

Chairman Patrick Leahy
Questions for the Record
Nomination of Michael Boggs
To Be U.S. District Judge for the Northern District of Georgia
May 20, 2014

1. **As a United States Senator, I believe that there is no greater responsibility than the one I make when I take the oath of office and affirm that I will “support and defend the Constitution of the United States.” At your hearing, in an exchange with Senator Franken, you testified that one of the differences between your role as a judge and your previous role as a legislator was that, “When I was a legislator, I did not have an obligation to be faithful to the rule of law.” Why do you believe legislators are not obligated to be faithful to the rule of law?**

Response: All government officers take oaths acknowledging an obligation to uphold the Constitution thereby representing that the rule of law is superior to the rule of persons. I did not mean to imply that legislators are above the law or not bound to the laws of our society. I simply used the term “rule of law” to differentiate the role of a judge from that of a legislator and to emphasize that members of the judiciary are particularly obligated to follow precedent and not decide cases based on popular will, unless that will is enacted through the legislative process and is consistent with the Constitution. While it is true that legislators themselves are subject to the rule of law as a constraint on their behavior, as are all citizens, I simply meant that legislators do not have the same obligations of faithfulness to precedent as judges. Legislators have discretion to make any law deemed appropriate within its powers, whereas the judiciary has a more specific and constrained duty of adherence to precedent.

2. **You testified at your hearing that your legislative votes related to the Confederate symbol on the Georgia state flag represented the will of your constituents. Given that your house district had a sizable African American constituency, did you consider their views when you voted against changing the Georgia flag? If so, what steps did you take to become aware of their views?**

Response: I considered the views of all of my constituents when I cast that vote thirteen years ago. The vote on the flag occurred with very little notice. Most of my colleagues and I were only given notice that a vote would occur just hours prior thereto and only then did we see for the first time the flag we were voting to adopt. While the issue of changing the flag was generally a topic of discussion within my legislative district at the time, I was quoted very shortly before that vote as saying that I did not think the vote would occur. As a result, there was virtually no time to speak with those within my legislative district about this issue. I did however have the occasion prior to the vote to speak with several African-American constituents, including both elected officials and members of the general public. While they generally made known their support for changing the flag, those with whom I spoke always stated that they supported me regardless of how I voted, and indeed, when I faced a challenger in my 2002 Democratic primary election, roughly one year after the flag vote, I was re-elected with 90% of the vote in my district.

3. **During your hearing, in response to Senator Hirono’s question asking whether you had ever voted your conscience against the will of your constituents while you were a state legislator, you testified that you had voted for reapportionment maps supported by Democrats but not supported by the majority of your constituents.**

- a. **Why do you believe this was a “vote of conscience” for you, as opposed to one of alignment with your political party’s interest?**

Response: For me, voting my conscience as a legislator sometimes meant casting votes contrary to what I considered to be the will of the majority of my constituents, and on other occasions voting my conscience meant casting votes contrary to what party leadership desired. I did not mean to suggest that my particular “votes of conscience” were necessarily cast only when presented with a moral choice on a public policy matter. During the majority of my legislative service, my district was rapidly changing from a majority Democratic district to a majority Republican district. Votes for the Democratic Party reapportionment maps, while very well in alignment with my party at the time, were viewed by many of my constituents as not in their best interest. However, I believed that the maps presented a reasonable compromise and were favorable to my district. For these reasons, I voted my personal conscience on that issue.

- b. **Please describe any other examples of votes you believed were based on your conscience against the will of the majority of your constituents.**

Response: While a member of the Georgia legislature I had the occasion to cast thousands of votes, some of which I am sure were based on my personal beliefs which differed from that of the majority of my constituents or were not in alignment with my political party’s interest. After ten years, I do not recall every vote I cast and do not recall any other specific examples of votes I believed were based on my conscience against the will of the majority of my constituents, although I’m sure it happened.

4. **In 2004, while a member of the Georgia legislature, you spoke on the floor in support of a resolution calling for a state constitutional amendment banning same-sex marriages. During your speech, you stated that lawmakers should be able to come together because such a ban was “commonsensical [and] premised on good conservative Christian values.” You also suggested that the significant step of amending the state constitution was warranted to protect against “the dangers we face with respect to activist judges.”**

- a. **Who do you consider to be an “activist judge”?**

Response: It would be inappropriate for me, as a sitting judge of the Court of Appeals of Georgia and a nominee for a federal district court judgeship, to express my personal opinion about whether any particular judge is “activist.” Respectfully, when I talked about activist judges in that floor speech ten years ago as a state legislator, I was referring generally to the possibility of a judge ruling that same-sex marriage

was constitutional. This issue looked different to me ten years ago when I was serving in a very different role as a state legislator than it looks now, especially after having been a judge for the last ten years. Federal judges have an obligation to apply precedent and uphold the Constitution, and if confirmed, I am committed to faithfully apply precedent whether it be *United States v. Windsor*, 133 S. Ct. 2675 (2013), *Lawrence v. Texas*, 539 U.S. 558 (2003), *Romer v. Evans*, 517 U.S. 620 (1996), or any other decision of the United States Supreme Court or the Eleventh Circuit Court of Appeals. I believe that my record as a state court judge for ten years demonstrates my commitment to precedent and to treating all litigants who appear before me fairly.

b. Was the Supreme Court “activist” when it decided *Roe v. Wade* (1973)?

Response: This case is binding precedent, and if confirmed as United States District Court Judge, I would apply this precedent and any other precedent of the United States Supreme Court and the Eleventh Circuit Court of Appeals fairly and impartially. During the entirety of my ten-year judicial career I have faithfully followed binding precedent.

c. Was Justice Kennedy an “activist” when he wrote the majority opinions in *Lawrence v. Texas*, 539 U.S. 558 (2003) or *United States v. Windsor*, 570 US 12 (2013)?

Response: These cases are binding precedent, and if confirmed as United States District Court Judge, I would apply these precedents and the binding precedent of all cases of the United States Supreme Court and the Eleventh Circuit Court of Appeals fairly and impartially. During the entirety of my ten-year judicial career I have faithfully followed binding precedent.

5. Please describe your understanding of the scope of the constitutional right to privacy. What do you believe to be the key elements of that right?

Response: The Supreme Court has stated that “[w]hile there is no ‘right of privacy’ found in any specific guarantee of the Constitution, the Court has recognized that ‘zones of privacy’ may be created by more specific constitutional guarantees and thereby impose limits upon government power. See *Roe v. Wade*, 410 U.S. 113, 152-153 (1973).” *Paul v. Davis*, 424 U.S. 693, 712-713 (1976). And, “[i]n *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are ‘fundamental’ or ‘implicit in the concept of ordered liberty’ as described in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).” *Id.* Activities that fall within this definition include “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States’ power to substantively regulate conduct.” *Id.* Privacy interests have also been found to exist in connection with the First Amendment’s protection for freedom of assembly, *Bates v. City of Little Rock*, 361 U.S. 516, 522-523 (1960), and in connection with the Fourth Amendment’s guarantee against unreasonable searches and seizures. *United States v. Jones*, 132 S. Ct. 945, 950-951 (2012). If confirmed, I would apply these precedents and all other

binding precedent of all cases of the United States Supreme Court and the Eleventh Circuit Court of Appeals on the issue of the constitutional right to privacy.

6. **At your nomination hearing, you testified about a case when you were a trial court judge, wherein the lawyer on the case told you that he had presented the case to your circuit's chief judge who refused to hear it. The case involved a woman who identified herself as a lesbian in chambers on the question of approving her adoption of a child from foster care. You testified that you heard the case and approved the adoption. Understanding that an adoption case may be sealed, I do not expect you to provide any identifying details on this case. However, can you provide me with the name and contact information of any person who can personally verify the facts of the matter as you testified to the Committee?**

Response: Due to privacy concerns, this answer was provided confidentially to the chair and ranking member.

7. **In the past several years, the Supreme Court struck down a number of federal statutes most notably several designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 521 U.S. 507 (1997), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), *Board of Trustees v. Garrett*, 531 U.S. 356 (1999), and *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012). The Supreme Court also struck down statutes as falling outside the authority granted to Congress by the Commerce Clause in the case of *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000). Similarly, a majority of the justices of the Court determined that core provisions of the Affordable Care Act were beyond the scope of the Commerce and Spending Clauses in *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012), and upheld the individual mandate under the taxing power. The Court struck down other federal statutes as violations of the 10th Amendment or the 11th Amendment, and part of a landmark Voting Rights Act, without articulating any clear basis for its unconstitutionality in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). These cases rely upon an expansive view of state's rights, and have been described as shifting powers to state governments as Congressional authority is diminished.**

- (a) **What is your view of these decisions? In your opinion, do they constitute "judicial activism"?**

Response: These cases are binding precedent, and if confirmed as United States District Court Judge, I would apply these precedents and the binding precedent of all cases of the United State Supreme Court and the Eleventh Circuit Court of Appeals fairly and impartially. During the entirety of my ten-year judicial career I have faithfully followed binding precedent.

- (b) **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, under Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment?**

Response: United States Supreme Court precedent dictates that the Commerce Clause allows congressional regulation of commerce in three broad categories. Congress may (1) “regulate the use of the channels of interstate commerce”; (2) “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and, (3) “regulate those activities having a substantial relation to interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-559 (1995); *see also United States v. Morrison*, 529 U.S. 598, 609 (2000).

“Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in Section 1 by enacting appropriate legislation. Congress is not limited to mere legislative repetition of th[e Supreme] Court’s constitutional jurisprudence. Rather, Congress’ power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (internal citations and quotation marks omitted.)

“[Section] 2 of the Fifteenth Amendment expressly declares that Congress shall have power to enforce this article by appropriate legislation. By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in Section 1. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. *South Carolina v. Katzenbach*, 383 U.S. 301, 325-326 (1966) (internal quotations omitted.) *See also Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Therefore, “in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.” *Katzenbach, supra*.

If confirmed, I am committed to follow binding precedent from the United States Supreme Court and the Eleventh Circuit in analyzing the scope of congressional power under Article I of the Constitution.

8. **Canon 7 in the Georgia Code of Judicial Conduct states that Judges shall refrain from political activity inappropriate to their judicial office, specifically that a judge or a candidate for public election to judicial office shall not publicly endorse a candidate for public office or make a contribution to a political organization. At your nomination hearing you confirmed in your testimony that you made a contribution to Georgia Conservatives in Action in September of 2012. Did you also make an earlier contribution in April 2012 to the same group for \$1,000?**

Response: Yes. I am very respectful and mindful of the obligations of judges pursuant to the Georgia Code of Judicial Conduct and throughout my ten-year judicial career have endeavored to be faithful to and exceed my legal obligations pursuant thereto. During my entire judicial career, I have never publicly endorsed any candidate for public office nor made a contribution to a “political organization” as that term is defined by the Georgia Code of Judicial Conduct.

9. **You testified that at the time you made your contribution to Georgia Conservatives in Action in 2012 you had no knowledge that this organization sponsored or endorsed candidates for public office. A quick Google search reveals that in December of 2011, Georgia Conservatives in Action publicly endorsed Chris Vaughn for U.S. Congress and issued a corresponding press release and in 2010, Georgia Conservatives in Action publicly endorsed Nathan Deal in the Georgia GOP Gubernatorial Runoff.**

- a. **What due diligence did you exercise in advance of contributing \$2500 to Georgia Conservatives in Action?**

Response: In exercising due diligence prior to my former campaign committee's donations, I reviewed the pertinent section of the Code of Judicial Conduct defining "political organization" and reviewed Georgia statutory authority regarding the disposition of campaign contributions, paying particular attention to O.C.G.A. § 21-5-33 (b)(1)(a), which expressly permitted contributions to a nonprofit organization. I also spoke personally with the representative of the organization who solicited the contributions and verified that the organization was duly incorporated as a nonprofit "social welfare" organization under Section 501(c)(4) of the Internal Revenue Code. As such, I was aware that the organization was an entity that was "primarily engaged in promoting in some way the common good and general welfare of the people of the community," *see* 26 C.F.R. Section 1.501(c)(4)-1(a)(2), and that they did not meet the definition of a "political organization" under the Code of Judicial Conduct. I was also aware that 501(c)(4) organizations were permitted to endorse candidates under the tax code. That I was familiar with the organization's tax exempt status at the time, is evidenced by my notation of "501 C4 Donation" on the April 6, 2012 check and my notation of "nonprofit contribution per: O.C.G.A. § 21-5-33(b)(1)(A)" on the September 27, 2012 check.

- b. **How did you come to be associated with this organization?**

Response: I have personally known the co-founders of this organization for nearly fifteen years – well before the existence of GCIA, which was incorporated as a Georgia nonprofit corporation in 2009. I have known them to be active in local and state government public policy matters, educating the public on matters of public policy and encouraging others to help them in advocating for issues of importance to them and to South Georgia. The Mission Statement of GCIA is to "educate, motivate and activate grass roots conservatives to have an effective voice in government," and that is what I understood the group to do.

- c. **What Georgia Conservatives in Action events or fundraisers did you attend as a sitting judge or candidate for judge?**

Response: To the best of my recollection, I attended the organization's Economic Development Summit in Waycross, Georgia in April of 2012 and the organization's meeting in Waycross, Georgia in October of 2010 where Wayne LaPierre spoke on "Defending America's Future." The organization's co-founders have personally

informed me that these events were not fundraisers. There may have been other events that I attended that I do not recall, although I have checked with the organization and they have no records of my attendance at any other GCIA events.

d. Why did you decide to financially support Georgia Conservatives in Action?

Response: One of the organization's co-founders asked if I could make two corporate donations to this organization to help with the costs associated with two specific events.

10. According to Canon 2 of the Code of Conduct for United States Judges, "A judge should avoid impropriety and the appearance of impropriety in all activities."

a. In 2012, as a sitting state appellate court judge, did you attend a fundraiser in support of Tyler Harper, then-candidate for State Senate from Georgia's 7th District?

Response: Yes.

b. Do you think your attendance may have given the appearance of an endorsement for then candidate Tyler Harper?

Response: In January of 2012, I attended a fundraiser for State Senator-elect Tyler Harper. At the time I attended, I fully intended to run for re-election to the Court of Appeals. Therefore, I was authorized to attend this event or any fundraiser for any other political candidate and did so with a full understanding that the attendance was authorized by the Code of Judicial Conduct and the Advisory Opinions stated therein.

Specifically, Canon 7(A)(2) of the Georgia Code of Judicial Conduct provides that "[j]udges holding an office filled by public election between competing candidates, or candidates for such office, may attend political gatherings and speak to such gatherings on their own behalf when they are candidates for election or re-election." Relying in part on this provision, the Judicial Qualifications Commission has ruled in a number of Advisory Opinions that elected judges and judicial candidates may attend fundraisers for partisan candidates. *See, e.g.*, Opinion No. 90 (October 24, 1986) (judicial candidate may attend fundraisers for partisan candidates); Opinion No. 124 (July 29, 1988) (if a judge has made the decision to run for election or re-election to office, he is a candidate and thus may attend a fundraising event for a partisan, non-judicial candidate if he is acting on his own behalf and the purpose of his attendance is to encourage individuals to vote for him in a future election); Opinion No. 203 (Dec. 15, 1995) (in attending a fundraising event for another candidate, a judge is not making a prohibited public endorsement) adding that "[t]he Commission makes this determination in recognition of the fact that most judges in this state must themselves periodically seek election to public office, and any other conclusion might be viewed as an unreasonable and unnecessary burden on the political process."

I am confident that my participation in attending fundraisers for any partisan or nonpartisan candidate while I have been a judge does not constitute a public endorsement of a candidate for public office in violation of Canon 7A. This conclusion is expressly supported by the provisions of Canon 7A(2) of the Georgia Code of Judicial Conduct and Advisory Opinion No. 203 (Dec. 15, 1995).

- c. Do you believe your attendance at a candidate fundraising event would avoid “the appearance of impropriety in all activities” under the Federal Code of Conduct?**

Response: It would not. It would also violate Canon 5 of the Code of Conduct for United States Judges, which prohibits attendance at a dinner or other event sponsored by a political organization or candidate. While I currently abide strictly by the Georgia Code of Judicial Conduct, which expressly permits attendance at fundraisers in recognition of the fact that judges in Georgia are elected, if confirmed, I would abide strictly by the Code of Conduct for United States Judges.

- d. Do you believe your attendance at a candidate’s political fundraiser would comply with the spirit of the Code of Conduct?**

Response: As noted above, it would not comply with the spirit or with the letter of Canon 5 of the Code of Conduct for United States Judges, while it does comply with the Georgia Code of Judicial Conduct. If confirmed, I would abide strictly with the letter and spirit of the Code of Conduct for United States Judges.

- e. Have you attended any other fundraisers while serving as a judge, running for election as a judge or since you have been nominated to be a federal judge?**

Response: As expressly permitted by the Georgia Code of Judicial Conduct, I have periodically attended various partisan and nonpartisan candidate fundraisers throughout my ten-year judicial career. I have not done this regularly. Since I was nominated to be a federal judge, I attended one fundraiser for a candidate running in a nonpartisan election for Superior Court Judge in Atlanta. In each instance, I fully and strictly complied with the Georgia Code of Judicial Conduct and the Judicial Qualifications Commission Advisory Opinions which authorize judges to attend fundraisers.