

Senator Lindsey Graham
Dawn Johnsen Questions for the Record

1. You clearly and publicly supported the Supreme Court's decision in *Boumediene*. In *Maqaleh v. Gates*, the Department of Justice has adhered to the Bush administration's position that detainees held at Bagram airbase in Afghanistan lack the right to challenge their confinement in federal courts. Do you agree with the Department of Justice's stated position that detainees held at Bagram lack habeas corpus rights?

Answer: I have not studied this issue and do not have a position on it. If I am confirmed and if the issue were presented to OLC, I would follow the traditional OLC processes to respond, including researching the relevant facts and law and consulting with other components of the Department of Justice and with the Department of Defense and other agencies that have relevant expertise.

2. You have said of ideological conservatism and originalist constitutional interpretation—

Ideological conservatives hold themselves out as faithful and strict constructionists and argue for their chosen interpretive methodologies—principally 'textualism' and 'originalism'—as a principled search for constitutional 'truth' unrelated to particular substantive outcomes. They depict those who hold different legal views—progressives, liberals, moderates, indeed all those in the mainstream of legal thought— as unprincipled judicial activists, inappropriately driven to reach outcomes that coincide with 'policy' preferences. Conservatives effectively shift focus away from particular substantive issues on which progressives often enjoy popular support to more abstract questions of theory, such as calls for 'judicial restraint,' 'originalism,' and 'federalism,' which conservatives apply selectively to reach desired outcomes.¹

Do you believe that Chief Justice John Roberts is out of "the mainstream of legal thought?" If not, please give some examples of ideological conservatives you view as outside "the mainstream of legal thought."

Answer: I do not believe that Chief Justice John Roberts is outside the mainstream of legal thought. My intent here was not to suggest that anyone is outside the mainstream of legal thought, but to say that many who are criticized as "unprincipled judicial activists" are within the mainstream of legal thought. Although I did not draft this as artfully as ideal, I did not purport to name anyone as out of the mainstream and would not do so now.

¹ Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 Harv. L. & Pol'y Rev. 239, 241 (2007).

3. You have written that “the courts underenforce constitutional rights, and the political branches have an obligation to fill constitutional gaps and uphold rights beyond those that the Court will enforce.”²

In your estimation, which constitutional rights do the courts underenforce? Do the courts underenforce all constitutional rights, or just selected ones?

Answer: The Supreme Court has fashioned a variety of doctrines (such as deference to the judgment of the political branches, justiciability, and others) that may lead a court to underenforce constitutional rights, a subject on which there exists an expansive body of academic literature. These doctrines apply to virtually all constitutional rights. The Court has also explained that some of its substantive doctrines, such as rational-basis equal protection review, are designed to be deferential to the political branches at least in part on the theory that those branches will themselves provide enforcement of the constitutional rights in question.

4. You called the Indiana Voter ID law, which was recently upheld by the Supreme Court, “excessive and indefensible,” writing—

The point for some is that they really don't want certain kinds of people to vote, that they even feel if people won't take the ‘trouble’ to manage the logistical and financial barriers our state has erected (which pose no problem for most), then they simply don't deserve to vote. Of course, everyone is against fraud, but who really thinks this is about fraud?³

Do you agree that voter fraud can corrupt the democratic process by skewing elections? Do you believe that it is reasonable for legislatures to take steps to mitigate potential voter fraud? If, as you wrote, the Indiana Voter ID law and other similar measures are not “about fraud,” what do you think they are designed to do and what is the motivation of their proponents?

Answer: If confirmed I, of course, will apply the Supreme Court’s decision in *Crawford* whenever it is relevant to an issue before the office. That will be the extent of my involvement on the issue of Voter ID laws. I agree that where fraud exists, it clearly is legitimate and appropriate for a legislature to take steps to mitigate voter fraud in order to prevent the corrupting of the democratic process. In the short blog post from which you quote, I expressed the view that we should strive to make new voters feel welcomed and encouraged to participate in our great democracy. I noted I was reacting to stories I had heard and read in Indiana that suggested that “many, but by no means all” supporters of the Court’s decision

² Dawn Johnsen, *Post by Dawn Johnsen*, The Constitution in 2020, Nov. 26, 2004, <http://constitutionin2020.blogspot.com/2004/11/post-by-dawn-johnsen.html>.

³ Dawn Johnsen, *A View on Crawford From Indiana*, Slate, April 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/29/a-view-on-crawford-from-indiana.aspx>.

might not be bothered by the fact the law might discourage some people from voting. Again, my role at OLC would be to apply the *Crawford* decision were it ever relevant to a legal issue before the OLC, regardless of my personal views.