

Nomination of Amy Coney Barrett to the Seventh Circuit Court of Appeals
Questions for the Record
Submitted September 13, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be “originalist”? If so, what does that mean to you? If not, how would you describe your approach?

If I am confirmed, my approach to resolving a constitutional question will be first to consult Supreme Court and Seventh Circuit precedent. Where precedent applies, it controls. If precedent does not settle an issue, I would interpret the Constitution with reference to its text, history, and structure. The basic insight of originalism is that the Constitution is a law and should be interpreted like one. Thus, where the meaning of text is ascertainable, a judge must apply it.

2. At your nominations hearing, I asked you the following: “If you believe a precedent of the Supreme Court conflicts with the Constitution’s original meaning, would you follow it as a judge? Do you believe it would be unlawful for you to do so?” You responded: “I do not believe it would be unlawful, and I would follow it as a judge.”

In your forthcoming article in the Notre Dame Law Review entitled *Originalism and Stare Decisis*, you write: “[B]efore originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful – as it might be if the text’s original meaning constitutes the law and relevant precedent deviates from it.” (92 NOTRE DAME L. REV. 1921, 1925).

- a. **Do you believe it may be unlawful for a judge to follow precedent that conflicts with the Constitution’s original meaning?**

No.

- b. **If not, why did you write that adherence to precedent might be “unlawful” if judicial precedent “deviates from” the Constitution’s “original meaning”?**

As the context of the paragraph in which that quote appears makes clear, I was describing the academic debate that began in the 1980s about the relationship between originalism and stare decisis. I took no side in that debate. The essay offered a descriptive account of the debate about the relationship of originalism to stare decisis; a descriptive account of Justice Scalia’s opinions addressing stare decisis in constitutional cases; and a concluding section that identified “potential lines of inquiry” that Justice Scalia’s jurisprudence opened for scholars interested in the topic.

3. In a 2013 article, *Precedent and Jurisprudential Disagreement*, you wrote the following about precedent and the propriety of departing from it: “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.” (91 TEXAS L. REV. 1711, 1728).

a. How would you determine what your “best understanding” of the Constitution is?

See Answer to Question 1.

b. I understand your argument to mean that every justice gets to determine what the Constitution means—if that’s correct, what is the role of precedent?

I did not argue that every justice gets to determine what the Constitution means. The article in which that quotation appears defended the Supreme Court’s longstanding approach to stare decisis, which carries a strong presumption of continuity but permits overruling in limited circumstances. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). The sentence immediately preceding the one you quote asked: “Does the Court act lawlessly—or at least questionably—when it overrules precedent?” *See* 91 TEX. L. REV. at 1728. The answer, which begins with the sentence you quote and continues through the remainder of the paragraph, describes the position taken by the Court itself: that the Court does not act lawlessly when it overrules precedent but rather has the ability to overrule precedent in “exceptional” circumstances. *See id.* at 1728-29.

c. Do you have the same views about judges on appellate courts?

Appellate judges in our system have no authority to overrule a precedent of the Supreme Court.

d. If a Supreme Court Justice believes that a precedent of the U.S. Supreme Court conflicts with the Constitution’s original meaning, what factors should that justice use in deciding whether to vote to overturn precedent?

The Supreme Court follows well-established precedents concerning the law of stare decisis. *See, e.g., Arizona v. Gant*, 556 U.S. 332, 348-51 (2009).

4. The list of superprecedents you included in your 2013 article, *Superprecedent and Jurisprudential Disagreement*, did not include *Roe v. Wade*. At your nominations hearing, I asked you about this, as did Senator Hirono. You said that you were quoting a list from scholars and that you agreed with the list “according to the definition of superprecedent employed by those scholars.” However, you acknowledged that “if you use a different definition of superprecedent, for example, a precedent that’s more than 40 years old and that has survived multiple challenges, then I would include *Roe* on that list.”

- a. According to your testimony, you had a choice as to which definition and corresponding sources to use in writing about which Supreme Court cases constituted superprecedents. **How did you choose your definition of superprecedent for the article?**

In that article, I used the definition employed by the scholars whose arguments I was addressing. *See Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1734 (citing Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Richard H. Fallon, Jr., Keynote Address, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008); and Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006)). That was the relevant definition in the context in which I wrote.

- b. **In the course of writing the article, were you aware of scholarship defining *Roe* as superprecedent? If so, how did you make the decision to decline those sources in favor of the ones you relied upon?**

I don't recall whether I was aware of scholarship defining *Roe* as superprecedent in the course of writing that article. The article was about the law of stare decisis generally, and my research focused on the sources I dealt with in the article.

5. In your article *Stare Decisis and Due Process* (2003), you argue that adherence to judicial precedent can in certain circumstances violate the due process rights of litigants. You write, for instance, that when adherence to precedent "effectively forecloses a litigant from meaningfully urging error-correction," then "stare decisis unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims." (*Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1013).

- a. **Please list some examples where following precedent "unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims."**

The article discusses some cases in which courts have so held. *See, e.g., Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897 (D.C. Cir. 1997); *Colby v. J.C. Penney Co.*, 811 F.2d 1119 (7th Cir. 1987).

- b. **If confirmed as a judge on the Seventh Circuit, would you balance your adherence to precedent with the due process rights of litigants? If so, how?**

If I am confirmed, I will faithfully follow all Supreme Court and Seventh Circuit precedent, consistent with the circuit's doctrine of stare decisis.

Your argument that litigants may well have due process rights not to be subject to stare decisis seems to encourage a continual re-litigation of settled issues. In fact, your article was recently cited in a Fifth Circuit amicus brief in support of an argument that the

circuit court should not be bound by its very recent decision in a substantially similar case. (Amicus Brief of 42 Members of Congress as Amici Curiae in Support of Defendants- Appellants, *Planned Parenthood of Greater Texas v. Smith*, Case 17-50282, 5th Cir., Aug. 14, 2017).

- c. Are you concerned that your argument could harm the stability of the law and the value of precedent? How does your argument impact reliance interests?**

My role as an academic was to stand outside of the system and to provoke students of the law to think hard about how the system works. Sometimes that involves critiques of the system. A judge, by contrast, operates within the system, and her duty is to apply the law as it exists. If I am confirmed, I will faithfully and impartially apply the law as it exists, in accordance with the judicial oath.

6. In February 2012, you signed onto a “statement of protest,” organized by the Becket Fund for Religious Liberty, against the accommodation that the Obama Administration created to the contraceptive coverage requirement in the Affordable Care Act (ACA).

The statement you signed read in part that the “so-called ‘accommodation’ changes nothing of moral substance and fails to remove the assault on religious liberty and the rights of conscience which gave rise to the controversy. It is certainly no compromise. . . Under the new rule, the government still coerces religious institutions and individuals to purchase insurance policies that include the very same services.”

- a. If confirmed, will you commit to recusing yourself from this litigation, since this is an ongoing legal issue on which you have already taken a public position?**

If I am confirmed, I will fully and faithfully apply the law of recusal, including 28 U.S.C. § 455 and the Code of Conduct for United States Judges. In any case in which the law requires me to recuse, I will do so.

- b. Where another constitutional right conflicts with the free exercise of religion, if confirmed, how would you as a judge go about resolving that conflict?**

If I am confirmed and such a question comes before me in the context of a case or controversy, I would resolve that issue as I would any other—by engaging in the judicial process, which includes examining the facts, reading the briefs, conducting necessary research, listening to the arguments of litigants, discussing the matter with colleagues, and writing and/or reading opinions.

- c. The Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples have a constitutionally-protected right to marry. If a state or local government**

official refused to issue a marriage license to a same-sex couple because that official said that doing so would violate their religious liberty, whose rights should prevail? How would you go about evaluating that issue?

See Answer to Question 6b.

7. During your nominations hearing, you were asked a number of questions about the 1998 article you co-authored, *Catholic Judges in Capital Cases*. You testified that the “article addressed a very narrow question. It actually addressed the obligation – or how a conscientious objector to the death penalty who was a trial judge – would proceed if the law required that judge to enter the order of execution. It did not address even the obligations – we did not draw any conclusions – about how an appellate judge who is a conscientious objector should behave.”

Your article, however, does address how conscientious objector appellate judges should approach capital cases. For instance, you wrote that “[a]ppellate review of a death sentence is not . . . a case of formal cooperation. This does not mean that it is all right. Whatever might be the legal significance of an affirmance, it probably looks to most people like an endorsement of the sentence. This can cause scandal, leading others into sin Considerations like this make it exceedingly difficult to pass moral judgment on the appellate review of sentencing. The morality of the acts which fall under that description will, it seems to us, vary from one set of circumstances to another.” (*Catholic Judges in Capital Cases*, 91 MARQUETTE L. REV. 303, 328-29).

You also addressed whether appellate judges should recuse themselves in capital cases that come before them on appeal: “Recusal problems on appeal are like those at the guilt phase, though they are not identical. From a moral point of view deciding an appeal is an act of material cooperation, not formal, and one where it is difficult to say what outcome is morally preferable. The issue is especially difficult in cases where the judge is asked to review the death sentence itself. Unless he intervenes the defendant will die. And his act of affirming, whatever its legal significance might be, looks a lot like approval of the sentence. Conscientious Catholic judges might have more trouble with cases like these than they would at trial. . . . If one cannot in conscience affirm a death sentence the proper response is to recuse oneself.” (*Catholic Judges in Capital Cases*, 91 MARQUETTE L. REV. 303, 341-42).

- a. **If confirmed as a judge on the Seventh Circuit, you may sit on a panel of appellate judges asked to review a capital sentence. Do you believe that you “in conscience [could] affirm a death sentence”? Do you believe that you “in conscience” could deny a stay of execution?**

As I said at my confirmation hearing, I cannot think of any cases or category of cases, including capital cases, in which I would feel obliged to recuse on grounds of conscience if confirmed as a judge on the Seventh Circuit. As I also stated at my confirmation hearing, I participated in capital cases as a law clerk to Justice Scalia, including in the common circumstance where the law afforded no relief from the sentence.

8. During your hearing before this Committee, Chairman Grassley asked how, if you were confirmed, you would decide whether you needed to recuse yourself from a case. You testified: “I can’t think of any cases or category of cases in which I would feel obliged to recuse on the grounds of conscience.” A little while later, Senator Hirono asked “If you were not up for a circuit court but a district court [position], would you recuse yourself as a Catholic judge from death penalty cases?” You replied: “If I were being considered for a trial court, I would recuse myself and not actually enter the order of execution.”

- a. From your perspective and the perspective of the article you co-authored, what is the difference between a trial court judge entering an order of execution and an appellate judge affirming a death sentence or denying a stay of execution?**

The article discusses these topics at pages 320-31. As I stated at my confirmation hearing, I co-wrote this article with one of my professors twenty years ago, during my third year of law school. As I also stated at my hearing, I cannot say that this article, in its every particular, captures how I would think about these questions if I revisited them today, with twenty more years of experience. But I continue to subscribe to the article’s core point that a judge may never twist the law to align it with her personal convictions, no matter how deeply held they may be.

- b. Your article *Catholic Judges in Capital Cases* also states “The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.” Besides recusing yourself from entering orders of execution as a trial court judge, are there other circumstances where you believe you would have a moral obligation to recuse from certain judicial proceedings, if you had been appointed to a different judgeship? For example, do you also believe you would need to recuse yourself from participating in judicial bypass proceedings for minors seeking abortions, had you been nominated to serve on a court that heard such claims?**

I have not had occasion to consider that question. If I am confirmed to the court for which I have been nominated, I will fully and faithfully apply the law of recusal, including 28 U.S.C. § 455 and the Code of Conduct for United States Judges. In any case in which the law requires me to recuse, I will do so.

- c. If not, why not? From your perspective—and I am asking only about what your personal approach would be—what is the difference between a case involving the death penalty and a case involving abortion, and what is the difference between a trial court judge and an appellate judge reviewing cases that present these issues?**

See Answer to Question 8b.

9. In *Catholic Judges in Capital Cases*, you wrote: “Judges cannot – nor should they try to – align our legal system with the Church’s moral teaching whenever the two diverge. They should, however, conform their own behavior to the Church’s standard. Perhaps their good example will have some effect.” (*Catholic Judges in Capital Cases*, 91 MARQUETTE L. REV. 303, 350). **What did you mean when you wrote that a judge should “conform their own behavior to the Church’s standard”?**

That passage makes clear the distinction between a judge’s official duty of resolving cases, in which the judge’s personal moral code can have no role, and the judge’s personal life, in which it should. The sentence you quote indicates that judges should live their own lives, as people, consistently with their own moral code. I would think that is something all judges—indeed, all people—seek to do.

10. In *Catholic Judges in Capital Cases*, you wrote: “Justice Brennan took a similar position during his confirmation hearings in 1957, when he was asked whether he could abide by his oath in cases where ‘matters of faith and morals’ got mixed with ‘matters of law and justice.’ He said: ‘Senator, [I took my] oath just as unreservedly as I know you did...And...there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.’ We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.” **What did you mean when you said that you “do not defend” Justice Brennan’s position as the “proper response for a Catholic judge to take with respect to abortion or the death penalty”?**

The article expressed no view about the merits of Justice Brennan’s statement. It quoted him in the course of discussing whether a judge could be disqualified under 28 U.S.C. § 455(a), which requires disqualification “in any proceeding in which [the judge’s] impartiality might reasonably be questioned,” from participating in a capital case merely because he or she was Catholic.

11. At your hearing, Senator Franken questioned you about speeches you gave to the Blackstone Legal Fellowship Program. As Senator Franken noted, that program is sponsored by the Alliance Defending Freedom, which the Southern Poverty Law Center has called “a legal advocacy and training group that specializes in supporting the recriminalization of homosexuality abroad, ending same-sex marriage, and generally making life as difficult as possible for LGBT communities in the U.S. and internationally.”

- a. At the time you spoke at the Blackstone Legal Fellowship Program, did you know about the Alliance Defending Freedom’s support to end same-sex marriage and recriminalize homosexuality abroad?**

At the time I gave a lecture at the Blackstone Legal Fellowship Program, I was generally aware that the program supported a traditional view of marriage. I did not know what positions the

Alliance Defending Freedom took in litigation or as a matter of public policy, and if the Alliance Defending Freedom was working to end same-sex marriage or recriminalize homosexuality abroad, I did not know it. I do not know even now whether the Southern Poverty Law Center's characterization of the Alliance Defending Freedom's position on these issues or any other is accurate. As I stated at the hearing, I understand its characterization to be a matter of public controversy.

b. If you are confirmed, what will you do to ensure that LGBT litigants appearing before you can have confidence that you will treat them impartially?

If confirmed, I will treat all litigants impartially and in accordance with my oath to “administer justice without respect to persons, and do equal right to the poor and to the rich,” and “faithfully and impartially discharge and perform all the duties incumbent upon me as a judge under the Constitution and laws of the United States.” 28 U.S.C. § 453.

12. The Civil Rights Division of the Department of Justice had a long-running lawsuit against Sheriff Joe Arpaio after finding that the Maricopa County Sheriff's Office had engaged in systematic, unconstitutional racial profiling of Latinos. The Division was also part of a lawsuit that resulted in a federal judge holding Sheriff Arpaio in criminal contempt for failing to comply with a federal court order. As you no doubt know, President Trump recently pardoned Sheriff Arpaio.

a. In general, do you believe that complying with federal court orders is important for the rule of law?

Yes.

b. What message do you think the President's pardon of Arpaio sends to judges? To law enforcement officers? To other officers of the court and legal practitioners?

This is a political issue about which I cannot ethically opine. *See* Canon 5, Code of Conduct for United States Judges; *see also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

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

I received the questions on the evening of Wednesday, September 15, 2017. After reviewing the questions, I drafted answers, conducting research where necessary. I shared the answers with the Office of Legal Policy at the Department of Justice. After conferring with lawyers there, I made revisions and authorized them to submit the responses on my behalf.