Responses of Judge John G. Roberts, Jr.
to the Written Questions of Senator Patrick J. Leahy

1. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home." Do you believe the Constitution protects that personal autonomy as a fundamental right?

RESPONSE: I understand the Fourteenth Amendment's Due Process Clause to extend beyond freedom from physical restraint to include substantive protection of liberty. Those aspects of personal liberty that the Court has held protected by the Due Process Clause safeguard individuals against unwarranted government intrusion. The home is also protected by the Constitution's guarantee of liberty, as confirmed by "[t]he right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures" in the Fourth Amendment.

2. In any given generation, does the Supreme Court have the authority to look at current American society, culture and mores to determine that there are new needs or freedoms that should be considered fundamental rights, or that there are new groups that may in certain circumstances be considered suspect classes?

RESPONSE: A judge's role is to decide cases. If a case should arise in which a party claims the protection of the Constitution, the role of the judge is to consider the arguments impartially, consistent with the judicial oath. The Court has the authority to decide those cases in a manner consistent with the meaning of the Constitution and the Court's precedents, under principles of stare decisis. I do not believe that authority is diminished by the fact that a particular claim has not been recognized before or a particular argument is new.

3. During your hearing, you frequently cited Chief Justice Rehnquist's opinion in *Payne v. Tennessee* as a precedent that you would consult when considering the doctrine of stare decisis. That opinion suggests that constitutional decisions in the commercial context deserve more respect than those involving individual liberties. Do you agree?

RESPONSE: One consideration under stare decisis is the extent to which an earlier decision has induced reliance. The Court has consistently stated that decisions regarding property are especially likely to induce reliance because property rights depend on settled expectations. This of course in no sense reflects a view that commercial cases are more important than constitutional ones; it instead reflects the principle that, in the commercial area, it is often more important that an issue be decided than that it be decided in a particular way.

4. How would you analyze and determine constitutionality in the following hypothetical: If before the Supreme Court's decision in *Brown v. Board of Education* in 1954 Congress had enacted a law that stripped all federal courts, including the Supreme Court, of jurisdiction to hear cases and appeals concerning the segregation of public schools, would such a law have been constitutional?

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RESPONSE: Such a hypothetical law certainly would have raised very grave constitutional issues. As I noted at the hearing, I have not had occasion to consider the constitutionality of such "jurisdiction-stripping" legislation in recent years, and would not want to opine in the abstract on whether such laws are constitutional. Of course, bills of this kind — not regarding segregation, but other issues — are regularly introduced in Congress. If such a bill were to become law, and be challenged before the Court, I would consider the matter in light of the arguments presented by the litigants, beginning with the applicable precedents of the Court.

5. Since you left law school, what in your view are the most significant cases the Supreme Court has decided and why do you consider them the most significant?

RESPONSE: The Court has decided many cases of significance since I left law school. The cases that have received the most public attention have tended to arise out of the 14th Amendment, for example: Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); and Grutter v. Bollinger, 539 U.S. 306 (2003). Several decisions, while perhaps receiving less attention, have had significant consequences for the law and the legal system, for example: I.N.S. v. Chadha, 462 U.S. 919 (1983), which held congressional veto provisions unconstitutional; Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which has been very important in the area of administrative law; and Apprendi v. New Jersey, 530 U.S. 466 (2000), which eventually led the Court to declare mandatory federal sentencing guidelines unconstitutional. This list is by no means exhaustive; the Court has decided many other significant cases over the last twenty-five years.

6. In the 1944 case *Ex parte Endo*, the Supreme Court articulated a "clear statement" rule for interpreting statutes that limit liberty in wartime. It said that when asked to find implied powers in a wartime statute, the Court must assume that Congress "intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language [it] used." Do you believe the clear statement of principle announced in the *Endo* case is settled law?

RESPONSE: The task for a judge interpreting a federal statute, during wartime and otherwise, is to arrive as close as possible to the meaning Congress intended. The various canons and presumptions the Court applies are a means of ascertaining that intent. Ex parte Endo, 323 U.S. 283 (1944), announced one such presumption and on that issue represents a precedent of the Court, entitled to respect under principles of stare decisis. The Court has not had many occasions to apply the Endo presumption since it was first announced, and thus has had little opportunity to clarify its scope and application. At all times, it is the role of the judge to consider the issues dispassionately and impartially, and to resolve cases in accordance with the law.

7. In 1983, you worked on an article on habeas corpus reform that was ultimately published by Paul Weyrich's Free Congress Foundation as authored by Attorney General William French Smith. The article calls the time spent on habeas corpus applications "a

particularly questionable indulgence," especially where it delays the carrying out of death sentences. It argues that habeas corpus "has little or no value in avoiding injustices or ensuring that the federal rights of [state] criminal defendants are respected." And it concludes by stating that the availability of habeas corpus to state prisoners to challenge their convictions in federal court "may well be an institution whose time has passed." Do you agree with these views today?

RESPONSE: The views expressed in the article you refer to are those of its author, Attorney General Smith. It is my understanding that the article's criticisms of successive habeas petitions were shaped by the legal landscape of the early 1980s. That landscape has changed in the wake of subsequent congressional statutes modifying federal habeas review. I have not had occasion to examine the arguments made in the Attorney General's article in light of that shift. The question of whether further habeas reform is appropriate is primarily a policy matter for Congress.

8. On behalf of Senator Carl Levin: Judge Roberts, according to your Senate Questionnaire you were interviewed for nomination to the Supreme Court by Vice President Cheney, Andrew Card, Karl Rove, Alberto Gonzales, Scooter Libby and Harriet Miers earlier this year on behalf of the President. With whom have you had discussions about your views on legal issues during the period from January 2005 up to the President's announcement of your nomination to the Supreme Court? Did you discuss with any of those individuals or others your views on the following:

a. whether or not abortion related rights are covered by the right of privacy in the Constitution;

b. powers of the President;

c. constitutionality of allowing prayer in public places;

d. the scope of the right of habeas corpus for prisoners;

e. the extent of congressional authority under the Commerce Clause of the Constitution;

f. affirmative action; and

g. the constitutionality of "court stripping" legislation aimed at denying Federal courts the power to rule on the constitutionality of specific activities or subject matter.

RESPONSE: I do not recall discussing my views on any of these issues with anyone during the relevant period of time in connection with my nomination. I may have discussed some of these issues since January 2005 in connection with the discharge of my responsibilities as a judge on the Court of Appeals for the D.C. Circuit, but I do not understand your question to seek such information, and would not regard it as appropriate for me to respond if it did.

9. On behalf of Senator Robert C. Byrd: The doctrine of preemption has been adopted as our national security policy. In your view, where does the President derive authority to undertake a preemptive strike against another country in the absence of an imminent threat? How do you reconcile such action by a President with the power granted the Congress by the Constitution to declare war?

RESPONSE: The Constitution allocates war powers both to the President and to Congress. Article II of the Constitution assigns the President the role of Commander-in-Chief of the armed forces. Article I gives Congress the powers to declare war, "to raise and support Armies," and "to make Rules for the Government and Regulation of the land and naval Forces." When the branches clash in the exercise of these powers, the Court's first task is to clearly define the nature of the controversy — in particular, to determine whether Congress has somehow authorized the President's actions, or prohibited them, or to decide that the case falls in a gray area. This is the framework Justice Jackson laid out in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which has become the Court's guiding framework in this area. The hypothetical scenario in your question is very difficult to analyze in the abstract, as the legal and factual context can be extremely important. The constitutionality of a President's initiation of military action could depend on any number of factors, including in particular the extent to which the action was authorized by Congress. If confronted with any such question as a judge, I would analyze it with an open mind, in light of the precedents of the Court under principles of stare decisis. My decision would be based on the rule of law.