Written Questions for Judge Amul Thapar
Submitted by Senator Patrick Leahy
May 3, 2017

1. While serving as a sitting district court judge, you have criticized the sentencing guidelines in part because they are not sufficiently punitive toward repeat offenders, arguing, "The way to stop recidivism is to keep the recidivists in jail."

What specific guidelines were you referring to? How have they constrained you in cases that are before you for sentencing? And how would you change them? Do you believe that federal judges have too much discretion at sentencing?

Response: I was not referring to any specific sentencing guideline. Rather, I was discussing the findings of the DOJ's Bureau of Justice Statistics regarding recidivism patterns among the American prison population, specifically the relationship between post-prison recidivism and arrest history. More information on those findings is available at https://www.bjs.gov/index.cfm?ty=tp&tid=17.

It is the exclusive role of Congress and the United States Sentencing Commission to enact sentencing reform and establish sentencing policy. Congress directs district judges to consider numerous factors when determining the appropriate sentence for each individual case. As a district judge, I have followed these directions. And if confirmed, I will review sentences in accordance with such directions in my new role as an appellate judge.

2. In your notes for a speech on overcriminalization, you wrote: "Enforce the commerce clause in a meaningful way" and referenced a "Scalia concurrence" in *United States v. Lopez* with the idea of "tak[ing it] to the next level and require that crime actually affect interstate commerce."

Justice Scalia did not file a concurrence, nor any other opinion in *Lopez*.

To which opinion in that case were you referring? Does any opinion in that case other than the majority opinion by Chief Justice Rehnquist represent binding authority?

Response: I was mistaken in my notes. As you point out, Justice Scalia did not file an opinion in *United States v. Lopez*. I do not recall to which opinion I was referring. Only Chief Justice Rehnquist's majority opinion represents binding authority.

In your view, does the Constitution, as interpreted by the Supreme Court in cases including *Lopez*, grant Congress the authority to legislate against criminal activity involving the channels or instrumentalities of interstate commerce?

The *Lopez* Court wrote: "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce."

Does that include the authority to legislate against criminal activity having a

substantial relation to interstate commerce?

How much deference should be accorded to Congressional findings that a given criminal activity has a substantial relation to interstate commerce? Are Federal criminal statutes entitled to a presumption of constitutionality?

Response: The Supreme Court has identified three categories of activity that Congress has the power to regulate under the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, including persons or things moving in interstate commerce; and (3) economic activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16−17 (2005). In *United States v. Lopez*¸ the Court invalidated a federal criminal statute as exceeding Congress's Commerce Clause power. 514 U.S. 549 (1995). The Court did not, however, hold that Congress could never regulate criminal activity through its Commerce Clause power. If confronted with any issues concerning the scope of Congress's authority to regulate criminal activity, I would review the parties' briefs, fully acquaint myself with the relevant facts, and faithfully apply the precedents of the Supreme Court and the Sixth Circuit. Please also see the response to Question 6 from Senator Grassley.

You also wrote: "Don't have regulatory violations – malum prohibitum rather than malum in se – bear criminal sanctions; corporate fraud – at lowest level empower private attorney generals that could sue and get rid of bad conduct without jailing low level fraud – i.e. wire and mail fraud; barriers to entry now are high; make it easier; downside suits that stifle corporations etc."

Were you arguing that this policy change could be undertaken by Federal judges, or was this a suggestion that you hoped would be taken up by the other two branches of government?

Response: Policymaking is the exclusive role of the other two branches of government.

3. You wrote in your notes for a lecture, "Hate Crimes –certify that state request fed govt bring case."

What did you mean by that? Do you believe that the Federal government should only bring a hate crimes prosecution when the state asks the Justice Department to do so?

Response: In that lecture, I was not stating a personal belief. Rather, I was describing 18 U.S.C. § 249, the federal statute that punishes hate crimes. Before the federal government prosecutes a crime under that statute, the Attorney General must certify that one of four specified reasons exists for federal prosecution of the offense. And one of those reasons is that the state has asked the federal government to assume jurisdiction. *Id*. § 249(b)(1).

4. You taught a course on Justice Scalia's contribution to American law, focusing on originalism and textualism. One criticism of originalism, according to David Strauss in a short article titled "Originalism, Conservatism, and Judicial Restraint," is that "Originalism is . . . in its essence, a destructive creed. It does not provide answers. It gives you a way of challenging the received wisdom. It is a way of getting rid of things . . . it is too indeterminate. That is when

you have to resort to precedent." Strauss added, "[I]f you favor judicial restraint, you should believe in precedent and be wary of originalism."

Do you agree with that criticism? How should judges balance originalist analysis against binding precedent in cases that are not cases of first impression?

Response: I am not familiar with that article. It is my obligation to follow the binding precedent of the Supreme Court and Sixth Circuit, and I will continue to fulfill that obligation faithfully.

5. Do you agree with Chief Justice Roberts' reminder 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?'"

Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

Response: As the Supreme Court has frequently said, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also, e.g., King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). I will faithfully follow the instructions of the Supreme Court in reading and interpreting statutes.

6. You told Senator Blumenthal that President Trump's attacks on the independent judiciary "doesn't matter to us." Yet even Justice Gorsuch called them "disheartening" and "demoralizing." Your later response to Senator Blumenthal suggested you meant that the President's rhetoric would not affect your actions on the bench.

Nonetheless, 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?

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?

Response: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The legitimacy of the judiciary stems from Article III of the United States Constitution and the duties assigned to us therein. As a judge, I strive to faithfully uphold these duties without regard to criticism.

7. 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.)

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

Response: I have not had a case presenting such a question nor have I reviewed the entirety of Supreme Court precedent on this question. However, no person or branch of government is above the law. The courts have frequently reviewed the decisions of the political branches in the realm of national security. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson concurred and set forth a "tripartite scheme" that the Supreme Court has adopted as "the accepted framework for evaluating executive action." *Medellin v. Texas*, 552 U.S. 491, 524 (2008). If faced with a case challenging the validity of an executive action involving national security, I will follow *Youngstown*, *Medellin*, and all other relevant precedent of the Supreme Court and Sixth Circuit.

8. At your hearing, you responded to Senator Flake that collegiality is "critical" and "really important" on the appellate bench. Earlier in the hearing, you discussed an article by Judge Harry Edwards about trying to find common ground and avoid unnecessary dissents. In contrast, Justice Alito was quoted recently saying that with eight justices, the Court "ha[d] a lot more discussion of some things and more compromise and maybe narrower opinions than we would have issued otherwise, but as of this Monday, we were back to an odd number." All appellate panels have an odd number of judges.

Do you agree with Justice Alito that having an odd number of judges is license to write broader opinions without seeking consensus for narrow decisions?

Response: I am not familiar with the quoted statement. In my experience sitting by designation on the Sixth and Eleventh Circuits, my colleagues and I always strived to decide cases unanimously. And for the most part, we did. If confirmed, I will continue to foster collegiality and to strive for unanimity.

9. 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?

Response: I understand that this issue has been raised in pending litigation. As a sitting judge, my ethical obligations preclude me from commenting further on this live issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). Litigants have a right to a fair and impartial judge who has not pre-committed to any position. If this or any similar issue comes before me, I will review the briefs and apply the relevant precedents of the Supreme Court and the Sixth Circuit.

10. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

Response: The Constitution establishes a purposeful scheme of separate and diffuse powers among the three branches of government. The judiciary's unique power is to say what the law is. The coordinate branches of government are expected to adhere to the constitutional structure and to respect the independence and powers of the judiciary. I have always ruled accordingly, upholding and defending the role of my branch. And I will continue to do so.

11. 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."

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?

Response: I agree that *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), recognized limitations on the President's power, even in times of war. I will faithfully follow *Hamdan* and all other Supreme Court precedent.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

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 to authorize torture or warrantless surveillance?

Response: Please see the response to question 7.

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

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

Response: I am not familiar with the referenced interview. The Supreme Court has held that state practices discriminating on the basis of sex are subject to a heightened level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). That scrutiny, often called "intermediate scrutiny," requires an "exceedingly persuasive justification" for sex-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

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

Response: I am not familiar with the quoted statement and therefore cannot comment on what it means. If faced with a case involving the Voting Rights Act, I will faithfully apply

Supreme Court and Sixth Circuit precedent.

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

Response: The Constitution says 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." U.S. CONST. art. I, § 9, cl. 8. The meaning of this clause is the subject of litigation currently pending in federal court. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 1:17-cv-00458-RA (S.D.N.Y. 2017). As such, I cannot comment further. Please see the response to Question 9.

15. 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."

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

Response: As a federal district judge, I am ill equipped to advise the Supreme Court on how it should treat factual findings made by Congress or the lower courts. If confirmed to the Sixth Circuit, I will faithfully follow *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and all other binding precedent.

16. 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"?

Response: The Thirteenth, Fourteenth, and Fifteenth Amendments each grant Congress the power "to enforce [the Amendment] by appropriate legislation." If an active case or controversy challenging Congress's legislation in this area comes before me, I will faithfully follow any relevant Supreme Court and Sixth Circuit precedent interpreting that power.

17. 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."

Do you believe the Constitution protects that personal autonomy as a fundamental right?

Response: *Lawrence v. Texas*, 539 U.S. 558 (2003), is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge and, if confirmed, as a circuit judge.

18. 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.

> 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?

Response: For lower-court judges, the command to follow Supreme Court precedent is inexorable, and it does not vary depending on the nature of the legal question in a case. I will follow all Sixth Circuit precedent unless it is contrary to an intervening Supreme Court decision or unless the Sixth Circuit, sitting en banc, has overruled it. Please also see the response to Question 8 from Senator Grassley and Question 10(a) from Senator Feinstein.

19. 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.

> 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.

Response: I would continue to follow the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines. I would also recuse myself from all cases over which I presided as a judge in the Eastern District of Kentucky. For specific examples, I would respectfully refer you to Question 14 of my Senate Judiciary Questionnaire, where I document the numerous times that I recused sua sponte for various reasons.

20. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding 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 held 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."

> 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?

Response: The courts have historically played a vital role in providing a forum for civil-rights claims. The court is a place where "unpopular" voices can be heard and where anyone can vindicate his or her rights on an equal footing with everyone else. Indeed, judges take an oath to protect the rights of the least powerful among us just as vigilantly as those of the most powerful. I take that responsibility seriously.

21. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. 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.

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

Response: The Constitution establishes a system of checks and balances and separated powers. This system ensures accountability across all three branches of governments. Respectfully, whether exercising a particular power is important to a particular branch is for that branch to determine.

22. 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?

Response: Article I, Section 8, Clause 3 of the Constitution grants Congress the power to "regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court has issued many decisions interpreting this clause. *See*, *e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824); *United States v. Darby*, 312 U.S. 100 (1941); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 898 (1964); *Gonzales v. Raich*, 545 U.S. 1 (2005); *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Similarly, the Supreme Court has held that Section 5 of the Fourteenth Amendment is "a positive grant of legislative power" to Congress. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). I will faithfully follow the precedent of the Supreme Court.