better understand the legal and judicial philosophy you will bring with you to the bench if you are confirmed.

RESPONSE: For the reasons set forth in my response to Question 5, I do not think it is appropriate for me to indicate whether I agree with the majority or minority in Morrison v. United States. It is of course for Congress to decide as a policy matter the objects and means of federal legislation, not the courts. As Chief Justice Marshall explained as long ago as McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

At the same time, the claim that Congress has exceeded constitutional limits is not one the courts may decline to decide. Even the dissenters in Morrison recognized that. See 529 U.S. at 651 n.19. These competing principles have typically been reconciled by a healthy deference to legislative determinations that the object of legislation is within constitutional bounds, a principle embodied in the notion of judicial restraint. Articulating when that deference goes too far and becomes abdication, and when it fails to go far enough and becomes judicial activism, has been the central problem accompanying the development of independent judicial review -- the one uniquely American contribution to political science. It has bedeviled our most gifted legal commentators. See, e.g., Alexander Bickel, The Least Dangerous Branch. I certainly do not hold the solution, but would note that the proper degree of deference is more likely to be struck the more a judge unfailingly bears in mind his constitutionally limited role, and the essential humility that is indispensable to a proper discharge of judicial functions.

7. What law review article or book (other than original legal documents such as the Constitution) has most influenced your views of the law? How has it influenced your views?

RESPONSE: No single publication has had an overarching influence on my view of the law. If I had to select one publication as the most influential, it would be Hart and Wechsler's The Federal Courts and the Federal System (2d ed. 1973), edited by Professors Bator, Mishkin, Shapiro, and Wechsler. That certainly is the book I have always had within reach of my desk at work since graduation from law school. I was struck during law school by the rigorous analytic process the book brought to bear on the most fundamental issues surrounding federal courts. As a casebook (albeit one with extensive, and probing, commentary), The Federal Courts and the Federal System does not offer definitive answers to those basic questions, but instead subjects them to a sort of written Socratic dialogue that reveals the underlying premises and suppositions of various positions. The authors and editors of the book are able to demonstrate that analytic process at the highest levels. I have long regarded the book as a model of the analytic rigor a good judge should bring to the issues he or she is asked to decide.