

Senator Dick Durbin
Written Questions for John Bush, Kevin Newsom, and Damien Schiff
June 21, 2017

For questions with subparts, please answer each subpart separately.

Questions for Kevin Newsom

1. You say you have been a member of the Federalist Society since 1999, and you served as President of the Birmingham Lawyers Chapter from 2012-2015 and have served on the Society's Federalism and Separation of Powers Practice Group Executive Committee since 2007. **Why did you join the Federalist Society?**

I like ideas, and the free exchange of ideas. At its core, the Federalist Society is an open-debate society. To that end, the Federalist Society puts on high-quality programming that addresses interesting topics from a range of viewpoints. I recently read in an alumni newsletter that Harvard Law School's outgoing Dean, Martha Minow, remarked that "No organization has had a more positive and constructive impact on the Harvard Law campus than the Federalist Society." (Her observation was reminiscent of now-Justice Kagan's reported remark, as HLS's Dean, "I love the Federalist Society.") Robust discussion about important legal issues is valuable, and in my experience, the Federalist Society plays a vital role in sustaining that discussion.

2. **Do you agree with the views espoused by the Federalist Society?**

As I sought to explain at my hearing, my personal opinions and views will not be relevant to my role as a circuit-court judge, should I be fortunate enough to be confirmed. I am not certain as to what you mean by "the views espoused by the Federalist Society," as it is my understanding that the Federalist Society does not take positions on particular legal issues. Research reveals that the Federalist Society's website states that, as a general matter, the group was "founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." I do not believe that those are controversial propositions.

3. **Do you believe that the views espoused by the Federalist Society views are compatible with your own views?**

Please see the response to No. 2 above.

4.
 - a. **Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?**

This question calls for me to opine on a political question, which I cannot ethically do. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

b. Do you believe that the President’s announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?

Again, I am not certain as to what you mean by “views that are at odds with the Federalist Society,” and I would refer you to my response to No. 2 above. In any event, as a lawyer, I have not felt any pressure to join the Federalist Society, but chose to do so out of an appreciation for its role in promoting open debate. And as a judge—if I am fortunate enough to be confirmed—my principal obligation will be to apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?

Please see the responses to Nos. 4(a) and 4(b) above. Thanks to the genius and foresight of the framers, the independence and integrity of the judiciary are preserved through the protections of Article III of the Constitution, which gives Article III judges life tenure without diminution in compensation.

5. The Federalist Society website lists the organization’s statement of purpose. That statement begins with the following: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.” **Do you agree or disagree with this statement? Please explain your answer.**

I had no role in authoring that statement, and I do not know precisely what the Federalist Society means by it.

- 6. Please list all years in which you attended the Federalist Society’s annual national convention.**

Although I do not recall specifically, I believe that I attended portions of the event on two occasions. The first time would likely have been in 2003, shortly after I was appointed to be Alabama’s Solicitor General but before I moved from Washington, D.C. to Alabama. The second occasion, I believe, would have been in 2007—the year in which the Federalist Society celebrated its 25th anniversary. The likely reason for my sporadic attendance is as follows: During my time at Bradley Arant Boult Cummings LLP, I have been very involved in the American Bar Association’s Council of Appellate Lawyers (“CAL”), which exists within the ABA’s Appellate Judges Conference. Each year, CAL helps to stage the Appellate Judges Education Institute’s CLE “Summit,” which almost always conflicts with the Federalist Society’s

national convention. I have attended the Summit on numerous occasions—in Washington, Dallas, New Orleans, San Diego, etc.

7. 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.

a. Do you want outside groups or special interests to make undisclosed donations to front organizations in support of your nomination?

I am not aware of any such donations made in support of my nomination—or against it, for that matter. I certainly have not solicited any such donations, nor could I ethically do so. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

b. Would you discourage donors from making such undisclosed donations?

Please see the response to No. 7(a) above.

c. If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?

Please see the response to No. 7(a) above.

8. I believe it is important for judicial nominees to demonstrate that they will be independent of President Trump. One of the ways to demonstrate this independence is for nominees to answer honestly whether they believe in the President’s most outrageous assertions.

Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?

This question calls for me to opine on a political question, which I cannot ethically do. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

9. **Please discuss the work you performed for the U.S. Chamber Litigation Center, which you say in your questionnaire that you were a member of from 2014 to the present. Will you recuse yourself from litigation matters in which the Chamber of Commerce or the U.S. Chamber Litigation Center is involved?**

I have participated on an “amicus committee,” which advises the U.S. Chamber Litigation Center about whether to file amicus briefs—primarily in cases pending in state courts. If confirmed, I will recuse in any matter that comes before the Eleventh Circuit in which I expressed an opinion in my role as a member of the U.S. Chamber’s state-litigation amicus committee. Beyond that, I will of course carefully study and apply 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing recusal determinations.

10. In an article you wrote in 2000, you said “courts invoking substantive due process – the idea of grounding protection for a substantive right in what is, by all accounts, a purely procedural provision – would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*.”

How do you want this statement of yours to be interpreted?

Please see the response to Question No. 4 submitted by Senator Feinstein.

11. In 1886, the Supreme Court noted that the right to vote “is regarded as a fundamental political right, because [it is] preservative of all rights,” a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

a. Do you believe that the right to vote is fundamental?

The Supreme Court has repeatedly held that the right to vote is a fundamental right. *See, e.g., Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).

b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?

In reviewing any claim that the right to vote has been infringed, I will (should I be fortunate enough to be confirmed) faithfully apply Supreme Court and Eleventh Circuit precedent articulating the proper standard of review.

c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?

If I am fortunate enough to be confirmed, I will faithfully apply any controlling precedent of the Supreme Court and Eleventh Circuit governing the timing of judicial review of laws concerning the right to vote.

12. Do you believe that systemic racial discrimination still exists in America today?

Racial discrimination undoubtedly still exists in America today.

13. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor’s statement, or are your views closer to Chief Justice Roberts’ statement in *Parents Involved*?

As I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role (should I be fortunate enough to be confirmed) as a circuit-court judge. *Parents Involved* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

14. Do you believe that courts should interpret the Constitution according to its original public meaning?

The Supreme Court has made clear that text and history play prominent roles in the interpretation of the Constitution. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Souter, J.). Of course, as a circuit-court judge (should I be fortunate enough to be confirmed), I will be bound to, and will, apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

15. Do you believe that the original public meaning of the Constitution evolves or changes over time?

As I sought to explain at my hearing, my personal opinions and views will not be relevant to my role (should I be fortunate enough to be confirmed) as a circuit-court judge. In that role, I will be bound to, and will, apply Supreme Court and Eleventh Circuit precedent on the meaning of the Constitution faithfully and to the best of my ability.

16. What is your understanding of the original meaning of the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution?

My understanding is that the meaning of the Foreign Emoluments Clause is currently the subject of active litigation in federal court. Accordingly, under the canons, I cannot comment on the issue. 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.”).

17. **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 the response to No. 16 above.