Responses of Jon David Levy, Nominee to be United States District Judge for the District of Maine, to the Written Questions of Senator Chuck Grassley

1. **During your hearing, I asked you about your comments regarding Judge Bork from a 1987 newspaper article. I have several follow-up questions on that topic. In that article you called on readers to write Senators to oppose Judge Bork's nomination. You wrote:**

   "It is ironic that on the 200th anniversary of the adoption of the Constitution, Robert Bork has been nominated to serve on our Supreme Court. Judge Bork embraces a rigid judicial philosophy of 'original intent' which treats the Constitution like a static document. He interprets the Constitution in accordance with legal and social principles as they existed in the late 1700s, and not as those principles have developed over the last two centuries." I recognize that this was a few years ago, but you were not a new lawyer at the time.

   a. **Do you stand by your criticism of Judge Bork?**

      Response: I have not reflected on Judge Bork's theory of constitutional interpretation in the twenty-six years since I wrote this letter. My recollection is that Judge Bork's theory of constitutional interpretation led him to take issue with established Supreme Court precedent such as *Shelley v. Kraemer*, 334 U.S. 1 (1948), which held that state court enforcement of racially restrictive deed covenants violates the constitutional guarantee of equal protection. Many legal commentators criticized Judge Bork's approach at the time he was under consideration for the United States Supreme Court and I believe my comments echoed some of those concerns. I would note that in the twenty-six years since I wrote this letter, the Supreme Court has recognized that the original public understanding of the text of the Constitution is a "critical tool of constitutional interpretation," *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), and I would faithfully follow this and similar Supreme Court and First Circuit precedent if confirmed as a District Court judge.

   b. **In your view, what role, if any, does the original meaning of the Constitution play in your judicial analysis?**

      Response: As the Supreme Court explained in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), the public's understanding of the meaning of the Constitution's text at the time of its enactment plays a significant role in constitutional interpretation. If confirmed, I will follow binding Supreme Court and First Circuit precedent with respect to interpretation of the Constitution.

   c. **How does your judicial philosophy differ from Judge Bork's?**

Response: My judicial philosophy is that judges should be absolutely faithful to the rule of law by respecting the separation of powers, adhering to precedent, and basing their decisions solely on the applicable law and the factual record. I am not familiar with Judge Bork's judicial philosophy, other than his adherence to original intent for purposes of constitutional interpretation. If confirmed as a District Court judge, I would apply binding precedent from the Supreme Court and First Circuit whether those courts had employed originalism or another theory of constitutional interpretation.

d. You concluded your article saying, "If he were alive today, I suspect that James Madison would be leading the fight against Judge Bork." Do you still believe that is a fair criticism?

Response: I have not given any thought to what James Madison would think of Judge Bork in the twenty-six years since I wrote this letter. I would add that having spent eighteen of the last twenty-six years as a judge, I have focused on being a good and fair judge and have endeavored to avoid criticizing other judges. If confirmed as a District Court judge, I would continue to carefully consider every case that comes before me, basing my decision on the facts of the case and the applicable law, while respecting the limited role of federal judges in our constitutional system.

2. You noted in the article about Judge Bork that, "the pursuit of Justice requires that our Constitution serve as a dynamic instrument—so that when it is applied we are mindful of both contemporary values and the fundamental ideals of our founding fathers." In 2009 during your remarks at a litigation and advocacy seminar you quoted Chief Justice Warren and challenged the audience to be guided by the principle that, in the end, "it is the law's spirit, and not its form, that keeps justice alive." But you also said during your Maine nomination hearing that you would not be, "beholden to any one theory or grand view of the law." These seem like conflicting notions—on one hand, you are committed to not being beholden to one theory, but you have also been clear that the Constitution is a "dynamic instrument," interpreted "in accordance with those principles that have developed over the last two centuries," and, "it is the law's spirit, not its form, that keeps justice alive." Can you explain how these two notions can peaceably coexist within your judicial framework?

Response: My 2009 remarks were made to an audience of judges and lawyers in Maine who are responsible for litigating child protection cases and implementing the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115. In my remarks, I made the point that judges and lawyers should not expect to receive additional resources with which to improve the administration of child protection cases, and that it was their responsibility to continually seek ways to improve that process. I quoted Chief Justice Warren to underscore that the statutory requirements of ASFA are not self-effectuating, and that any improvements in the quality of the administration of child protection cases in Maine will come from the spirit in which judges and lawyers approach their responsibilities. I do not believe that this view is at odds with the idea, expressed in

my Maine nomination hearing remarks, that judges should not be beholden to any single grand theory of the law when interpreting the law.

3. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is an absolute commitment to the rule of law, and the discipline to stay true to that commitment in every case. I possess this attribute.

4. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: Judges should treat everyone, both inside and outside the courtroom, with courtesy and respect. Further, judges must continually evaluate everything they do by the standard of whether it demonstrates respect for the public and generates respect for the law. I hold myself to this standard and would continue to do so if confirmed.

5. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: As demonstrated during my eighteen-year career as a judge, I am unequivocally committed to being faithful to all binding precedent even if I personally disagree with it.

6. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In a matter of first impression involving the construction of a statute, I would first examine the language of the statute. If the text of the provision were clear, my analysis would be at an end. If the text of the provision were not clear, I would examine the provision in the broader context of the statute in which it appears. I would also look to relevant precedent from the Supreme Court, the First Circuit, and other federal courts that have interpreted similar or analogous provisions. Finally, I would consider any relevant legislative history in accordance with established rules of statutory construction.

7. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: I would apply the decision.

8. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Statutes enacted by Congress are presumed to be constitutional and should only be declared unconstitutional if they are in clear violation of a provision of the Constitution. In addressing a constitutional challenge to a statute, I would be guided by all applicable precedent of the Supreme Court and the First Circuit. If I were to conclude that a statute might be unconstitutional, I would apply the doctrine of constitutional avoidance and, if appropriate, decide the case on an alternative basis without ruling on the constitutionality of the statute.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: No. I am not aware of any precedent that would ever make it proper for me, if confirmed as a District Court judge, to rely on foreign law or the views of the "world community" to determine the meaning of the Constitution.

10. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: If confirmed, I will be faithful to my sworn duty to decide cases based solely on the factual record and the applicable law. The best evidence I can give the Committee is the written record of the decisions I have issued during my eighteen years as a state trial and appellate judge.

11. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: Throughout my eighteen years as a state trial and appellate judge, I have remained faithful to the oath I took which requires that I put aside my personal views and be fair to all who appear before me. I am fully committed to being fair and impartial, and to deciding cases based only upon the applicable law and the evidence in the record.

12. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket and manage your caseload?

Response: Yes. If confirmed, I would take an active role in the management of the cases assigned to me. I would apply principles of differentiated case management so that the process applicable to each case would be tailored to the requirements of the case. Whenever appropriate, I would hold Rule 16 conferences shortly after the filing of a case, as my experience has taught me that the pretrial process is made more effective and efficient by the early involvement of the assigned judge. I would also continually evaluate

the ways in which I manage cases to ensure that cases are decided in a fair and timely manner.

13. As a judge, you have experience deciding cases and writing opinions. Please describe how you reach a decision in cases that come before you and to what sources of information you look for guidance.

Response: I begin by carefully evaluating the factual record, remaining mindful of my responsibility as a judge to assess evidence in accordance with the rules of evidence and the applicable burdens of proof. My factual determinations are based strictly on the evidentiary record, and I do not consider extraneous resources in making factual findings. I then apply the applicable law to the facts as I find them. To determine the applicable law, I identify and study the relevant provisions of the Constitution, statutes, and rules, as well as binding precedent. I approach decision writing with great care, usually producing multiple drafts of a decision before issuing a final opinion.

14. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees."

a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.

Response: I have had no such contact.

b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.

Response: No.

15. Please describe with particularity the process by which these questions were answered.

Response: Following my receipt of the questions from the Department of Justice, I drafted answers to the questions. After speaking to a Justice Department official, I finalized my answers and authorized the Justice Department to submit my answers to the Committee.

16. Do these answers reflect your true and personal views?

Response: Yes.

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Describe how you would characterize your judicial philosophy, and identify which US Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: My judicial philosophy is to be faithful to the rule of law, remaining ever mindful of the separation of powers and the role of precedent, and to fairly and impartially decide each case based on the evidentiary record and controlling law. While I frequently apply Supreme Court decisions as binding precedent in my current position as a Justice of the Maine Supreme Judicial Court, I have not studied the body of decisions of any single Justice of the Warren, Burger, or Rehnquist Courts so as to be in a position to identify which individual Justice's judicial philosophy is most analogous to mine.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: Yes. As the Supreme Court explained in *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), the public understanding of the meaning of the text of the Constitution when it was enacted plays an important role in constitutional interpretation. If confirmed, I will follow all binding Supreme Court and First Circuit precedent with respect to interpretation of the Constitution.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If I am confirmed as a judge of the District Court, I would not overrule precedent.

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 552 (1985).

Response: The Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is binding precedent. Therefore, if confirmed, I would follow and apply the holding in *Garcia* as I would all other precedent established by the Supreme Court.

Do you believe that Congress's Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The United States Supreme Court has held that Congress's Commerce Clause power extends to regulating: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 608-09 (2000); *United States v. Lopez*, 514 U.S.

549, 558-59 (1995). These cases likewise stand for the proposition that the Commerce Clause does not empower Congress to regulate non-economic activity that has only an attenuated effect on interstate commerce. *See Morrison*, 529 U.S. at 612-13 (citing *Lopez*, 514 U.S. at 563-67). If confirmed, I would follow and apply Supreme Court and First Circuit precedent that limits Congress's power to regulate non-economic activity under the Commerce Clause.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The President's authority to issue executive orders or take executive actions is subject to the limits on the exercise of federal power set forth in the Constitution and specific acts of Congress. Guidance for determining whether the President has exceeded the constitutional limits on his authority is set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), and in subsequent cases such as *Medellin v. Texas*, 552 U.S. 491 (2008) and *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Furthermore, regulatory actions by the executive branch are subject to limitations set forth in cases such as *Gonzales v. Oregon*, 546 U.S. 243 (2006) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If confirmed, I would faithfully apply these and all other relevant precedent of the Supreme Court and First Circuit.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: The Supreme Court has held that a right is fundamental for purposes of substantive due process when it is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). If confirmed, I would follow all applicable Supreme Court and First Circuit precedent in addressing issues involving fundamental rights.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has applied heightened scrutiny in certain cases involving classifications based on race, religion, national origin, and gender, or when "state laws impinge on personal rights protected by the Constitution." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). With respect to strict scrutiny, the Court has stated that it only applies in cases where the characteristics of a class, such as race, "so seldom provide a relevant basis for disparate treatment." *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 505 (1989)). The Court has stated that intermediate scrutiny applies to gender-based classifications, *see United States v. Virginia*, 518 U.S. 515, 532-34 (1996), and classifications based on illegitimacy, *see City of Cleburne*, 473 U.S. at 441. If confirmed, I would follow all relevant Supreme Court and First Circuit precedent regarding the level of judicial scrutiny to be given to a classification.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: I have not formed an expectation concerning the use of racial preferences fifteen years from now. If confirmed, I would follow Supreme Court precedent concerning the use of racial preferences, including *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).