Nomination of Mark Bennett to the U.S. Court of Appeals for the Ninth Circuit
Questions for the Record
April 18, 2018

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 lower courts to depart from Supreme Court precedent?

   Decisions of the Supreme Court are absolutely binding on lower federal courts. Thus, it is never appropriate for lower courts to depart from Supreme Court precedent.

   b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

   Supreme Court precedent is absolutely binding on all lower federal courts. While it is appropriate for a circuit court judge to determine whether Supreme Court precedent is applicable to a particular case, if applicable the decision must be followed, whether in a concurring opinion, a dissent or an opinion for the court.

   c. When, in your view, is it appropriate for a circuit court to overturn its own precedent?

   In the Ninth Circuit, "Circuit precedent may be overturned without an en banc rehearing if the Supreme Court has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Bender*, 586 F.3d 1159, 1163 (9th Cir. 2009) (*quoting Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (*en banc*)).

   d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

   As a circuit court nominee, I respectfully believe it would not be appropriate of me to comment on how the Supreme Court should approach this question.

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 text book 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 Law of Judicial Precedent, Thomas West, p. 802 (2016).) 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"? Do you agree it is "superprecedent"?**

Roe v. Wade is binding Supreme Court precedent, and binding on all lower court judges, regardless of what other label (like "super-stare decisis" or "superprecedent") may be applied.

b. **Is it settled law?**

Yes, *Roe v. Wade* is settled law.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Obergefell is both settled and binding precedent from the Supreme Court.

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?**

The majority opinion in *Heller* is binding precedent of the Supreme Court and binding on all lower court judges. As a circuit court nominee, I believe it would not be appropriate for me to express an opinion on whether or not I agree with Justice Stevens's dissent.

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

The *Heller* decision states, *inter alia*, that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court also stated that "[n]othing 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." *Id.* at 626-27.

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

As a circuit court nominee, I believe it would not be appropriate for me to express an opinion on the correctness of the *Heller* decision. *Heller* is binding precedent, and were I fortunate enough to be confirmed, I would fully and faithfully follow *Heller* and all other binding Supreme Court precedent.

5. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

   a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

   No.

   b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

   No.

   c. What are your "views on administrative law"?

   If I were fortunate enough to be confirmed, I would apply the binding precedent of the Supreme Court, including as set forth in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), as well as the binding precedent of the Ninth Circuit.

6. When is it appropriate for judges to consider legislative history in construing a statute?

   The Ninth Circuit has stated that it may be appropriate to consider legislative history when a statue is ambiguous. *See, e.g.*, *Abrego Abrego v. Dow Chemical Co*, 443 F.3d 676, 683 9th Cir. 2006) ("[C]onsideration of legislative history is appropriate where statutory language is ambiguous. Ambiguity, however, is at least a necessary condition").

7. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

8. Please describe with particularity the process by which you answered these questions.

I received five sets of "Questions for the Record" from Senators on April 18, 2018. I reviewed all questions and personally drafted answers to them, in some cases after conducting legal research or reviewing other materials. I sent my responses to the Office of Legal Policy at the Department of Justice ("OLP"). After receiving some suggestions from OLP, I made edits that I believed appropriate and accurate, and I then authorized the submission of my responses.

Written Questions for Mark Jeremy Bennett
Submitted by Senator Patrick Leahy
April 11, 2018

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

> **"oftentimes 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?

I agree that in determining the meaning of a potentially ambiguous statute, a judge must read the words of the statute in the context in which they are used, and not in isolation. Rules of statutory construction may require a judge to consider the statute as a whole, and to read the words used in their context. However, in determining the meaning of a statute, a federal judge must respect the role of the Congress. It is not the job of a judge to rewrite a statute or to decide what the law should be, but it is the job of the judge "to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 177 (1803). If I am fortunate enough to be confirmed, I would fully and faithfully follow all binding precedent of the Supreme Court and the Ninth Circuit, including *King v. Burwell*.

2. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

   (a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

   In accord with the Code of Conduct for United States Judges, and as a judicial nominee, I do not believe it would be appropriate for me to comment on political matters or questions.

   (b) 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 judge or court?**

   Please see my response above to Question 2(a).

3. 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*." (Emphasis added.)

   (c) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

I do not know of any such provision or precedent, and the Supreme Court has addressed issues of this nature, including in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If I were fortunate enough to be confirmed, and a case involving the lawfulness of executive action were to come before me, I would carefully consider the issues and the arguments of the parties and fully and faithfully follow all binding precedent of the Supreme Court and the Ninth Circuit.

4. **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?**

   I believe that issues involving or relating to the First Amendment, including as it may relate to the immigration laws of the United States, could come before me, were I fortunate enough to be confirmed, and thus I should not express a personal opinion on this subject. Were issues like this to come before me, I would carefully consider the issues and the arguments of the parties and fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

5. Many are concerned that the White House's denouncement last 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.

   (d) If this President, or any other executive branch official, refuses to comply with a court order, how should the courts respond?

   It is difficult to answer this question in the abstract, without full knowledge of the facts and the law applicable to the particular case at bar. It would also be inappropriate for me to hint how I might rule on a case that might come before me. A basic premise of the rule of law is that all citizens are required to follow the lawful orders and directions of a court, unless stayed, vacated, or reversed by a higher court. If such an issue were to come before me, I would carefully consider the issues and the arguments of the parties, and I would fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

6. 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."

(e) 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?

As the Supreme Court explained in *Hamdan v. Rumsfeld*, "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers." 548 U.S. 557, 593 n.23 (2006).

The Constitution explicitly provides powers and responsibilities to both the President and the Congress. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States …." U.S. Const. Art. II, sec. 2.

It is within the power of the Congress "To declare War, … To raise and support Armies, … To provide and maintain a Navy, … and To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States …. " U.S. Const. Art I, sec. 8.

If called upon to decide issues involving the separation of the powers between the Executive and Legislative branches, I would carefully consider the issues and the arguments of the parties and I would fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

(f) 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 6(e).

7. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(g) Do you agree with that view? Does the Constitution permit discrimination against women?

I am unfamiliar with the particular interview. The Supreme Court has made clear that the Equal Protection Clause applies to women as well as men and that the clause may reach and forbid gender-based discrimination. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532

(1996) ("[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.") State-sponsored gender-based discrimination is generally judged by what has been termed "intermediate scrutiny." "Such discrimination is … unconstitutional unless it is substantially related to the achievement of an important governmental interest." *Hibbs v. Dep't of Human Resources*, 273 F.3d 844, 855 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003).

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

I am unfamiliar with this characterization. If I were fortunate enough to be confirmed, and a case involving the Voting Rights Act came before me, I would carefully consider the issues and the arguments of the parties, and I would fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

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

The Constitution states: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, 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." U.S. Const. Art. 1, sec. 9, cl. 8. The meaning of this clause is currently the subject of litigation, and I believe it would be inappropriate for me, as a judicial nominee, to express a personal opinion on this question. If I were fortunate enough to be confirmed, and a case involving the Emoluments Clause came before me, I would carefully consider the issues and the arguments of the parties, and I would fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

10. 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."

(h) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

I believe that it would be inappropriate for me, as a nominee to a lower federal court, to comment on how the Supreme Court should consider or treat factual findings made by Congress or the lower courts. If I were fortunate enough to be confirmed, I would fully and faithfully follow all binding Supreme Court precedent, including *Shelby County*, as well as all binding Ninth Circuit precedent.

11. 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"?

Section 2 of the Thirteenth and Fifteenth Amendments both provide: "Congress shall have power to enforce this article by appropriate legislation." Section 5 of the Fourteenth Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." If I were fortunate enough to be confirmed, and a case involving the authority of the Congress to act under these amendments came before me, I would carefully consider the issues and the arguments of the parties, and I would fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

12. 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."

(i) Do you believe the Constitution protects personal autonomy as a fundamental right?

Lawrence v. Texas, 539 U.S. 558 (2003) is a binding precedent of the Supreme Court, and if I were fortunate enough to be confirmed, I would fully and faithfully follow it.

13. 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.

(j) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

A lower court judge must follow binding Supreme Court precedent, regardless of whether or not the question involves statutory or constitutional interpretation. In the Ninth Circuit: "Circuit precedent may be overturned without an en banc rehearing if the Supreme Court has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Bender*, 586 F.3d 1159,1163 (9th Cir. 2009) (quoting *Miller v. Gammie,* 335 F.3d 889, 899-900 (9th Cir. 2003) (*en banc*)). Although an en banc court may reconsider prior circuit precedent, were I sitting on an en banc court, I

would view stare decisis as very important, including because of reliance interests.

14. 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.

(k) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

If I am fortunate enough to be confirmed, I will carefully review and address any real or potential conflicts by reference to 28 U.S.C. § 455, the Ethics Reform Act of 1989, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

I will recuse myself in any litigation where I have ever played a role. For a period of time, I anticipate recusing in all cases where my current firm, Starn O'Toole Marcus & Fisher, represents a party. I also anticipate recusing myself in cases in which my wife, a Supervisory Deputy Attorney General for the State of Hawai'i, or those she directly supervises, are involved in representing the State.

I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case by case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary. If appropriate, I will also take guidance from the Ninth Circuit and the Administrative Office of the United States Courts.

I would take very seriously the Code of Conduct's admonition in its Canon 2A commentary: "A judge must avoid all impropriety and appearance of impropriety."

15. It is important for me to try to determine, for any judicial nominee, whether he or she has a sufficient understanding of 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 made clear 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."

(l) 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?

All federal judges have an obligation to enforce and protect the civil rights guaranteed by the Constitution and laws of the United States. Each will have taken an oath "to administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform all the duties … under the Constitution and laws of the United States." Were I fortunate enough to be confirmed, I would take that obligation very seriously. I agree with the words of *Federalist* 78, that part of a judge's role is to "secure a steady, upright, and impartial administration of the laws."

16. Both Congress and the courts must act as a check on abuses of power. In cases like Iran- Contra, warrantless spying on American citizens, or politically motivated hiring and firing at the Justice Department during the Bush administration, Congressional oversight serves as a check on the Executive. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

(m) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

The framers designed a system of checks and balances which is fundamental to our constitutional system. No branch of government is free from or not subject to those checks and balances. I believe that it would be inappropriate for me, as a judicial nominee, to express a personal opinion on how the Congress has or should fulfill its constitutional role.

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?

The Constitution provides the Congress the power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art I, sec. 8, cl. 3. The Constitution also provides Congress the power: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art I, sec. 8, cl. 18. As discussed above, Section 5 of the Fourteenth Amendment provides the Congress the power to enforce that Amendment through "appropriate legislation."

The Supreme Court has addressed Congress's powers under the Commerce Clause since the very beginnings of our nation, including in *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Gibbons v. Ogden*, 22 U.S. 1 (1824). The Court has also addressed Section 5 in numerous cases. *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641 (1966). If I am

fortunate enough to be confirmed, I would fully and faithfully follow all binding precedent of the United States Supreme Court and the Ninth Circuit.

Nomination of Mark Jeremy Bennett to the
United States Court of Appeals
For the Ninth Circuit
Questions for the Record
Submitted April 18, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
   a. Do you agree with Justice Roberts' metaphor? Why or why not?

      I agree that the role of a judge is to be a neutral arbiter and not an advocate for a party to a lawsuit. A federal judge must act in accordance with his or her oath, and "administer justice without respect to persons, and do equal right to the poor and to the rich, and … faithfully and impartially discharge and perform all [his or her] duties … under the Constitution and laws of the United States." 28 U.S.C. § 453.

   b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

      A judge should always apply the law, based on the Constitution, statutes, and binding precedent. In certain limited circumstances, the law requires a judge to explicitly consider the practical consequences of a ruling. For example, in deciding whether an injunction is appropriate, a judge must consider any irreparable harm if relief is withheld and the balance of hardships. *See, e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right. …. In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'")

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
   a. What role, if any, should empathy play in a judge's decision-making process?

      A judge must always act in accord with the law and with the oath the judge takes to administer justice impartially. A district judge, in sentencing a defendant, and in considering the circumstances of the victims of a crime, the defendant, and family members of both, and the factors set forth in 18 U.S.C. § 3553(a), will likely and appropriately bring empathy and compassion to bear in carrying out his or her duties. However, for all judges, nothing can or should interfere with the judge's duty to apply the law faithfully and impartially.

   b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

      Every person is defined, in part, by that person's life experience. And it

would be impossible for a judge to completely set that aside in fulfilling the judge's mandated role. However, the duty of every judge, whether a trial court judge or an appellate judge, is to apply the law impartially and faithfully, regardless of personal experience. That requirement to follow the law is a basic precept and principle that is at the very heart of the "rule of law."

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

   No.

Senator Ben Sasse
Questions for the Record to Mark J. Bennett
April 18, 2018

During your tenure as Attorney General of Hawai'i, you joined an amicus brief in *Citizens United v. Federal Election Commission* urging the Supreme Court "to resolve this case without overruling *Austin v. Michigan Chamber of Commerce*." The brief argued that "*Austin* correctly settled the bounds of state corporate electioneering laws" because "*Austin* confirmed the settled expectations of governments, corporations, and campaigns." The brief then warned that "[i]f the Court overrules *Austin*, '[n]ot just one case, but a half-century of election law would be tossed aside in favor of a new regime of corporate and union political participation of uncertain shape and effect.'"

During your tenure in office, you also joined an amicus brief in *District of Columbia v. Heller* that argued that "the Second Amendment's 'obvious purpose' is 'to assure the continuation and render possible the effectiveness' of state militias" and that numerous state constitutions "[u]nlike the Second Amendment . . . explicitly guarantee an individual right to own a gun for specified private purposes."

1. In presenting arguments on behalf of the state, were you as Attorney General free to employ any reasonable legal argument, or did you have a duty to present the best view of the law?

   While attorney general of Hawai'i, I did not believe a state's amicus brief was intended to reflect the personal views of the lawyer who wrote it (or the lawyers whose states joined it), but should instead reflect the interests of the states which joined it. Thus, I believed that amicus briefs Hawai'i joined should present reasonable and reasonably supported legal arguments in Hawai'i's interests.

2. When you signed onto the *Citizens United* brief, was it your best view of the law that § 203 of the Bipartisan Campaign Reform Act of 2002 did not conflict with the original public meaning of the First Amendment to the Constitution?

   The amicus brief Hawai'i joined--the Brief of the States of Montana, Arizona, Connecticut, Florida, Hawai'i, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, as Amici Curiae Addressing June 29, 2009 Order for Supplemental Briefing and Supporting Neither Party--asked the Supreme Court (as reflected in the brief's conclusion) to "resolve this case without overruling *Austin.*"

   The brief did not address the question of whether § 203 did or did not conflict with the original public meaning of the First Amendment to the Constitution, and I do not recall personally considering that question when Hawai'i joined the brief.

If I am fortunate enough to be confirmed, I will fully and faithfully follow all binding precedent of the United States Supreme Court, including *Citizens United*.

3. When you signed onto the *Heller* brief, was it your best view of the law that the original public meaning of the Second Amendment to the Constitution did not guarantee an individual right to bear arms unconnected to militia service?

   When Hawai‘i joined the amicus brief in *Heller*, I did not base that decision on my personal opinion as to whether or not the Second Amendment to the Constitution guaranteed an individual right to bear arms unconnected to militia service. Indeed, the brief noted both that "the Amici States do not defend the specific handgun ban at issue in this case and do not as a matter of public policy endorse it …" and that "neither New York … nor any of the other Amici States has enacted a law banning handguns …." Brief at 1 & 2.

   The issue of whether the Second Amendment guarantees an individual right to bear arms unconnected to militia service has now been settled in *Heller*. If I am fortunate enough to be confirmed, I will: 1) Fully and faithfully follow the binding Supreme Court decision and precedent in *Heller* that the Second Amendment provides an individual and individually enforceable right to keep and bear arms (unconnected to militia service); and 2) Fully and faithfully follow the binding Supreme Court decision and precedent in *McDonald* that this individual right to keep and bear arms is fully applicable to the laws of the several states and not just the laws of the federal government.

4. In the absence of controlling precedent from a higher or en banc court, what factors determine whether it is appropriate for a court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?

   In the Ninth Circuit, "Circuit precedent may be overturned without an en banc rehearing if the Supreme Court has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Bender*, 586 F.3d 1159,1163 (9th Cir. 2009) (*quoting Miller v. Gammie,* 335 F.3d 889, 899-900 (9th Cir. 2003) (*en banc*)).

   Thus, it would never be appropriate for a three-judge panel to "overturn circuit precedent" unless this test were met. However, a subsequent Supreme Court decision relating to the original public meaning of the Constitution could undercut the theory or reasoning underlying the prior circuit court precedent in such a way that rendered the cases clearly irreconcilable.

Nomination of Mark Jeremy Bennett to the
United States Circuit Court for the Ninth Circuit
Questions for the Record
Submitted April 18, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

    a. Do you believe there is implicit racial bias in our criminal justice system?

    Unfortunately, racial bias is present in and affects our nation, despite attempts to eradicate it from America, including from the criminal justice system. Racial bias should be eradicated from our nation and should not be part of or present in any aspect of our criminal or civil justice system. It should and must be part of the job of every judge, federal and state, to be ever vigilant in guarding guard against racial bias and prejudice and to do everything possible to eliminate them from our court and justice systems. If I were fortunate enough to be confirmed, I would take that absolute obligation very seriously.

    b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

    Yes.

    c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

    I had not studied the issue of implicit racial bias in our criminal justice system prior to my nomination.

---

[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

    a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

    I have not studied or reviewed these particular statistics, but I do believe that both decreases in and increases in crime rates are influenced by a variety of factors. I believe that this is a complex issue that should be left to the political branches to debate and resolve. Judges who impose criminal sentences and appellate courts that review such sentences should consider all lawful factors and options, and should not treat defendants differently based on race or any other impermissible consideration.

    b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

    Please see my answer to question 2.a.

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

    Yes.

---

[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*