

**Nomination of John Nalbandian
to the U.S. Court of Appeals for the Sixth Circuit
Questions for the Record
Submitted March 14, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper role of precedent.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

It is never appropriate for lower courts to depart from Supreme Court precedent.

b. When, in your view, is it appropriate for a circuit court to overturn its own precedent?

One panel of the Sixth Circuit may not overrule a prior panel decision. *See, e.g., United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (“One panel of this court may not overrule the decision of another panel”); 6th Cir. R. 32.1(b). Within the circuit, only the *en banc* court may overrule a prior panel. *Ferguson*, 868 F.3d at 515. I would be bound to follow these rules as a circuit judge.

c. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

As a lower court nominee, it would be inappropriate for me to comment on what circumstances might justify the Supreme Court overturning its own precedent. The Supreme Court has the “prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)

2. Many conservative judges and legal scholars believe that the Constitution should be interpreted consistent with its “original meaning”—in other words, the meaning it had at the time it was enacted.

a. With respect to constitutional interpretation, do you believe judges should rely on the “original meaning” of the constitution?

If confirmed, I would be bound by the precedent of the Supreme Court and the Sixth Circuit. In many instances, the Supreme Court has indicated that the Constitution should be interpreted according to its original public meaning. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 581-87 (2008) (interpreting the terms “Arms,” “keep,” and “bear” using founding-era sources); *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004) (interpreting the Sixth Amendment’s Confrontation Clause according to founding-era understanding of English common law). Where the Supreme Court has interpreted constitutional provisions by discerning their original public meaning, I would fully and faithfully follow those precedents.

b. How do you decide when the Constitution’s “original meaning” should be controlling?

I would be bound by and would follow the precedent of the Supreme Court with respect to “original meaning” and in all other respects. In general, in deciding any case, I would consider the arguments of the parties and all applicable laws and precedents in light of the specific facts of the case.

c. Does the “original meaning” of the Constitution justify a constitutional right to same-sex marriage?

The Supreme Court recognized that a constitutional right to same-sex marriage exists in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (the Fourteenth Amendment “does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex”). I would follow *Obergefell* as I would follow all other binding precedent of the Supreme Court.

d. Does the “original meaning” of the Constitution explain the right to marry persons of a different race recognized by the Court in *Loving v. Virginia*?

In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held that the Fourteenth Amendment prohibited states from restricting the right to marry based on race. I would follow *Loving* as I would all other binding precedent of the Supreme Court.

e. In your nominations hearing, you said that, in interpreting the Equal Protection or Due Process clauses, modern-day originalists would ask “what is the value or the principle that’s embodied by the words ‘equal protection,’ ‘due process of law.’” What is the value or principle embodied in “equal protection” and “due process of law,” and how do those values or principles apply to groups that the Framers of those amendments might not have had in mind, such as women or LGBT individuals?

The Supreme Court has held that gender-based classifications are subject to heightened scrutiny under the Fourteenth Amendment. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976). The Supreme Court has held that the Fourteenth Amendment protects a liberty interest in private consensual adult sexual conduct. *Lawrence v. Texas*, 539 U.S. 558 (2003). The Supreme Court has also held that the Fourteenth Amendment protects the fundamental right of same-sex couples to marry. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I would follow these binding precedents from the Supreme Court as I would all other binding precedent of the Supreme Court.

3. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A textbook on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to

overturn it. The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? “superprecedent”?
The Supreme Court’s decision in *Roe v. Wade* is precedent of the Supreme Court that I will be bound to apply faithfully and to the best of my ability. For lower court judges, it does not matter whether a Supreme Court decision is labeled “super-stare decisis,” “superprecedent,” or just “precedent,” it is binding on those lower courts.

b. Is it settled law?

Roe v. Wade is binding precedent of the Supreme Court and I will follow it faithfully.

4. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Obergefell is binding precedent of the Supreme Court and I will follow it faithfully

5. During your nominations hearing, you told Senator Blumenthal that you believe that *Brown v. Board of Education* and *Loving v. Virginia* were correctly decided. You said that you answered as to whether those cases were “correctly” decided because you believe those cases are “longstanding precedents” that are “well accepted.” But you refused to answer whether *Roe v. Wade* was “correctly” decided.

a. *Roe v. Wade* was decided six years after *Loving*. How is *Loving* a “longstanding precedent” of the Supreme Court but *Roe* is not?

As a circuit nominee and possible circuit judge, it would be inappropriate for me to opine on questions that might arise in cases that could come before me. I declined to answer whether *Roe v. Wade* was correctly decided because legal controversies over abortion continue to be litigated in the lower courts, including the Sixth Circuit and courts within the Sixth Circuit. See, e.g., *Brinkman v. EMW Women’s Surgical Center, P.S.C.*, No. 17-6151 (6th Cir.); *EMW Women’s Surgical Center, P.S.C. v. Beshear*, 17-6183 (6th Cir.); *EMW Women’s Surgical Center, P.S.C. v. Glisson*, 17-cv-00189-GNS (W.D. Ky.); *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898 (S.D. Ohio 2016); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007); *Cincinnati Women’s Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006). Those controversies could come before me. I do not believe that there are similar, contemporary controversies regarding racial segregation and interracial marriage.

b. The holding in *Roe v. Wade* has been reaffirmed more than three dozen times. How is *Roe* not “well accepted,” compared to *Brown* or *Loving*?

Please see response to No. 5(a) above. In addition, as a circuit judge, I would be bound to follow and would faithfully follow *Roe*, *Brown*, and *Loving* as Supreme Court

precedent.

c. You also testified that the issues decided in *Roe* are “still subject to developing case law.” But in 2015 in *Obergefell v. Hodges*, the Supreme Court cited *Loving* repeatedly in support of its holding that same-sex couples have a constitutional right to marry. How are the issues decided in *Roe* “still subject to developing case law” but the issues decided in *Loving* are not?

Please see response to No. 5(a) above. The question of legal bans on interracial marriage is not subject to contemporary debate and is unlikely to arise in any case before me.

6. In 2008, you filed an amicus brief in the Supreme Court in *Crawford v. Marion County Election Board*. In that brief, you argued that Indiana’s voter-identification law did not suppress voter turnout.

a. On what evidentiary basis did you come to that conclusion?

My clients’ positions in its amicus brief are set forth in full in that brief. The brief cited social science studies in support of its position regarding the impact of the law at issue in *Crawford*. The Supreme Court upheld the Indiana law by a 6-3 vote.

b. Can voter-identification laws impose a significant burden on voting? Can they suppress voter turnout?

As a circuit court judge, I would be duty bound to follow the precedent of the Supreme Court, including *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), regarding voter-identification laws and Supreme Court cases regarding voting rights generally. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992). In any case involving voter-identification laws, I would evaluate the arguments of the parties in light of applicable law and precedents and the specific facts of the case. The facts my client relied on in its amicus brief would not affect how I review a case involving voter-identification laws, if one were to come before me.

7. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

a. Do you agree with Justice Stevens? Why or why not?

The Supreme Court’s decision in *Heller* is binding precedent that I would be bound to follow as a circuit judge. My personal views and opinions about any Supreme Court decision or dissenting opinion are not relevant to my role as a circuit judge.

b. Did *Heller* leave room for common-sense gun regulation?

The Supreme Court in *Heller* held that the Second Amendment protects a right for private individuals to keep basic firearms for self-defense. It also explained that “nothing in this opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). I would apply *Heller* faithfully.

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

It would be inappropriate for me to express a personal opinion regarding the *Heller* decision. It is binding precedent that I would faithfully follow to the best of my ability.

8. It has been reported that Brett Talley, who was nominated to a vacancy on the U.S. District Court for the Middle District of Alabama but later withdrew his nomination, did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

Without disclosing specific advice by any attorneys, my understanding was that I was to disclose responsive materials, including online materials, truthfully and to the best of my abilities.

b. Did anyone at the Department of Justice or the White House advise you that you did not need to disclose certain material, including material “published only on the Internet,” as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

No.

c. Have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

No.

d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any

steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

I believe that once I became aware that I was under consideration for a federal judgeship, I took some steps on social media to strengthen existing privacy controls on my private Twitter and Instagram accounts. I do not use those accounts to post public commentary under my own name or a pseudonym regarding legal, political, or social issues.

9. You indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 1991, you have been on the Board of Advisors for the Cincinnati Lawyers Chapter since 2010, and you served as the President of the Cincinnati Lawyers Chapter from 2000 to 2008. The Federalist Society's "About Us" webpage states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

I did not author this language and I am not aware of what the Federalist Society meant by this statement.

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

I did not author this language and I am not aware of what the Federalist Society meant by this statement.

c. As a member of the Federalist Society, explain what "traditional values" you understood the organization placed a premium on.

I did not author this language and I am not aware of what the Federalist Society meant by this statement.

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

I received the questions on March 14, 2018. I reviewed the questions, performed research, and personally drafted answers. I shared my draft responses with the Office of Legal Policy at the

Department of Justice and, after receiving feedback, made edits that I deemed appropriate. I then authorized the submission of the responses.

Senator Dick Durbin
Written Questions for John Nalbandian, Dominic Lanza, and Joseph Hunt
March 14, 2018

For questions with subparts, please answer each subpart separately.

Questions for John Nalbandian

1. You say in your questionnaire that your representative clients include the tobacco company R.J. Reynolds and British Petroleum, but you did not describe any matters you handled for these clients. **Please discuss the work you have performed on behalf of these clients.**

I was a junior associate at a large law firm when I worked for those clients. Without betraying any confidences of those clients I will say that the work that I performed on behalf of those clients was work typical of junior associates at large firms working with teams of lawyers. That would have included legal research and drafting legal memoranda or possibly motions or briefs on certain discrete legal issues.

2.
 - a. **Do you believe there has ever been an instance where a state legislature has enacted voter ID requirements for the purpose of making it more difficult for a particular segment of the electorate to vote?**

I filed an amicus brief in *Crawford v. Marion Cty. Elec. Bd.*, 128 S. Ct. 1610 (2008), which concerned the Indiana voter identification law, which the Supreme Court upheld. The Supreme Court did not determine that the state legislature enacted the law to make it more difficult for some persons to vote. The adoption of voter ID laws is a political and public policy question and it would be inappropriate for me under the judicial canons to opine that issue. If I were presented with arguments regarding voter ID laws in a case as a judge, I would review the arguments of the parties and apply all applicable law and precedent to the facts of the case. I would be bound by the Supreme Court's decision in *Crawford* as well as all other Supreme Court cases involving voter qualifications and all other issues.

2.
 - b. **If a state legislature did enact voter ID requirements for that purpose, would that be wrong?**

Please see my answer to question 2(a) above.

3. You have an extensive history of involvement in Republican Party politics. For example, you say in your questionnaire that you were General Counsel to the Republican Party of Kentucky from 2010 to 2016; you have participated in Election Day operations and given advice to campaigns, including those of Senator McConnell and Senator Paul; you have been a member of the Republican National Lawyers Association since 2008; you were a member of the Boone County GOP Executive Committee from 2008-2012; you were either a delegate

or alternative delegate to the last three Republican National Conventions; and you have been a member of the board of directors of the Commonwealth Political Action Committee since 2001.

Given this partisan background, which is unusual in its scope for a federal judicial nominee, it seems that litigants might get the impression that you would be more favorable to positions advocated by the Republican Party than positions associated with the Democratic Party. Of course, it is important for a judge to be able to separate himself from politics and to show no favoritism when it comes to the administration of justice. **What can you point to in your record to provide litigants with reassurance that you would not show political favoritism if confirmed to the federal bench?**

There are no Democratic and no Republican Judges as far as I'm concerned. I realize that being a judge is completely different than being an advocate or participating in political activity. I pledge that I would be, consistent with the judicial oath and the canons of judicial ethics, impartial and fair to all litigants and would set aside my personal and political views on any topic.

I am honored to have received letters of support from Democrats and I've successfully worked with many Democrats over the years, for example, on the Board of Directors of the State Justice Institute.

I clerked for a federal judge who himself had been politically active and in private practice and learned from him from the beginning of my career what it means to be impartial and act fairly and with humility.

- 4. Please name the Supreme Court Justice, past or present, whose approach to constitutional interpretation you believe represents the best approach for removing a Justice's personal preferences from decisionmaking.**

I am reluctant to single out certain Supreme Court Justices to answer this question because I believe that all Supreme Court Justices strive to follow the law and keep their personal preferences from affecting their decisionmaking.

- 5. In your view, is there any role for empathy when a judge is considering a criminal case – empathy for the victims of the alleged crime, for the defendant, or for their loved ones?**

I would follow the precedent from the Supreme Court and the Sixth Circuit with regard to what the appropriate considerations are for a judge with respect to criminal cases and sentencing. Also, please see my answer to Senator Whitehouse's question 2.

- 6. You say in your questionnaire that you have been a member of the Federalist Society since 1991.**

- a. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

The selection and confirmation of Judges is a task for the political branches and it would be inappropriate for me to comment on this issue under the Judicial Canons.

- b. **Please list each year that you have attended the Federalist Society's annual convention.**

I believe to the best of my recollection that my only attendance was in 2004.

- c. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I did not attend.

7.

- a. **Is waterboarding torture?**

I believe that there is legislation from Congress regarding torture. This is a political issue and I believe that it would be inappropriate for me to comment under the judicial canons of ethics. It is also inappropriate for me to comment on any issue that may someday come before me. If I were ever faced with a case that involved this issue, I would consider the arguments of the parties and apply all applicable law and precedent to the facts of the case.

- b. **Is waterboarding cruel, inhuman and degrading treatment?**

Please see my answer to question 7(a) above.

- c. **Is waterboarding illegal under U.S. law?**

Please see my answer to question 7(a) above.

8. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

This is a political matter and I am constrained by the judicial canons of ethics from commenting.

9. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees strive to answer questions posed to them to the best of their ability within the constraints of the canons of judicial ethics.

10. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's nominees.

a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I am not aware of any such donations being made in support of my nomination. And under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could arise in the future in a case before me.

b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

Please see my response to question 10(a). Further, if the issue arose, I would consider all applicable rules concerning recusal including 28 U.S.C. §455, the Code of Conduct for United States Judges, and all other laws and rules regarding recusals.

c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my response to question 10(a).

11.

a. **Can a president pardon himself?**

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could come before me in a future case.

b. What answer does an originalist view of the Constitution provide to this question?

Please see my answer to question 11(a).

c. If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could involve future litigation.

12. The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

a. What is your understanding of what the Founding Fathers intended this clause to mean? To the extent you may be unfamiliar with this provision of the Constitution, please familiarize yourself with it before answering.

My understanding is that the meaning of the Foreign Emoluments Clause is currently the subject of litigation pending in federal court. Accordingly, under the canons of judicial ethics, it would be inappropriate for me to comment on this issue.

b. Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?

Please see my answer to question 12.a.

13. What is your favorite Supreme Court dissent, and why?

I am reluctant to single out specific Supreme Court opinions for approval or disapproval. That said, one dissent worthy of recognition is the dissent of Kentuckian John Marshall Harlan in *Plessy v. Ferguson*, which was vindicated in *Brown v. Board of Education*.

**Nomination of John B. Nalbandian
to the United States Court of Appeals
for the Sixth Circuit
Questions for the Record Submitted March 14, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Yes, I agree to the extent that Justice Roberts is saying that judges should resolve disputes without regard to their own policy, personal, or political preferences.

b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

The practical consequences should play a role if the governing legal doctrine call for a judge to take such consequences into account. For example, the Sixth Circuit’s four-part analysis for the issuance of preliminary injunctions takes into account the effects of the absence of the injunction on the moving party and the harm to others if an injunction is granted. *See, e.g., Flight Options, LLC v. Int’l Bhd. Teamsters, Local 1108*, 863 F.3d 529, 539-40 (6th Cir. 2017).

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

a. What role, if any, should empathy play in a judge’s decision-making process?

b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?

With respect to these questions, judges are human and having empathy for the suffering of others is a natural human response. Judges, however, must be careful not to allow their personal feelings overcome their duty to apply faithfully the law and precedent without regard to certain characteristics of the litigants. Judges should strive to avoid bias whether implicit or explicit. The judicial oath requires a judge to “administer justice without respect to persons, and do equal right to the poor and the rich, and . . . [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge].” 28 U.S.C. §453. A judge cannot violate that oath. That said, compassion and empathy may have a role in some limited circumstances like in sentencing under 18 U.S.C. §3553(a). I would apply the precedent of the Supreme Court and the Sixth Circuit faithfully if such questions were to come before me.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. During your confirmation hearing, you testified that you believed *Loving v. Virginia* and *Brown v. Board of Education* were rightly decided Supreme Court cases. With respect to *Loving*, you said “I don’t think there’s any question about” whether the case was rightly decided. You described *Brown* “seminal decision in the Supreme Court’s history.” You refused, however, to state your view as to whether *Roe v. Wade* was likewise rightly decided.

a. Is *Roe v. Wade* a “seminal decision in the Supreme Court’s history”?

Roe v. Wade is a longstanding precedent of the Supreme Court and I would follow it fully and faithfully to the best of my ability.

b. Is there “any question about” whether *Roe* was correctly decided?

Please see my answer to Senator Feinstein’s question 5(a).

5. When speaking about originalist legal theory, you stated your view that a judge should look to the “values and principles” that a text embodied at the time it was adopted.

a. How should a judge evaluate the “values and principles” embodied in a piece of text?

As a lower court judge I would faithfully follow the precedent of the Supreme Court regarding how to interpret the text of the Constitution. Also, please see my answers to Senator Feinstein’s questions 2(a) and 2(b).

b. What should a judge do if, in his or her assessment, the “values and principles” of a text conflict with the text’s plain meaning?

Please see my answer to question 5(a) above. It is my understanding that in general, the Supreme Court and Sixth Circuit look to the plain meaning of the text before applying any tools of construction, I would follow that precedent faithfully.

**Nomination of John B. Nalbandian,
to be United States Circuit Judge for the Sixth Circuit
Questions for the Record Submitted March 14, 2018**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

I would apply the Supreme Court's governing precedent in the area of substantive due process and fundamental rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (listing cases).

a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes.

b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. *See Glucksberg*, 521 U.S. at 720-21.

c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Yes. I would be bound by precedent from the Supreme Court and the Sixth Circuit. I would also consider relevant precedent from other courts for its persuasive value.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

I would consider binding precedent from the Supreme Court and the Sixth Circuit including any governing rationale.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Both *Casey* and *Lawrence* are binding Supreme Court precedents and I would apply them faithfully as well as all other applicable precedent.

f. What other factors would you consider?

I would consider any other factors that are relevant under governing Supreme Court and Sixth Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has held on numerous occasions that the guarantee of equal protection in the Fourteenth Amendment applies to discrimination based on gender as well as race. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996).

- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

To the extent that this question is asking for an opinion on something that may come before me as a judge, it would be inappropriate for me to answer under the canons of judicial ethics. Otherwise, the academic rationale for this Supreme Court precedent will have no effect on my duty to apply it fully and faithfully.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I do not know why the *United States v. Virginia* dispute was filed and resolved when it was.

- c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

Obergefell v. Hodges held that the Fourteenth Amendment requires same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." 135 S. Ct. at 2607.

- d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Under the judicial canons of ethics, it would be inappropriate for me to opine on the subject of pending litigation or on matters that might come before me in litigation.

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

Yes, under Supreme Court decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

- a. Do you agree that there is a constitutional right to privacy that protects a

woman's right to obtain an abortion?

Yes, under Supreme Court decisions like *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Yes, under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

As a lower court judge, I would fully and faithfully apply the precedent of the Supreme Court and the Sixth Circuit. Where applicable precedent considers evidence of changing societal understandings, I would follow that analysis.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

I would follow the relevant precedent of the Supreme Court and the Sixth Circuit regarding this type of evidence. Generally, under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), federal courts may permit and consider expert evidence where it may assist the trier of fact in resolving a question at issue and where the evidence meets the standards of reliability set forth by governing law.

5. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347

U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

My understanding is that this question has been the subject of much scholarship. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); William Baude, *Is Originalism Our Law?*, 115 Columbia L. Rev. 2349 (2015); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis Univ. L.J. 550 (2006). This is an academic debate that does not affect the binding force of the *Brown* decision on a lower court judge.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited March 12, 2018).

This is an academic debate that does not change the force of Supreme Court precedent. That said, Supreme Court decisions show that in some instances discerning the original public meaning of certain provisions of the Constitution may not be easy. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). But that does not change the legal force and precedential nature of the Supreme Court’s decisions.

6. During your hearing, you asserted that the Supreme Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967), was properly grounded in the principle of equal protection, notwithstanding the public’s understanding of whether equal protection included a right to interracial marriage at the time of the Fourteenth Amendment’s adoption.

a. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

As a lower court judge I would be bound by the Supreme Court’s holdings and governing rationales on the original public meaning of particular provisions of the Constitution. And regardless of the particular methodology employed by the Supreme Court in interpreting the Constitution or its provisions, I am absolutely bound by that Court’s decisions.

b. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my answer to question 6(a).

c. What sources would you employ to discern the contours of a constitutional provision?

As a lower court judge, I would be bound by the precedents of the Supreme Court and the Sixth Circuit in any case involving the interpretation of a constitutional provisions. I would consider the arguments of the parties as well as all applicable law (including law regarding what sources the Supreme Court and the Sixth Circuit have consulted in construing constitutional provisions) and precedent and the specific facts of the case.

7. At your hearing, you stated that *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967), were correctly decided, but you then refused to answer whether *Roe v. Wade*, 410 U.S. 113 (1973), was correctly decided.

a. Please explain why you would not answer this question with respect to *Roe v. Wade* but would answer it with respect to *Brown v. Board of Education* and *Loving v. Virginia*.

I declined to answer because of the possibility that litigation involving abortion would come before me. Please see my answer to Senator Feinstein's question 5(a) (listing recent and pending district court and Sixth Circuit cases involving the contours of abortion rights).

As I indicated at my hearing I will fully and faithfully follow all Supreme Court precedent including *Roe v. Wade* and *Casey*.

There is no reason to believe that racial segregation and interracial marriage will pose any contemporary controversies in the country. With regard to lists of Supreme Court cases and whether they are correctly decided, I believe further comment would be inappropriate for the same reasons that, in their confirmation hearings, Justice Kagan declined to "grade cases" from the Supreme Court and Justice Gorsuch declined to offer personal views on past Supreme Court cases.

All of the cases listed below are precedents of the Supreme Court and I will follow them fully and faithfully.

b. Was *Baker v. Carr*, 369 U.S. 186 (1962), correctly decided?

Please see my answer to question 7(a) above.

c. Was *Gideon v. Wainwright*, 372 U.S. 335 (1963), correctly decided?

Please see my answer to question 7(a) above.

d. Was *United States v. Nixon*, 418 U.S. 683 (1974), correctly decided?

Please see my answer to question 7(a) above.

e. Was *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), correctly decided?

Please see my answer to question 7(a) above.

f. Was *Griswold v. Connecticut*, 381 U.S. 479 (1965), correctly decided?

Please see my answer to question 7(a) above.

g. Was *Miranda v. Arizona*, 384 U.S. 436 (1966), correctly decided?

Please see my answer to question 7(a) above.

h. Was *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), correctly decided?

Please see my answer to question 7(a) above.

8. A 2014 report by Justin Levitt published in the *Washington Post* (available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.dc645a28fb6b) found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were 1 billion ballots cast. Meanwhile, the Department of Justice has been involved in many successful cases against jurisdictions that violate the Voting Rights Act.

a. Do you agree that laws passed with the stated purpose of protecting “voter integrity” can suppress the votes of racial minorities?

It would be inappropriate for me under the judicial canons of ethics to comment on political issues or issues that might come before me in litigation. The Supreme Court has made clear that Constitution and the Voting Rights Act and other laws can constrain the enactment of certain state voting regulations. I would apply that law and those precedents fully and faithfully in any case involving voting rights that comes before me.

b. The amicus brief you filed in *Crawford v. Marion County*, 553 U.S. 181 (2008), asserted that Indiana’s voter ID law did not disproportionately impact minorities and the poor. Do you agree that it is possible for a voter ID law to disproportionately impact minorities and the poor?

As a circuit court judge, I would be duty bound to follow the precedent of the Supreme Court, including *Crawford v. Marion Cty. Elec. Bd.*, 128 S. Ct. 1610 (2008), regarding voter-identification laws and Supreme Court cases regarding voting rights generally. See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992). In any case involving voter-identification laws, I would evaluate the arguments of the parties in light of applicable law and precedents and the specific facts of the case. The facts my client relied on in its amicus brief would not affect how I review a case involving voter-identification laws, if one were to come before me.

c. Your client, the Center for Equal Opportunity, states on its website that it opposes bilingual ballots. Do you agree that the failure to provide election materials, including ballots, in a minority language can constitute a violation of the Voting Rights Act?

I have always represented my clients zealously as required by ethical rules. Under those views, the views of a client should not be imputed to the attorney. *See* ABA Model Rules of Professional Responsibility 1.2(b). That said, it would be inappropriate for me under the judicial canons of ethics, to offer personal views on political questions or questions that might come before me in litigation.

9. Based on your service on the Board of Directors of the State Justice Institute, what measures would you take as a judge to provide support for limited English proficiency litigants and pro se litigants?

The State Justice Institute has prioritized helping courts provide service to limited English proficiency and pro se litigants. I have supported this work as a member of the State Justice Institute's Board. Whether I am permitted to remain on the Board of Directors of SJI is not a question that I have examined in any depth. I will do so in accordance with applicable recusal and ethical rules. With regard to measures outside of the State Justice Institute, I will not know what measures are currently being taken and what measures might be taken until I become a judge and can interact with the relevant court governing bodies.

10. Based on your service on the Board of Directors of the State Justice Institute, what measures would you take as a judge to enhance public trust and confidence in the courts?

Similar to the answer to question 9, the State Justice Institute has prioritized enhancing public trust and confidence in the courts. If I become a judge, I will attempt to ascertain what measures are currently being taken and what measures might be taken to enhance public trust and confidence in the courts consistent with governing ethical constraints. I believe generally that judges should be involved in their communities and with the local bar to the extent permitted by governing ethical standards.

11. You coauthored an article entitled *Life Sciences Patents Dealt a Significant Blow*, in which you expressed concerns that if the holding of the district court in *Association for Molecular Pathology v. U.S. Patent and Trademark Office*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010), was upheld on appeal, it "would deal a fatal blow to the vast majority of genetic patents and significantly stifle research into the role genetics plays in human illness."

a. This case ultimately reached the Supreme Court. Does the holding from the Supreme Court in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013), raise the concerns you outlined in your article related to incentivizing future research and development?

I have not looked closely at the implications of the Supreme Court case. The article expressed concern that the invalidation of all of the patents at issue in the matter could have a chilling effect on the incentives to perform certain kinds of scientific research.

My understanding is that the Supreme Court ultimately invalidated some of the patents involved in the case and upheld the validity of others. My further understanding is that the implications of this Supreme Court case on scientific research is subject to academic debate. *See, e.g.,* Peter Lee, *The Supreme Court's Myriad Effects on Scientific Research: Definitional Fluidity and the Legal Construction of Nature*, 5 U.C. Irvine L. Rev. 1077 (2015).

b. Do any of the Supreme Court's other recent cases concerning patent eligible subject matter (namely, *Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012); and *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014)), raise the concerns you outlined in your article related to regarding incentivizing future research and development?

I have not examined this question closely. My understanding is that these Supreme Court cases address what can constitute a patentable subject matter. My understanding is that there is still debate about the implications of these cases. *See, e.g.,* Haghghatian et al., *So What's Patentable Now? Recent Decisions on Section 101*, 34 Corp. Couns. Rev. 73 (2015).

**Nomination of Dominic W. Lanza to the
United States District Court for the District of Arizona
Questions for the Record
Submitted March 14, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

- a. Do you believe there is implicit racial bias in our criminal justice system?

The unfortunate but undeniable reality is that racial bias continues to exist in America. Racial bias and discrimination are antithetical to the rule of law and to the core liberties protected by the Constitution. During my tenure in the U.S. Attorney's Office, I have attempted to address these issues by serving on the office's diversity committee, serving as a volunteer participant in the "Court Works" program (in which local students hailing primarily from at-risk schools act as the attorneys, witnesses, jurors, and judge in a simulated trial), helping oversee our office's civil rights prosecutions, and participating in outreach activities to various community groups.

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I had not specifically studied this issue prior to my nomination.

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

- a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not previously reviewed these studies and statistics. In any event, it would be inappropriate for me, as a judicial nominee, to offer an opinion on this topic.

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

See answer to question 2a.

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*