Nomination of Amy St. Eve to the U.S. Court of Appeals for the Seventh Circuit
Questions for the Record
March 28, 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?

It is never appropriate.

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 binding on all circuit court judges, even when the judge is authoring a concurring or dissenting opinion. It is appropriate to analyze whether the precedent applies to the particular factual scenario before the court. If it applies, however, a circuit court judge must follow it.

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

Pursuant to the Seventh Circuit's Circuit Rule 40(e), a proposed opinion which would overrule a prior decision of the Seventh Circuit must first be circulated among the active members on the circuit and a majority of the active members must vote to hear the case en banc. Cir. R. 40(e). As the Seventh Circuit has noted, "[o]ne panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e)." *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002).

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

As a sitting District Court judge and a nominee to the Seventh Circuit, I do not believe it would be appropriate for me to comment on the procedures of the Supreme 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 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 which all circuit courts and district courts must apply. Regardless of whether it is labeled "super-stare decisis" or "superprecendent" or "precedent," it is binding.

b. Is it settled law?

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 binding precedent from the Supreme Court and settled 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."Do you agree with Justice Stevens? Why or why not?

I have seen numerous cases involving gun violence as a District Court judge in Chicago. The Seventh Circuit has addressed some regulations that restrict a private civilian's use of firearms. *See, e.g.*, *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017); *Friedman v. Highland* Park, 784 F.3d 406 (7th Cir. 2016). These cases and the Supreme Court precedent in this area are binding precedent in the Seventh Circuit. Given that I am a sitting District Court judge and a nominee for the Seventh Circuit, it would be inappropriate for me to comment on whether I agree with Justice Stevens' dissent.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). It further explained that "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." *Id.* at 626-27. The Seventh Circuit has also addressed restrictions on firearms under the Second Amendment. *See, e.g.*, *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017); *Friedman v. Highland* Park, 784 F.3d 406 (7th Cir. 2016).

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

Given that I am a sitting District Court judge and a nominee for the Seventh Circuit, it would be inappropriate for me to give my personal opinion on the *Heller* opinion. It is binding precedent and I will apply it.

5. As noted in your Senate Questionnaire, from 1994 to 1996, you were an Associate Independent Counsel with Independent Counsel Kenneth Starr's office investigating the land transaction known as "Whitewater," and the prosecution of James and Susan McDougal. Press from the time notes that, at trial, Ms. McDougal claimed that James McDougal decided to cooperate with Starr's investigation "as a favor to former associate independent counsel Amy St. Eve," because Mr. McDougal "thought she was a nice girl, and she was a writer and had promised to help him write his memoirs." (Erica Werner, *McDougal Says Clinton Told the Truth*, Arkansas Democrat-Gazette (March 24, 1999)).

a. Why did Ms. McDougal believe that Mr. McDougal had cooperated as a "favor" to you?

I have no idea why Ms. McDougal made this comment.

b. Did you ever discuss with Mr. McDougal or agree to write "his memoirs"?

No. I never discussed with Mr. McDougal his memoirs and I never agreed to write his memoirs.

6. In a 2006 case, *Coleman v. United States*, you dismissed the suit of an American-born child, Saul, who claimed that deportation of his mother from the United States effectively removed him from the country as well. Looking to Seventh Circuit precedent, you wrote that "the [mother's] pending removal order [did] not prevent Saul from exercising his rights of citizenship." (145 F. Supp. 2d 757, 768-69 (N.D. Ill. 2006))

However, the Supreme Court has held that "[t]he home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." (*Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (quoting *Poe v. Ullman*, 367 U.S. 497, 551-52 (Harlan, J., dissenting)) The Court has also emphasized that "the custody, care and nurture of [a] child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (*Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))

In dismissing Saul's case, did you consider any of the U.S. Supreme Court precedent emphasizing the rights to family? If so, please explain. If not, why not?

In ruling on the motion in *Coleman v. United States*, 454 F. Supp.2d 757 (N.D. Ill. 2006), I addressed the arguments raised by the parties in the case and applied binding precedent. Under this case law, I granted the motion to dismiss the claim because the child still had the right to remain in the United States. Coleman did not appeal.

7. In 2015, you issued an opinion in *United States EEOC v. AutoZone, Inc*. in which you granted a company's motion to dismiss a suit by an African American employee who alleged he had been subject to racially-motivated disparate treatment in violation of Title VII. (2015 WL 4638065 (N.D. Ill. Aug. 4, 2015))

The plaintiff alleged that his forced transfer from one store location to another, for the alleged reason to make his original location "predominantly Hispanic," was an "adverse employment action," violating Title VII's prohibition on segregating employees. You ruled that the plaintiff had failed to provide evidence that the transfer itself constituted an adverse employment action. Your decision was upheld by a panel of the Seventh Circuit. And rehearing was denied en banc. However, three judges dissented from the en banc denial. The dissent argued that the panel opinion "endorse[d] the erroneous view that 'separate-but-equal' workplaces are consistent with Title VII." (875 F.3d 860, 863 (7th Cir. 2017) (Wood, C.J., dissenting))

Can a company's decision to racially segregate employees in the workplace produce any adverse effects for employees? If so, please explain such potential effects. If not, please explain why planned racial segregation of employees does not produce adverse effects.

In *United States EEOC v. Autozone*, 2015 WL 4638066 (N.D. Ill Aug. 4, 2015), I granted summary judgment in favor of Autozone because the EEOC had not provided evidence of an "adverse employment action" as defined under Title VII. The statute and binding Seventh Circuit precedent require a plaintiff asserting such a claim to establish both that the employer limited, segregated or classified an employee based on his race and that the employee suffered an adverse employment action. The statute and binding Seventh Circuit precedent made clear that these are two distinct elements. The Seventh Circuit affirmed the grant of the summary judgment because the EEOC conceded that there was no adverse employment action in the case. Accordingly, the Seventh Circuit held that the EEOC had failed to raise an issue of fact regarding an essential element of its case. As a sitting District Court judge and a nominee to the Seventh Circuit, it would not be appropriate to give my opinion about the application of this statute to a factual scenario that may come before me some day.

8. 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 asked to address a question involving administrative law, I would apply the binding precedent of the Supreme Court, including *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

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

It is appropriate to consider legislative history when a statute is not plain on its face. When a statute is ambiguous, the legislative history can be instructive. I have considered legislative history numerous times when construing ambiguous statutes as a District Court judge.

10. 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.

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

I reviewed the questions when I received then. I then reviewed the cases referenced in the questions. After that, I drafted answers to each of the questions and then carefully reviewed and edited each response. I conducted some additional research and finalized my answers. I sent my draft responses to the attorneys at the Department of Justice's Office of Legal Policy.

Senate Judiciary Committee
"Nominations"
Questions for the Record
March 21, 2018
Senator Amy Klobuchar

Questions for Michael Scudder and Amy St. Eve, Nominees to the United States Court of Appeals for the Seventh Circuit

- If you are confirmed, you will be hearing cases as part of a panel of judges. In your view, is there value to finding common ground – even if it is slightly narrower in scope – to get to a unanimous opinion on appellate courts?

  Yes.

- You both previously served as Assistant United States Attorneys. What did you learn from this experience, and how will it shape your perspective as a federal judge?

  It was privilege to serve as an Assistant United States Attorney. During my tenure as a federal prosecutor, I spent a significant amount of time in the courtroom. I learned the importance of the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. I also saw the personal impact that courtroom proceedings can have on everyone involved, including the defendant, the victims, the jury, and the witnesses, and the importance of treating everyone fairly. In addition, my years as an Assistant United States Attorney taught me the importance of developing the record in the courtroom. This positive experience has shaped my perspective as a federal judge. I treat everyone who comes into the courtroom fairly and never forget the human aspect of the job. I am also very mindful of the application of the federal rules and the importance of the record.

Nomination of Amy J. St. Eve to the
United States Circuit Court for the Seventh Circuit
Questions for the Record
Submitted March 28, 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, racism still exists in America. I have tried very hard during my tenure as a District Court judge to ensure that no racial bias or any other bias exists in the courtroom.

    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 have not studied the issue, but I have attended presentations pertaining to implicit bias at judicial conferences. I have not read any books and do not recall the specific articles I have read.

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

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[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.
[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at*

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 am not familiar with the Pew Charitable Trusts fact sheet and have not researched this particular issue. I am aware as a sitting District Court judge that there are many factors that impact crime rates.

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 response to question 2a.

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, and I am very fortunate to sit on a District Court that is diverse.

http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*