**Written Questions for Joan L. Larsen**
**Submitted by Senator Patrick Leahy**
**September 6, 2017**

1. In 1994, you co-authored a law review article in which you referred to Congress as "the most dangerous (and powerful) branch of government."[1] More recently, you wrote a 2006 article defending presidential signing statements.[2] In this article, for example, you dismissed concerns about a signing statement issued by President George W. Bush in relation to anti-torture legislation as a "frenzy."

   (a) **Do you still view Congress as the most dangerous branch of government?**

I prepared a draft of the law review article to which the question refers when I was a third-year law student and was fortunate to be able to publish a co-authored version with my professor, Steven G. Calabresi. I do not recall specifically why the article used the phrase "most dangerous" branch except to say that it is a play on Alexander Hamilton's prediction that the "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." THE FEDERALIST NO. 78 (Alexander Hamilton). Whether one branch of government is aptly characterized as more "dangerous" than another is contextual and difficult to assess in the abstract. There can be no doubt, however, about the enormous power constitutionally conferred on the Congress. Article I, for example, authorizes 17 specific grants of power to the Congress, and, in addition, grants the power to "make all Laws which shall be necessary and proper for carrying into execution [those] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *See* U.S. CONST. art. I, § 8, cls. 1–18. And the Reconstruction Amendments give Congress the power to enforce their provisions by appropriate legislation. *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2. Beyond its power to legislate, the Constitution has granted Congress power to check the other branches of government. For example, Congress has the power of the purse, U.S. CONST. art. I, § 9, cl. 7; U.S. CONST. art. I, § 8, cl. 1; the power to override vetoes, U.S. CONST. art. I, § 7, cl. 2; the power to issue articles of impeachment, U.S. CONST. art. I, § 2, cl. 5; the power to try such impeachments, U.S. CONST. art. I, § 3, cl. 6; and the power to propose amendments to the Constitution or to call a constitutional convention, U.S. CONST, art. V. Please see also my response to Question 1 from Senator Feinstein for a discussion of the 2006 article to which this question refers.

   (b) **What Constitutional constraints do you believe there are on the President's ability to disregard a statute properly enacted by Congress, with or without the use of a signing statement?**

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[1] Steven G. Calabresi and Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel* , 79 CORNELL L. REV. 1045 (1994), p 1156.

[2] Joan Larsen, *Bar Group Is Wrong: Presidents Can Interpret Laws They Sign*, THE DETROIT NEWS, Sept. 13, 2006.

Please see my responses to Questions 1 and 4c from Senator Feinstein.

2. Chief Justice Roberts wrote in *King v. Burwell* that

> [o]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions?'

**Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

It would be inappropriate for me, as a judicial nominee, to comment on the merits of any particular Supreme Court opinion. *King v. Burwell* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent, including the Supreme Court's guidance on interpreting statutes.

3. President Trump has issued several attacks on the independent judiciary, including calling a judge who ruled against him a "so-called judge," stating that a judge should be blamed if "something happens" as a result of issuing a constitutionally required court order, and attacking a judge's ethnicity. Justice Gorsuch described some of the President's remarks as "disheartening" and "demoralizing."

**(a) Is this rhetoric appropriate?**

The President's remarks are the subject of a political debate. As such, it would not be consistent with my ethical obligations for me to comment on this issue. *See* Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

**(b) In your view, does such rhetoric have any impact on respect for the rule of law?**

Please see my response to Question 3a.

**(c) While anyone can criticize the merits of a court's decision, do you believe that it is ever appropriate to criticize the legitimacy of a federal judge or court?**

This question also appears to call for me to weigh in on a political question, which I cannot do, consistent with my ethical obligations. *See* Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). I can comment,

however, that outside criticisms of the judiciary should have no effect on a judge's decision-making, which must be guided only by the law. As a Justice of the Michigan Supreme Court, I have faithfully sought to discharge this duty, and I will do the same if confirmed as circuit judge.

4. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial and will not be questioned." **Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?**

In appropriate cases, courts can and have reviewed executive action involving national security decisions. The Supreme Court has adopted Justice Jackson's "tripartite scheme" as described in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for evaluating executive action. If a case comes before me challenging an executive action, I will follow all relevant precedent of the Supreme Court and the Sixth Circuit. I would not hesitate to hold that any President had exceeded his constitutional authority if the law so commanded.

5. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

This question appears to request that I weigh in on a matter that is or could be the subject of litigation, which I cannot do consistent with my ethical obligations. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court. . . ."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

6. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders. **If a President or any other executive branch official refuses to comply with a court order, how should the courts respond?**

The Constitution's system of separated powers depends on the notion that each coordinate branch of government will respect the constitutionally conferred powers of the other two. As a judge, I take seriously the judiciary's independence from the other branches of government. In my experience as a Justice on the Michigan Supreme Court, I have never seen an executive official ignore a court order. If such a case were to come before my court, I would review the text of the Constitution and any relevant statutes, any relevant precedent, and the arguments and briefs of the parties before forming a judgment.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

    **(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President– even in a time of war?**

In *Hamdan*, the Supreme Court recognized that Congress may, in the proper exercise of its war powers, restrict the President in a time of war. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))). If confirmed, I will faithfully apply *Hamdan*, *Youngstown*, and all other binding precedent of the Supreme Court and the Sixth Circuit.

> Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."
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> (b) **In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

Please see my response to Question 1 from Senator Feinstein.

8. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women. **Do you agree with that view? Does the Constitution permit discrimination against women?**

Please see my response to Question 8a from Senator Feinstein.

9. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

I cannot comment on Justice Scalia's characterization of the Voting Rights Act, as I am not familiar with the statement or its context. If confirmed as a circuit judge, I would be bound to faithfully apply the Voting Rights Act and the Supreme Court's precedent interpreting it, and I will do so.

10. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The Constitution states that "no Person holding any Office or Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." US CONST. art 1, § 9, cl 8. Because the meaning of this clause is currently the subject of litigation, *see e.g.*, *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. 2017), I cannot comment further. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges

and nominees for judicial office.").

11. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision." **When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

As a current Justice of the Michigan Supreme Court and as a nominee to the circuit court, I do not believe it is my role to instruct the Supreme Court on how to treat factual findings made by Congress or by lower courts. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), is a precedent of the Supreme Court; I am bound to follow the Supreme Court's precedent as a Justice of the Michigan Supreme Court and will continue to follow it if I am confirmed to the Sixth Circuit.

12. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

The Thirteenth, Fourteenth, and Fifteenth Amendments each grant Congress the power to enforce those Amendments "by appropriate legislation." If a case came before me requiring me to interpret this authority, I would review the text of the Constitution, any relevant statutes, any relevant precedent, and the arguments and briefs of the parties before forming a judgment.

13. 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?**

*Lawrence v. Texas*, 539 U.S. 558 (2003), is a binding precedent of the Supreme Court that I will faithfully follow as a Justice of the Michigan Supreme Court and will continue to follow if I am confirmed to the Sixth Circuit.

14. In the confirmation hearing for Justice Gorsuch earlier this year, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

    (a) **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis?**

I do not believe it is appropriate for a lower court to depart from Supreme Court precedent. *See People v. Lewis*, __ N.W.2d __, slip op. at 4 (Mich. July 31, 2017) (recognizing "the Supreme Court's admonition that other courts should not conclude that the Court's 'more recent cases have, by implication, overruled an earlier precedent' but should instead leave to the Supreme Court 'the prerogative of overruling its own decisions'" (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997))). If confirmed, I will follow the Sixth Circuit's precedent regarding the circumstances under which that court will revisit its own precedent. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

**(b) Does your answer vary depending on the court or depending on whether the question is one of statutory or constitutional interpretation?**

Please see my response to Question 14a. My duty to follow the precedent of the Supreme Court would not vary depending on whether the question before me were one of statutory or constitutional interpretation. With respect to the Sixth Circuit's own caselaw, if confirmed I would follow the Sixth Circuit's precedent regarding whether the stare decisis rules should vary depending on whether the question is one of constitutional or statutory interpretation.

15. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

**How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I am interested in specific examples, not just a statement that you would follow applicable law.**

If I am confirmed as a circuit judge, I would recuse myself from any matter in which a judgment of the Michigan Supreme Court, rendered or considered during my tenure on the Court, would be under review by the Sixth Circuit. This would most likely occur, if at all, through a petition filed pursuant to 28 U.S.C. § 2254. In addition, my husband occasionally acts as an expert witness or consultant in litigation matters. I would recuse myself from any case in which my husband participated as a witness, consultant, or otherwise. I would evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis, following the Code of Conduct for United States Judges, the Ethics Reform Act of 1989, 28 U.S.C. § 455, and all other relevant recusal rules and guidelines.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to

bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

**Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?**

Courts have played an important role in ensuring protection of the rights of all persons, including "discrete and insular" minorities referenced by the *Carolene Products* footnote. Judges must apply the law evenhandedly and without bias or favoritism, and we must treat all parties that come before us with dignity and respect. I adhere to these principles as a Justice on the Michigan Supreme Court, and I would continue to do so if confirmed to the Sixth Circuit.

17. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Article I, Section 8, Clause 3 of the Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court has held that Congress may use its authority under this Clause to regulate: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, including persons or things moving in interstate commerce, and (3) economic activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. If faced with a case that implicates the scope of congressional power, I will faithfully apply the Constitution and the relevant precedent of the Supreme Court and the Sixth Circuit.