

**Nomination of Emily Coody Marks to the
U.S. District Court for the Middle District of Alabama
Questions for the Record
Submitted October 24, 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?**

It is never appropriate for a district court to depart from Supreme Court precedent or precedent from a relevant circuit court.

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

It is not appropriate for a district court judge to question binding precedent from the Supreme Court or the relevant circuit court.

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 reviewed Chief Justice Roberts' testimony before the Committee during which he referenced "super-stare decisis", nor have I read Justice Gorsuch's textbook wherein he referenced "super-precedent." I agree that *Roe v. Wade* is binding precedent.

- b. **Is it settled law?**

Yes, *Roe v. Wade* is binding Supreme Court precedent.

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 binding Supreme Court precedent.

- 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 read *Pidgeon v. Turner* and therefore, have not had an opportunity to analyze the decision. In any event, as a judicial nominee, I believe it would be inappropriate for me to give my opinion about a decision which examines *Obergefell*. If I am confirmed, I would be bound by 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 a judicial nominee, I believe it would be inappropriate for me to express a particular opinion about a matter which may come before me if I am confirmed as a district court judge. If I am fortunate enough to be confirmed, I would be bound by Supreme Court precedent, including *District of Columbia v. Heller*.

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

See my response to Question 4(a).

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

See my response to Question 4(a).

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?**

As a judicial nominee, I believe it would be inappropriate for me to express a particular opinion about a matter which may come before me if I am confirmed as a district court judge. If I am fortunate enough to be confirmed, I would be bound by Supreme Court precedent, including *Citizens United v. FEC*.

- b. **What is the right way to balance individual's First Amendment rights when corporations can, in effect, silence an individual through monetary spending?**

See my response to Question 5(a).

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

A judge should be respectful, patient, deliberate, and consistently mindful of the responsibility of the position. A judge should treat those who appear before her with dignity and remain cognizant of the fact that all are equal under the law. I make it a point to treat others the way that I want to be treated. If I am fortunate enough to be confirmed, I would continue to treat others with dignity, respect, and patience.

7. What steps are you undertaking to prepare to assume the responsibilities of a federal district court judge, if you are confirmed?

After I was nominated, I reached out to the Chief Judge of the Middle District of Alabama and made arrangements to attend criminal sentencings. I have attended multiple criminal sentencings conducted by different judges in the Middle District. I have also been reading materials regarding federal sentencing, case management, and the transition from private practice to the judiciary.

8. According to your Questionnaire, your legal practice has been devoted to civil litigation.

- a. **Specifically, what steps are you undertaking to prepare yourself to hear criminal cases?**

See my response to Question 7.

- b. **How will you familiarize yourself with the requirements of the Speedy Trial Act, a defendant's right to counsel, a defendant's right against self-incrimination, prosecutors' obligations under *Brady v. Maryland* and *Giglio***

v. United States, and other critical aspects of criminal proceedings?

I will approach these issues in the same manner in which I approach issues that arise in civil cases and about which I am not entirely familiar. I will read cases, consult the other judges in the Middle District and elsewhere, and I will utilize the voluminous materials available to district judges to educate myself about these issues.

9. 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?

See my response to Questions 7 and 8(b).

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

I received these questions the evening of October 24, 2017 with instructions to provide my responses to the Office of Legal Policy. I reviewed the questions and began working on my responses thereto. I provided my responses to the Office of Legal Policy on October 25, 2017.

Senator Dick Durbin
Written Questions for Emily Marks
October 24, 2017

For questions with subparts, please answer each subpart separately.

Questions for Emily Marks

1. According to your questionnaire, you became a member of the Federalist Society just this year.

a. **Why did you join?**

Both of my parents were debaters, and I grew up in an environment where vigorous debate of issues was encouraged. The fact that the Federalist Society similarly encourages debate of issues appealed to me.

b. **Did anyone suggest to you that you join the Federalist Society in order to enhance your prospects for a judicial nomination?**

No.

c. **If so, who suggested this to you and when?**

See my response to Question 1(b).

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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 do agree with Justice Roberts’ metaphor. Just as an umpire should follow the rules of baseball, a judge should follow the rule of law without bias or the desire to advance a particular outcome.

- 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 render her decision based upon the law. To borrow Chief Justice Robert’s baseball metaphor, the consequences of a particular call should not factor into the umpire’s call of a ball or strike. Similarly, a judge should not allow consideration of the consequences of a decision to influence her faithful application of the law.

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

No. The determination of whether there is a genuine issue of material fact is an objective one. If a genuine issue of material fact objectively exists, then summary judgment is inappropriate and the case should proceed to trial.

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 should base her decisions on the law and should not be influenced by empathy for a particular party or lawyer. Empathy can and should play a role in the way in which a judge treats those who appear before her.

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

A judge should base her decisions on the law and should not be influenced by her personal life experiences. A judge can and should use

her life experiences to inform the way in which she treats those who appear before her.

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

No judge can fully understand what it is like to walk in the shoes of every person who may appear before her. However, I have had the opportunity to interact with a varied group of people during my education, my law practice, and my work with the Alabama Bar Association’s Volunteer Lawyers Program and the Federal Defenders. I have an appreciation for the fact that we all have varied backgrounds and experiences, but have a common goal in the fair application of the law. I pledge to be faithful to the law and to treat all who appear before me with respect and equality under the 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.

4. In your questionnaire, you noted that you joined the Federalist Society in 2017. Why did you join so recently? Had you ever previously considered joining the Federalist Society, and if so, why did you decide not to? Did anyone influence your decision to join, or suggest that you join? Were you told that was a prerequisite for a judicial nomination?

I had previously made the decision to join the Federalist Society when my schedule permitted me to attend meetings. No one influenced my decision. Due to my busy schedule and various commitments, I was not able to attend any of the monthly lunch meetings until 2017. No one has ever told me or even suggested to me that joining the Federalist Society was a prerequisite for a judicial nomination.