

Questions for the Record
Senator Mazie K. Hirono
September 13, 2017

Questions for Joan Larsen, Nominee to the Sixth Circuit

1. In your article, “Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury,” you lay out your understanding of originalism in making an argument for the return of the Founder’s original understanding of the legal authority of juries. As you describe it, that original role of juries has been altered and truncated in accordance with “contemporary public understandings” like “predictability, uniformity, transparency, and equality, none of which,” you admit, “is likely to result from jury justice.” Yet, despite these contemporary values embodied in the changes to the jury system over the centuries, you argue for a return to the original understanding and describe originalism’s “only enemy is change imposed by judges.”

- a. Could you explain your approach to the Constitution and understanding of originalism?

The article to which this question refers did not advocate a return to the original jury but instead explored what it might mean if the Supreme Court were to mandate a return to the original jury. If a case came before me implicating the scope of the constitutional right to jury trial, I would carefully consider the constitutional text and structure, the parties’ briefs and arguments, and the precedent of the Supreme Court and the Sixth Circuit. For a discussion of my approach to the Constitution and understanding of originalism, please see my response to Question 6 from Senator Feinstein.

- b. In light of your defense of originalism and your criticism of judicial interpretations of the Constitution, how can you assure us that you understand that the Constitution protects the right to make “intimate and personal choices” like a woman’s choice to terminate her pregnancy?

The Supreme Court has held repeatedly that the Constitution protects a woman’s decision to terminate her pregnancy. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Roe* and *Casey* are precedents of the Supreme Court, and I will faithfully follow them and all other Supreme Court precedent.

- c. How would your understanding and defense of originalism impact your interpretation of laws enacted by Congress like the Voting Rights Act to protect the right of all Americans to vote regardless of race?

If a case came before me implicating the Voting Rights Act or the right to vote, I would consider the text of the statute, the relevant constitutional provisions, the parties’ briefs and arguments, and the binding precedent of the Supreme Court, and, if I am confirmed, the precedent of the Sixth Circuit. I would faithfully apply the law to the facts at issue in the case.

- d. How would your understanding and defense of originalism impact your review of restrictions on the right to vote enacted by states with a discriminatory purpose or effect?

If a case came before me challenging state-imposed restrictions on the right to vote, I would consider the text of any relevant constitutional or statutory provisions, the parties' briefs and arguments, and the binding precedent of the Supreme Court and, if I am confirmed, the precedent of the Sixth Circuit. I would faithfully apply the law to the facts at issue in the case.

2. Over the years, you have been critical of legal protections for LGBTQ rights. In a 2012 speech to a Federalist Society chapter, you criticized the Obama Justice Department's refusal to defend the Defense of Marriage Act (DOMA). You criticized the Supreme Court's decision in *Lawrence v. Texas*, which struck down a Texas law banning consenting adults from engaging in homosexual sex acts, for its reliance on international law, which you described as "alarm[ing]." And in 2016 as a member of the Michigan Supreme Court, you refused to give the Supreme Court's same sex marriage decision, *Obergefell v. Hodges*, its full effect when you refused to review a lower court decision that had denied parental visitation rights to a lesbian mother who would have been married to her ex-spouse but was unconstitutionally prohibited from doing so prior to *Obergefell*. I want to ask you about *Obergefell*. How would an originalist who opposed the decision in *Obergefell* square the denial of marriage to people of the same sex with the text of the Constitution, specifically the Due Process and the Equal Protections clauses of the Fourteenth Amendment?

With respect to the 2012 speech referenced in the question, please see my response to Question 4 from Senator Feinstein and my response to Question 8 from Senator Whitehouse. With respect to the 2004 article referenced in the question, please see my response to Question 7 from Senator Whitehouse. With respect to the order denying leave to appeal in *Mabry v. Mabry* referenced in the question, please see my response to Question 17 from Senator Feinstein.

There is considerable debate, even among originalists, about how originalism should operate in general and how it should apply in any particular case. *Obergefell v. Hodges* is a precedent of the Supreme Court that binds me as a Justice of the Michigan Supreme Court and would bind me if I were confirmed to the Sixth Circuit. My duty and commitment to follow Supreme Court precedent does not and would not depend upon whether a precedent comports with any particular theory of constitutional interpretation.

3. Are there any beliefs you hold, religious or otherwise, that would prevent you from participating and ruling on any part of any type of case that could come before on the circuit court? Would your criticism of LGBTQ Americans, same-sex marriage and adoption play any part in your ability to rule fairly on these cases?

I do not believe I have any personal beliefs that would prevent me from participating in or ruling on a case that could come before me either as a Justice of the Michigan Supreme Court or, if confirmed, as circuit judge. In the unlikely event that such a circumstance would present itself, I would apply the recusal standards set forth in Michigan law or, if confirmed, the Code of Conduct for United States Judges and 28 U.S.C. § 455. I disagree with the premise of the second

question. Throughout my career, I have been guided by the principle that all people are entitled to dignity, respect, and equal treatment under law, whether in the classroom, in my chambers, or in the courtroom. Further, my duty as a Justice of the Michigan Supreme Court is to apply the law fully and faithfully, administering justice without respect to persons, and that would continue to be my duty if I were confirmed to the circuit court.