

Senator Dick Durbin
Written Questions for Britt Grant, Patrick Wyrick and Jane Nitze
May 30, 2018

For questions with subparts, please answer each subpart separately.

Questions for Britt Grant

1. You say in your questionnaire that while you were Georgia’s Solicitor General, you “drafted, reviewed, or edited” an amicus brief filed by 9 states including Georgia in the Supreme Court case *Friedrichs v. California Teachers Association*. The brief you worked on argued that the Supreme Court should overrule a 40-year-old precedent, *Abood v. Detroit Board of Education*, in which the Supreme Court upheld the validity of public sector union fair share fees.

a. **In this brief you advocated for overruling a longstanding Supreme Court precedent. When in your view is it appropriate for Supreme Court precedents to be overruled?**

The above-referenced brief was filed on behalf of my client, the State of Georgia, and other states. The Supreme Court ultimately reached a split decision in the *Friedrichs* case, affirming the decision below. It is my understanding that the Court is currently considering the same question in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. In that case, as in any other, the decision about whether to overrule a prior Supreme Court precedent is one for the Supreme Court alone, and it would be inappropriate for me to offer my own view on what when and if it would be appropriate.

b. **Are there other instances in your career in which you have worked on a brief advocating for a Supreme Court precedent to be overruled? If so, please list the briefs and the cases they advocated for overruling.**

To the best of my recollection and knowledge, the following briefs, filed on behalf of 39 and 43 states respectively, both argued that *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a state to be haled into the courts of another state without its consent, should be overruled.

Franchise Tax Board of California v. Hyatt, 2015 WL 1939076, Brief of Amici Curiae State of West Virginia and 39 Other States in Support of Petitioner.

Franchise Tax Board of California v. Hyatt, 2015 WL 5345832, Brief of Amici Curiae State of West Virginia and 43 Other States in Support of Petitioner.

2. You say in your questionnaire that while you were Solicitor General you worked on a Supreme Court amicus brief filed by a number of states in the case *Friedman v. City of Highland Park*. This case involved a challenge to a municipal assault weapons ban passed by Highland Park, Illinois. The ban had been upheld by the 7th Circuit and the brief you

worked on argued for the Supreme Court to grant cert in this case and reverse the 7th Circuit. The brief claimed that if the Supreme Court did not grant cert, it would “encourage lower courts to continue their consistently narrow view of *Heller* and the Second Amendment.” The Supreme Court did not grant cert and therefore left standing the 7th Circuit’s ruling upholding Highland Park’s ban

- a. **Please explain how lower courts have consistently applied a narrow view of *Heller*, as was argued in this brief.**

As a federal court nominee, it would be inappropriate under the Canons of Judicial Conduct, specifically Canon 3(A)(6), to provide a personal opinion regarding a matter that is the subject of current or pending litigation.

- b. **If a lower court’s job is to simply follow precedent, why is there any dispute whether courts are applying a narrow view of *Heller*?**

Please see the response to question 2(a)

- c. **Do lower court judges have discretion to interpret *Heller* broadly or narrowly?**

Lower court judges are bound to faithfully and fairly interpret *Heller* and all other binding United States Supreme Court precedents.

- d. **Would you, if confirmed to the 11th Circuit, apply a narrow view of *Heller*?**

As I would for all binding Supreme Court precedents, I would apply *Heller* faithfully and fairly if confirmed to the 11th Circuit.

3. You say in your questionnaire that when you were working in the Office of the Georgia Attorney General you “drafted, reviewed or edited” a number of briefs that were filed before the Supreme Court, including amicus curiae briefs filed by states in some of the most high-profile cases in recent years. However, you do not state with specificity in your questionnaire what work you performed on these briefs.

- a. **Please discuss the work that you specifically performed in the amicus brief that Georgia joined in the *Shelby County v. Holder* case.**

As best I can recall, I reviewed and edited the brief in the above-referenced case.

- b. **Please discuss the work that you specifically performed in the amicus brief that Georgia joined in the *Sebelius v. Hobby Lobby Stores, Inc.* case.**

As best I can recall, I reviewed and edited the brief in the above-referenced case.

- c. **Please discuss the work that you specifically performed in the amicus brief that Georgia joined in the *Obergefell v. Hodges* case.**

As best I can recall, I reviewed the brief in the above-referenced case. I may have edited the brief, but I cannot recall doing so.

- d. **Please discuss the work that you specifically performed in the amicus briefs that Georgia joined in the *U.S. v. Texas* case.**

As best I can recall, I reviewed and edited the briefs in the above-referenced case.

4. You say in your questionnaire that you have been a member of the Federalist Society since 2004 and that you served on the Atlanta Chapter Executive Board from 2013-2017. You say that you continue to serve on the Federalist Society's "Federalism and Separation of Powers Practice Group Executive Committee" while you have been serving as a sitting justice on the Georgia Supreme Court.

- a. **What work do you perform for this committee?**

I have participated in several conferences calls to discuss programmatic planning. For example, the committee often plans publicly-available conference calls featuring participants from both sides of a case relating to separation of powers or federalism issues.

- b. **What message does it send to litigants about your views when you are serving in the leadership of the Federalist Society while also serving as a sitting judge?**

I have sworn an oath to "administer justice without respect to person and do equal rights to the poor and rich, and that I will faithfully and impartially discharge and perform the duties incumbent on me as a judge." That is the message that I hope litigants will understand about me, and I do my best to live up to it with each case.

5. In November 2017 an article was written about you in *Reporter Newspapers* entitled "Local state judge makes Trump's Supreme Court short list." The article says "Grant described her judicial philosophy as 'separation of powers' and change by 'democratic process rather than by judicial fiat.'"

Do you believe it is change "by judicial fiat" when the Supreme Court overrules one of its past cases?

No.

6. **In your experience as a Justice of the Georgia Supreme Court, when do you believe it is appropriate for your court to overrule one of its precedents?**

The Georgia Supreme Court largely follows federal precedents regarding stare decisis. In *Jackson v. State*, 287 Ga. 646 (2010), for example, we explained that “[s]tare decisis is an important principle that promotes the rule of law, particularly in the context of statutory interpretation, where our incorrect decisions are more easily corrected by the democratic process. . . . In considering whether to reexamine a prior erroneous holding, we must balance the importance of having the question *decided* against the importance of having it *decided right*. In doing so, we consider factors such as the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning.” (internal citations and punctuation omitted).

7. You said in a March 2017 speech to the State Bar of Georgia’s Young Lawyers’ Division that a judge should not elevate his or her “own preferences over the preferences of those who are elected to make the laws.” **Do you believe that judges should be deferential to legislatures that pass laws to regulate gun possession and use, like Highland Park, Illinois did by banning certain types of military-style assault weapons from civilian use?**

As a judicial nominee it would be inappropriate under Canon 3(A)6) of the Code of Conduct for United States Judges for me to opine regarding a matter that is the subject of litigation.

8. **What is your favorite Supreme Court dissent and why?**

As a nominee to a lower court, it would be inappropriate for me to highlight my agreement or disagreement with particular Supreme Court opinions, whether majority opinions, concurrences, or dissents.

9. **What do you think lower court judges can learn from Supreme Court dissents?**

That is a question that it is difficult to answer in the abstract; I expect that it would depend greatly on the particular writing in question.

10. In 1988, the Supreme Court held by a 7 to 1 vote in the case *Morrison v. Olson* that Congress is allowed under the Appointments Clause to limit the removal of an independent counsel to cases in which a principal officer finds good cause. Recently a number of Republican members of this Committee argued, in a debate over a bill to protect the special counsel’s Russia investigation, that we should act as if we are bound by Justice Scalia’s dissent in *Morrison v. Olson*.

- a. **Is Justice Scalia’s dissent binding?**

No.

- b. **What weight of authority should lower court judges give to Justice Scalia’s dissent in *Morrison v. Olson*?**

A dissent is never binding, but may be persuasive in rare instances if it informs a question that is not resolved by the majority opinion in the case.

11.

- a. **Do you believe that judges should be “originalist” and should adhere to the original public meaning of constitutional provisions when applying those provisions today?**

Lower court judges should adhere to whatever meaning the United States Supreme Court has assigned to constitutional provisions when applying those provisions today. Indeed, it is rare for a circuit court to consider a true case of “first impression” in the sense that there is no Supreme Court precedent that bears on the question at issue in the case.

- b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

...no Person holding any Office of 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.

12. You say in your questionnaire that you have been a member of the Federalist Society since 2004.

- a. **Why did you join the Federalist Society?**

I joined the Federalist Society because lawyers that I knew had been involved with the Society, and I appreciated the fact that they hosted events at my law school featuring a wide range of viewpoints from members and non-members.

- b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News’ Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

As a judicial nominee, I may not comment on political matters under Canon 5 in the Code of Conduct United States Judges.

- c. **Please list each year that you have attended the Federalist Society’s annual convention.**

To the best of my recollection, and following a review of my own records, I attended portions of the annual convention in 2015, 2011, and 2008.

- d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I did not attend this speech, or any other part of the 2017 convention.

13.

- a. **Is waterboarding torture?**

It is my understanding that waterboarding constitutes torture where it is intentionally used "to inflict severe physical or mental pain or suffering" upon a detainee. 18 U.S.C. § 2340(1).

- b. **Is waterboarding cruel, inhuman and degrading treatment?**

It is my understanding that Congress amended the Detainee Treatment Act through Section 1045 of the National Defense Authorization Act for Fiscal Year 2016. The law provides that no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual. 42 U.S.C. § 2000dd-2(a)(2). It is also my understanding that waterboarding is not authorized in the Army Field Manual.

- c. **Is waterboarding illegal under U.S. law?**

Please see the responses to questions 13(a) and 13(b).

14. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

I do not have any basis for evaluating the accuracy of this statement, but even if I did I would not be able to comment under Canon 5 in the Code of Conduct for United States Judges, which prohibits comments regarding political matters.

15. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees should answer questions to the best of their ability within the confines imposed by the Code of Conduct for United States Judges and any other restrictions that govern their conduct. For instance, I am also bound by the Georgia Code of Judicial Conduct.

16. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's nominees.

- a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I have no knowledge of any such donations, and am not aware of the Judicial Crisis Network supporting my nomination. Because the question of whether any such donations are problematic is a question of ongoing political debate, Canon 5 in the Code of Conduct for United States Judges prohibits me from offering my own opinion on the question.

- b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

If confirmed, I will carefully apply the recusal requirements outlined in Canon 3 of the Code of Conduct for Judges, 28 U.S.C. § 455, and any other relevant materials. Beyond that, the question of disclosure or nondisclosure of any donations is a matter of ongoing political debate. Accordingly, Canon 5 of the Code of Judicial Conduct prohibits me from commenting on it.

- c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see the responses to questions 16(a) and 16(b).

17.

- a. **Can a president pardon himself?**

I have not researched this question.

- b. **What answer does an originalist view of the Constitution provide to this question?**

I have not researched this question.

18. In your view, is there any role for empathy when a judge is considering a case?

Empathy is an important part of any human being's character, including judges. Certain legal contexts allow empathy to be a factor in a judge's decision-making, but those contexts are more likely to be at the trial level relating to issues like criminal sentencing. At the appellate level, empathy remains meaningful as a human response, but cannot be allowed to govern decision-making, as a judge is required to "faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453. As Justice Kagan said during her 2010 testimony before this Committee, "I think it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it's true of statutory law—the question is what the law requires." The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 111th Cong., S. Hrg. 111-1044, at 103 (2010).