Nomination of Iain D. Johnston to the United States District Court for the Northern District of Illinois
Questions for the Record
Submitted July 1, 2020

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?

It is not appropriate for lower courts to depart from Supreme Court precedent.

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

District court judges do not issue concurring or dissenting opinions and as a result would not question Supreme Court precedent in that way.

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

District court judges are not bound by their own decisions. *Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011). But because of the importance of consistency and reliability, district court judges should give great weight to their previous decisions. However, if a court of appeals from the circuit in which the district court is located or the Supreme Court issued a decision that was contrary to a district court's prior decision, the district court must overturn its own precedent. Moreover, if a party convinces the district court under the applicable standards of the Federal Rules of Civil Procedure that the precedent was wrongly decided, the district court may overturn its own precedent.

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

The Supreme Court has identified several factors in determining whether to overturn its own precedent. These factors include the quality of the reasoning, the workability of the rule the decision established, the decision's consistency with other related decisions, and the reliance on that previous decision. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). The Court has also repeatedly recognized that adherence to *stare decisis* is strongest when a decision interprets a statute, but more forgiving when the decision interprets a constitutional provision. *Id.*

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"?

I am not sure what Senator Specter meant by the term "super-stare decisis" and I know of no controlling authority that has used the term "superprecedent." As a district court judge, I would apply all precedent. I agree that *Roe v. Wade* is established law.

b. Is it settled law?

Yes. Please see answer to question (a) above.

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?**

The Supreme Court's decision in *Obergefell* is now five years old and is controlling precedent that I would follow if I were to be confirmed, just as I would follow all precedent.

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?

Generally, as a rule, it is inappropriate for a judge or a nominee to weigh in on the correctness of a Supreme Court decision.

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

I am not sure what is meant by the phrase "common-sense gun regulation." But *Heller* specifically states that Second Amendment rights are not unlimited. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The decision also notes that nothing in the "opinion should be taken to cast doubt on long standing prohibitions" regarding the possession and sale of firearms and identified a non-exhaustive list. *Heller*, 554 U.S. at 626-27, n. 26.

c. Did *Heller*, in finding an individual right to bear arms, depart from decades

of Supreme Court precedent?

Heller limited an understanding of the holding in *United States v. Miller*, 307 U.S. 174 (1939) by stating that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *Heller*, 554 U.S. at 676.

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?

The First Amendment protects fundamental rights of all of the people of the United States. As a district court nominee, I do not believe it is appropriate to comment further as to the merits of a Supreme Court opinion.

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

The First Amendment rights of all individuals should be a concern to any case or controversy brought to a federal court. As a district court nominee, I do not believe it is appropriate to comment further as to the merits of a Supreme Court opinion.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-09 (2014), the Supreme Court found that under the Religious Freedom Restoration Act of 1993 certain corporations can seek to enforce freedom of religion rights under the First Amendment.

6. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Constitution protects and guarantees both the equal protection of the laws as well as the right to free exercise of religion. Consequently, the Constitution requires both that the government not deny a person the equal protection of the laws and that the government not prohibit a person's free exercise of religion. Both of these constitutional provisions are the bedrock of the people's liberties under our system of government.

7. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. Please also see response to question 6.

8. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

In *Loving v. Virginia*, 388 U.S. 1, 12 (1967), the Supreme Court held that state laws prohibiting interracial marriage violate the Equal Protection Clause of the Fourteenth Amendment. Please also see response to question 6.

9. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society from 1995 to 1998. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

    a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I did not write this purpose statement and do not know what the author meant. And I do not know if this was the organization's purpose statement in 1995-1998, so I cannot elaborate.

    b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

I am not a current member of the Federalist Society and have not been a member for over twenty years, so I am not in a position to answer this question.

    c. What "traditional values" does the Federalist society seek to place a premium on?

I am not a current member of the Federalist Society and have not been a member for over twenty years, so I am not in a position to answer this question.

    d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No.

e. Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that "membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct]." (*Draft Ethics Opinion No. 117: Judges' Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

f. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

I was generally aware that a draft of an ethics opinion had been circulated but had not read the draft until responding to Senator Whitehouse's question. Because I was not a member of either organization at the time of my nomination, there was no membership to relinquish.

g. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

I am not a member of the Federalist Society so I have no membership to relinquish.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former 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"?

Administrative law is an extensive area of the law. Generally, administrative law relates to the two main components of agency rule making and adjudication. Agencies are primarily, but not entirely, arms of the executive branch of government. Administrative agencies promulgate rules and regulations through notice and comment rulemaking. Additionally, administrative agencies then, at times, seek to enforce those promulgated rules through enforcement actions within the agency that results in a quasi-judicial decision. In some circumstances, agencies can seek enforcement directly with a court. The agencies' actions in both contexts must comply with the agencies' own organic statute as well as the Administrative Procedures Act and the Constitution.

11. Do you believe that human activity is contributing to or causing climate change?

Responding to this question would require me to address a political and policy issue. Consequently, under Canon 5 of the Code of Conduct, I cannot answer this question. Additionally, this issue is pending in at least one federal court, so under Canon 3(A)(6), I cannot answer this question.

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

As a district judge, I would consider legislative history in those circumstances in which the Supreme Court or the Seventh Circuit Court of Appeals holds that it is appropriate to do so. The Supreme Court has considered legislative history in construing statutes previously. But recently, the Supreme Court seems to counsel that such a practice should be used when a statute is ambiguous. *See Milner v. Dep't of the Navy*, 562 U.S. 562, 574 (2011).

13. 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 any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

These questions, as well as the written questions from the other Senators, were provided to me by the Office of Legal Policy. I responded to the questions in draft form and then consulted with the Office of Legal Policy. I finalized my responses and authorized the Department of Justice to file these responses.