

**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.