

**Nomination of Kevin Christopher Newsom to be
United States Circuit Judge for the Eleventh Circuit
Questions for the Record
Submitted June 21, 2017**

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?

On the merits, I would faithfully apply the considerations and factors that the Supreme Court and Eleventh Circuit have outlined for determining whether an asserted right is fundamental and thus protected under the Fourteenth Amendment. As a matter of process, I would carefully review the briefs submitted for the court's consideration (including amicus briefs, if any), as well as the underlying precedents, and then engage in a dialogue with my law clerks and court colleagues to determine the correct answer.

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

Please see my response to No. 1 above.

- 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?

Please see my response to No. 1 above.

- 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?

Please see my response to No. 1 above.

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

Please see my response to No. 1 above.

- 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*).

Please see my response to No. 1 above.

- f. What other factors would you consider?

Please see my response to No. 1 above.

2. You were 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?

I have never personally assessed whether *Brown* is consistent with originalism, although I understand that others have done so and have concluded that it is. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- 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 June 21, 2017).

I have not studied this issue, but I have never understood the chief proponents of originalism to assert that all constitutional terms are necessarily “precise or self-defining”—only that the original meaning of those phrases, if capable of being discerned, should play a prominent role in their interpretation. In any event, the debate over methods of constitutional interpretation, while interesting, would have little relationship to my role as a circuit-court judge, if I am fortunate enough to be confirmed. As a member of a lower court, my chief role would be to apply existing Supreme Court and Eleventh Circuit precedent, which I would do faithfully and to the best of my ability.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment’s promise of “equal protection” guarantees equality across race and gender, or does it only require racial equality?

The Supreme Court has long (and repeatedly) held that the Fourteenth Amendment applies beyond racial classifications. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 3584 (2015) (same-sex couples); *United States v. Virginia*, 518 U.S. 515 (1996) (gender); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). Because the scope

of the Fourteenth Amendment's application to particular groups is currently the subject of active litigation, I must refrain from commenting further. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); cf. also Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Should such a case come before me, I will (if fortunate enough to be confirmed) carefully review the briefs and the applicable precedent to determine the proper outcome.

- 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?

Please see my response to No. 3 above.

- 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?

Please see my response to No. 3 above.

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

Please see my response to No. 3 above.

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

Please see my response to No. 3 above.

4. During your hearing, you testified regarding substantive due process, which includes a right to privacy.

The Supreme Court has held that the Constitution protects the specific rights mentioned in the subparts of this question. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Court's decisions on those issues—as on all others—will be binding on me as a circuit-court judge, should I be fortunate enough to be confirmed.

- a. Do you agree that the right to privacy protects a woman's right to use contraceptives?

Please see my response to No. 4 above.

- b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?

Please see my response to No. 4 above.

- c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?

Please see my response to No. 4 above.

- d. 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 response to No. 4 above.

- 5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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?

I would assume that all judges (and nominees) would agree that the Constitution must be applied to changing societal circumstances and that it is appropriate to consider evidence relevant to such circumstances, consistent with the ordinary rules pertaining to the admission and consideration of evidence. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (Scalia, J.) (holding that a thermal-imaging scan constituted a "search" under the Fourth Amendment).

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

I have not had occasion to consider the specific questions whether and under what circumstances sociological, scientific, and empirical evidence should inform an appellate court's decisionmaking process. If that question arose, I would carefully review—and faithfully apply—Supreme Court and Eleventh Circuit precedent on those topics.

6. At your Senate Judiciary Committee hearing, Senator Kennedy asked whether, under the rational basis test, Congress needs to put forth “any reason whatsoever” for passing a law, or a “good reason.” You responded that “any conceivable basis, even if not the articulated basis” is sufficient to justify a law under the rational basis test.
 - a. What evidence would you rely on to determine if a basis is “conceivable”?

The understanding of the rational-basis test that I expressed at the hearing was based on Supreme Court precedent. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (“On rational-basis review, a classification in a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’ Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” (citations omitted)). Given the frequency with which the rational-basis test is invoked in federal courts, and because cases arising under the test are likely to come before me as a judge if I am fortunate enough to be confirmed, I should not comment further. *See* Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). Should a case come before me requiring me to apply rational-basis review, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

- b. How would you identify Congress’s reason for passing a law? For example, would you review legislative history, contemporaneous statements of individual legislators, or other extrinsic evidence in determining Congress’s reason for passing a law?

Please see the response to No. 6a above.

- c. How would you identify the president’s reason for signing a law or executive order?

Please see the response to No. 6a above.

- d. How would you ensure that a reason put forth by Congress or the president is not pretextual?

Please see the response to No. 6a above.