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

QUESTIONS FROM SENATOR WHITEHOUSE

1. In response to a question from Senator Hirono at your confirmation hearing, you explained that you agreed with the list of "superprecedents" that you presented in *Precedent and Jurisprudential Disagreement*, a 2013 piece in the *Texas Law Review*, based on that particular definition used. In that article, you describe "superprecedents" as "decisions that no serious person would propose to undo even if they are wrong." What, if anything, would you change about the particular definition of "superprecedents" you used in that 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.

a. Under your definition, what are some examples of a superprecedent?

That article used a definition articulated by other scholars, as well as the examples they offered. *See Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1734 (explaining that scholars consider *Marbury v. Madison*, *Martin v. Hunter's Lessee*, *Helvering v. Davis*, the *Legal Tender Cases*, *Mapp v. Ohio*, *Brown v. Board of Education*, and *the Civil Rights Cases* to be superprecedents).

b. Under your definition, what are some examples of a Supreme Court case that is not a superprecedent?

I have neither offered my own definition of superpredecent nor undertaken an independent analysis of whether any particular case qualifies as a superprecedent under the definition employed by the scholars whose work I cited.

c. As several legal historians have written, opponents of racial desegregation tried to block and limit *Brown v. Board of Education* for decades after the decision. In your view, was *Brown* a superprecedent from the moment it was decided? When, if ever, did *Brown* become a superprecedent?

I have not undertaken an independent analysis of whether any particular case qualifies as a superprecedent under the definition employed by the scholars whose work I cited. *Brown v. Board of Education* is clearly a landmark precedent of the Supreme Court binding on all courts of appeals.

d. Would you describe any of the landmark LGBTQ rights decisions as superprecedents, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (declaring that the Fourteenth Amendment requires every state to perform and recognize marriages between individuals of the same sex); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating federal definition of marriage as a union of one man and one woman under Fifth Amendment's Due Process Clause); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state ban on same- sex sodomy under Fourteenth Amendment's Due Process Clause); and *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment barring protected status for gays, lesbians, or bisexuals under Fourteenth Amendment's Equal Protection Clause)?

See Answer to Question 1c.

e. At your confirmation hearing, you testified that "I have not said that judges should not be bound by *stare decisis*." But you have written that you "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." And you have written that "Whatever the merits of statutory *stare decisis* in the Supreme Court, the inferior courts have no sound basis for following the Supreme Court's practice."Do you think there is any conflict between this hearing testimony and these previous written statements?

There is no conflict. The first phrase that you quote—"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"—comes from my article *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013). That article 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.

The second quotation is from *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005). That article did not suggest that the courts of appeals should not be bound by stare decisis. It asked whether it made sense for the courts of appeals to give

statutory cases unusually strong precedential effect rather than the normal precedential effect they give non-statutory cases.

f. As a judge on the Seventh Circuit Court of Appeals, would you be bound by precedent of the Supreme Court? Would you be bound by Seventh Circuit precedent? Do you believe there is sound basis for the Seventh Circuit's practice of following its own precedent?

I would be absolutely bound by Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). I would also be bound by Seventh Circuit precedent, consistent with the circuit's doctrine of stare decisis. *See, e.g.*, *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005). That doctrine promotes consistency, protects reliance interests, and contributes to the actual and perceived integrity of the judicial process. *See Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052, 1065 (7th Cir. 2000).

2. At your confirmation hearing, you declined to answer numerous questions about your views on certain specific cases and legal issues, indicating that doing so would be inappropriate because it might give future litigants the impression that you would not approach an issue impartially as a judge. In your record of writings and speeches made before your nomination, however, you have freely opined on particular cases and issues. Why should those same future litigants not be concerned about your impartiality based on your pre-nomination record, just as you propose they would be based on your answers to questions at the confirmation hearing?

If confirmed, I will apply the law faithfully and impartially in accordance with the judicial oath. I will also continue to observe the Code of Conduct for United States Judges, which, in giving guidance to both judges and nominees to judicial office, cautions against making comments that could reasonably be interpreted as bias. That Code, of course, did not purport to give me guidance before I was a judicial nominee.

3. In October 2015, you signed onto a letter expressing "fidelity to and gratitude for the doctrines of the Catholic Church" that stated in part: "We give witness that the Church's teachings—on the dignity of the human person and the value of human life from conception to natural death; on the meaning of human sexuality, the significance of sexual difference and the complementarity of men and women; on openness to life and the gift of motherhood; and on marriage and family founded on the indissoluble commitment of a man and a woman—provide a sure guide to the Christian life, promote women's flourishing, and serve to protect the poor and most vulnerable among us."

a. Given your public avowal of "marriage and family founded on the indissoluble commitment of a man and a woman" and views you have articulated in your writings and in other public statements, how can you assure members of the LGBTQ community and other vulnerable groups that you are committed to rendering decisions impartially and without bias or prejudice?

Consistent with the views articulated in my writings and public statements, including my testimony at my hearing, I do not think it lawful for a judge to impose personal opinions, from whatever source they derive, upon the law. If confirmed, I will apply the law faithfully and impartially in accordance with the judicial oath.

b. As you know, the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) that, as a matter of civil law, same-sex couples are entitled to the same protections, rights and benefits of marriage as different-sex couples. Do you agree that the Church's view regarding marriage as a union between a man and a woman is irrelevant to the legal question of the right of same-sex couples to marry?

Yes.

c. In *Pavan v. Smith*, 582 U. S._____(2017), the Supreme Court summarily reversed a decision from the Arkansas Supreme Court refusing to list both members of a same-sex married couple on their child's birth certificate. Justice Gorsuch dissented from that decision, arguing that *Obergefell* did not decide the question presented in that case. What is your view?

Pavan v. Smith is binding precedent that I will faithfully follow if confirmed.

d. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court rejected religious and moral beliefs about sodomy as a justification for a law that criminalized intimate same-sex relationships. Do you agree that religious or moral beliefs cannot be the sole basis for the enactment and enforcement of criminal laws?

Lawrence v. Texas is binding precedent that I will faithfully follow if confirmed.

e. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court rejected arguments about innate differences between men and women as a justification for excluding women from enrolling in VMI. Likewise, in *Windsor* and *Obergefell*, the Supreme Court refused to credit similar arguments when offered as a justification for denying same-sex couples the protections and responsibilities of civil marriage. Is your view about "the significance of sexual difference and the complementarity of men and women" something to which you would attach legal significance? And if so, how do you reconcile that with the cases I just mentioned?

I would not attach legal significance to my personal view on any question. *United States v. Virginia*, *Windsor*, and *Obergefell* are all binding precedents that I will faithfully follow if confirmed.

4. In your 1998 article *Catholic Judges and Capital Punishment*, you describe litigants' concerns about "appearance of partiality" and a law requiring a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"

as being "public relations concerns" that are "trump[ed]" by "constitutional guarantees."

a. Do you believe that the public's confidence in a fair and impartial judiciary is essential to our legal system?

Yes. The quoted language, which addresses the question whether a litigant can successfully disqualify a judge solely because of his or her religion, is not to the contrary.

5. As discussed at your confirmation hearing, you delivered a paid speech for the Blackstone Legal Fellowship program funded by Alliance Defending Freedom (ADF). ADF has been classified as a hate group by the Southern Poverty Law Center for its advocacy against gay rights here and abroad. According to SPLC, ADF has "supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a 'homosexual agenda' will destroy Christianity and society. ADF also works to develop 'religious liberty' legislation and case law that will allow the denial of goods and services to LGBTQ people on the basis of religion.

a. You explained that you were unaware of the program's discriminatory conduct at the time you made your speech. If you had known of the program's support for anti-gay policies, would you have still provided the speech? Why or why not?

I have not undertaken to investigate the accuracy of SPLC's description of ADF's policy positions or its characterization of ADF as a hate group. As I said in my hearing, I understand that SPLC's designation of ADF as a hate group is a matter of public controversy. For my part, I would not participate in any program that advocated hatred and discrimination against any group, including LGBTQ persons.

b. Now that you have had a chance to more thoroughly familiarize yourself with ADF, do you agree with the Southern Poverty Law Center (SPLC) that ADF is a hate group? Do you agree with their efforts to criminalize homosexuality?

See Answer to Question 5a.

6. You have publicly stated your belief that "*Roe* [v. *Wade*] essentially permitted abortion on demand, and *Roe* recognizes no state interest in the life of a fetus." Do you still ascribe to these views?

The quoted language is from a report of the event in a student newspaper. I have no transcript of the event, so I have no way of verifying the accuracy of the quote. My recollection, however, is that I described *Casey*'s modification of *Roe* as it is described in *Casey* itself. As the joint opinion in *Casey* explained: "Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decisions on behalf of the potential life within her as

unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy . . . . The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." 505 U.S. at 876. *Casey*'s rejection of *Roe*'s trimester framework in favor of the "undue burden" standard permitted more state regulation of abortion.

7. You have written that abortion is "always immoral." Do you still ascribe to that view?

In *Catholic Judges in Capital Cases*, my co-author and I recounted the Catholic Church's teaching that "abortion . . . is always immoral." 81 MARQ. L. REV. 303, 316 (1998). If I am confirmed, my views on this or any other question will have no bearing on the discharge of my duties as a judge.

8. Who is a judge or justice with whom you most align your views and approach to judicial decision making?

It is difficult to identify a single judge or justice, for there are many whom I admire. Justice Antonin Scalia, for whom I clerked, is the justice I know best, and I admire the fluidity of his thought, the clarity of his writing, and his careful attention to statutory and constitutional text. I admire Chief Justice John Marshall's commitment to consensus and collegiality, which manifested itself in both the resolution of cases and his personal relationships with colleagues. I admire Justice Elena Kagan for the way in which she is able to bring the knowledge and skill she acquired as an academic to the practical resolution of disputes. And, of course, there are many other judges and justices who possess qualities I would seek to emulate if I am confirmed.

   a. In response to a question from Senator Cruz, you explained that a good appellate judge is one "who is willing to take the consequences of rulings that might be unpopular. So, one who is brave." Can you provide an example of a judge or justice who provided an unpopular decision with whom you agreed?

I admire Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). While the majority upheld Louisiana's racial segregation laws as consistent with the Fourteenth Amendment's Equal Protection Clause, Justice Harlan, in a lone dissent, refused to go along with the pernicious "separate but equal" doctrine, insisting that it was "hostile to both the spirit and letter of the constitution . . . ." It took more than 50 years for his view to prevail in *Brown v. Board of Education*, 347 U.S. 483 (1954).