

**Nomination of Michael Brown to the
U.S. District Court for the Northern District of Georgia
Questions for the Record
Submitted September 27, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for a district court to depart from Supreme Court or the relevant circuit court's precedent?

I do not think it is ever appropriate for a district court to depart from Supreme Court precedent. To the contrary, district courts are bound by Supreme Court decisions unless or until the Supreme Court exercises its authority to overrule one of its own decisions. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Similarly, a district court is bound to follow binding precedent from the controlling circuit court unless or until it is overruled by the Supreme Court or circuit court sitting *en banc*. *United States v. Vega-Castilla*, 540 F.3d 1235, 1236 (11th Cir. 2008).

b. When, if ever, is it appropriate for a district court judge to question Supreme Court or the relevant circuit court's precedent?

Please see my Response to Question 1(a).

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A textbook on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (*The Law of Judicial Precedent*, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? “superprecedent”?

I have not read *The Law of Judicial Precedent* and am not familiar with how that textbook or other commentators or scholars distinguish “super-precedent” or “super-stare decisis” from “standard” binding precedent and stare decisis. As explained above, I understand that district court judges are bound by all precedent from the Supreme Court and controlling circuit courts, without regard to the classification of that precedent as “super-precedent” by commentators or scholars. If confirmed, I will follow all binding precedent – including *Roe v. Wade*.

b. Is it settled law?

Yes. *Roe v. Wade* is settled as binding precedent of the United States Supreme Court.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry.

- a. **Is the holding in *Obergefell* settled law?**

Yes. *Obergefell* is settled as binding precedent of the United States Supreme Court.

- b. **On Friday, June 30, the Texas Supreme Court issued a decision in *Pidgeon v. Turner* which narrowly interpreted *Obergefell* and questioned whether states were required to treat same-sex couples equally to opposite-sex couples outside the context of marriage licenses. The Texas Supreme Court stated that “The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and... it did not hold that the Texas DOMAs are unconstitutional.” Is this your understanding of *Obergefell*?**

I have not studied this opinion and am unfamiliar with the Texas Supreme Court’s reasoning and holding. Regardless, as a nominee to the district court, it would be improper for me to comment on or provide my personal opinion about a legal issue that could come before me if I am confirmed. See Canon 3(a)(6) and Canon 1 (commentary), Code of Conduct for Federal Judges. If this issue were to come before me, I would consider the arguments of counsel, any applicable legal authority, and all binding precedent, including the Supreme Court’s decision in *Obergefell*.

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

- a. **Do you agree with Justice Stevens? Why or why not?**

As explained in response to Question 3(b), it would be improper for me to comment on or provide my personal opinion about a legal issue that could come before me if I am confirmed. If this issue were to come before me, I would consider the arguments of counsel, any applicable legal authority, and all binding precedent, including the Supreme Court’s decision in *Heller*.

b. Did *Heller* leave room for common-sense gun regulation?

While I have not studied this opinion closely and it would be improper for me to comment on or provide my personal opinion about a legal issue that could come before me, I note that the Supreme Court's opinion in *Heller* states: "Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

I have not studied the *Heller* opinion or prior Supreme Court cases in this area of the law sufficiently to answer this question. Regardless, *Heller* constitutes binding Supreme Court precedent. If I am fortunate enough to be confirmed, I will apply it.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

It would be improper for me to provide any personal views at this time, as a case raising these issues could come before me if I am confirmed. At that time, I would have an obligation to decide the case impartially based on the arguments of counsel, existing legal authority, and binding Supreme Court precedent, including *Citizens United*. I pledge to do so, regardless of any personal views I may have.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see my answer to Question 5(a).

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

Please see my answer to Question 5(a).

6. Please explain your view of the appropriate temperament of a judge. Do you believe you have the appropriate temperament to be a judge?

I believe that a federal judge should be impartial, patient, and courteous. Judges preside over an adversarial process, deciding issues on behalf of one side and against another side. A judge can only do this fairly and impartially if the judge is well prepared and willing to engage with counsel. This also requires patience as the judge allows the parties to present their evidence or legal argument, withholding judgement until each party has an equal opportunity. When a judge is impatient or impolite, parties are less able to present their arguments clearly and completely, thus preventing the court from making an impartial decision based upon a full record. I have tried cases before many different judges, some who were patient and courteous and some who were impatient and rude. Regardless of the outcome (that is, whether the judge ruled for or against my client), I always felt that the patient and polite judges were being impartial and fair, trying to decide issues to the best of their abilities. On the other hand, I typically felt that the impatient or rude judges were acting with a bias for or against my client or were simply trying to get off the bench. I believe that I have the appropriate temperament to be a judge. I pledge that, if confirmed, I will be impartial and will treat all litigants with patience and courtesy. They will know they are getting my very best effort.

7. District court judges often say that the most difficult aspect of their job is sentencing defendants. Judges also comment that one of the most complicated legal areas are decisions involving the United States Sentencing Guidelines. How do you plan to familiarize yourself with the Guidelines, and, more importantly, how do you plan to prepare yourself to sentence criminal defendants?

I am very familiar with the United States Sentencing Guidelines, having served as an Assistant United States Attorney for six years. My practice for the last 15 years has also included many federal criminal cases, requiring me to keep up with amendments to the Guidelines and changes in the law of sentencing, including decisions from the Supreme Court regarding the applicability of the Guidelines. I believe that I am sufficiently familiar with the Guidelines at this time. My experience as a federal prosecutor and a criminal defense attorney has also prepared me for the difficult decisions that a judge must make when imposing a criminal sentence. I will follow the Guidelines, arguments of counsel, recommendations from United States Probation Office, and the factors set forth in Title 18, United States Code, Section 3553.

8. What assurances or evidence can you give the Committee and future litigants who come before you that you will be fair and impartial to everyone who appears before you, if confirmed?

Over the last 23 years, I have represented clients who were civil defendants and civil plaintiffs. I have represented criminal defendants and served as a federal prosecutor. The diversity of my practice should provide assurance that I will be fair and impartial to everyone who appears before me. I have also represented many clients on a *pro bono* basis. As a result, I understand the difficulties that individuals with limited financial means face in complex litigation or criminal prosecutions. Finally, while serving as an Assistant United States Attorney, I had to exercise prosecutorial discretion in deciding what charges to bring and against whom. I did so impartially based on the evidence and the law, without bias or preference. These experiences—along with my pledge to do so here—should provide

adequate assurances that, if confirmed, I will treat all litigants fairly and impartially.

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

I received these questions on September 27, 2017. I conducted research and prepared the answers myself. I provided my answers to the Department of Justice's Office of Legal Policy and, after consulting with them, made edits to my answers as I deemed appropriate. I then authorized the Office to submit the answers on my behalf.