

Nomination of Kevin Newsom to the U.S. Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted June 21, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2009, you filed a Supreme Court amicus brief in *Caperton v. A.T. Massey Coal Co.* That case was about whether a state supreme court justice—who had received over \$3 million in campaign contributions from the CEO of a coal company—was obligated to recuse himself when the coal company sought to overturn a jury verdict on appeal. You argued that the Due Process Clause did not require the justice to recuse himself. You also argued that a rule which mandated recusal in cases with such an obvious conflict of interest would nevertheless be “hopelessly inadministrable.”
 - a. **Do you still believe it is proper for a judge to hear a case in which one party has made large contributions to that judge’s campaign?**

As with any brief I have filed as an attorney, the arguments made in the *Caperton* brief reflected the views of my client—the State of Alabama—and the other states who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. See ABA Model Rules of Professional Responsibility 1.2(b). In any event, the sole point that the states’ brief sought to make was that, in the main, the question whether and in what circumstances it is proper for a state-court judge to recuse should be left to state legislatures and bar committees. Of course, the Supreme Court’s decision in *Caperton* is binding precedent, and if I am fortunate enough to be confirmed, I will apply it faithfully and to the best of my ability.

- b. **How would you handle recusal issues if you are confirmed? Should we be concerned that you will find recusal standards for federal judges “hopelessly inadministrable”?**

If confirmed, I will 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. I am not concerned that the standards articulated in those sources—and expounded in advisory opinions—will be difficult to administer.

- c. **In your amicus brief, you argued that if the Supreme Court held that there was, in fact, a Due Process Clause violation, “*Caperton* motions [for judicial recusal based on due process] would fly fast and furious. And given the right’s unwieldiness, resolution of those motions would gum up the state litigation process by requiring judges (1) to allow discovery into the pertinent considerations, (2) to slog through laundry lists of case-dependent factors, and, in all likelihood, (3) to refer their recusal decisions to their colleagues for independent review.” Since *Caperton* was decided, have you filed a *Caperton* motion in any case you have litigated?**

To my recollection, no.

d. How many times has a *Caperton* motion been filed by another attorney in a case you were litigating?

To my knowledge, none. Happily, so far as I am aware, the brief's prediction that the decision could lead to numerous recusal motions seems to have been incorrect.

2. In 2004, when you were Solicitor General of Alabama, you filed a Supreme Court brief on behalf of several states in *Rasul v. Bush*, and argued that U.S. courts did not have jurisdiction to hear challenges to the detention of foreign nationals held at Guantanamo Bay. You argued that because the President has "plenary" powers as Commander in Chief and because Congress has the power to declare war, the courts should "hesitate before second-guessing [those Branches'] military decisions, even indirectly." The Supreme Court disagreed in a 6-3 decision.

a. Do you still believe that courts should not second guess the President when he is making "military decisions"?

As with any brief I have filed as an attorney, the arguments made in the *Rasul* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. See ABA Model Rules of Professional Responsibility 1.2(b). Moreover, although my name (along with the name of the Acting Attorney General) was on the signature block of the brief filed in the *Rasul* case, I was not counsel of record, and while I am certain that I reviewed the brief, I do not recall playing an active role in its drafting.

I have not had occasion to study the post-*Rasul* precedent carefully, and I am reluctant to express any views on that subject because a similar issue might come before me as a judge, should I be fortunate enough to be confirmed. See Canons 2 and 3, 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."). If such a case were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. Do you believe an executive order precluding the entry of individuals from certain countries would qualify as a "military decision," and therefore not be reviewable by U.S. Courts?

Please see the response to No. 2(a) above.

c. How did you decide which amicus briefs to join or lead as Solicitor General of Alabama?

Decisions about filing or joining multi-state amicus briefs were ultimately the Attorney General's to make. But as a general matter, in making recommendations to the Attorney General, I sought to identify cases in which the State of Alabama's institutional interests (typically as a litigant or prospective litigant) were implicated and might not otherwise be fully

protected by the briefs of the principal parties to the case. To my recollection, the briefs that the State of Alabama filed or joined during my tenure were almost always joined by other states—the great majority by attorneys general from both sides of the aisle.

d. Why did you believe it made sense for your state to weigh in with the Court about *Rasul*?

Please see the response to No. 2(a) above.

3. You opposed the Supreme Court’s 2005 decision in *Roper v. Simmons* that held it is unconstitutionally cruel and unusual to execute juveniles. You authored an amicus brief in the Supreme Court case on behalf of Alabama and other states defending capital punishment for minors under the age of 18. After the ruling, NPR reported on *All Things Considered* that you “regret[ted]” the Court’s decision, and quoted you saying that, “there’s no real magic in the number 18. Some of the court’s reasoning would apply equally to 19-year-olds and some 25-year-olds, that at the same time won’t apply to some 17-year-olds, you know, on the other side.”

a. Why did you “regret” the decision in *Roper*? Do you regret it today?

As with any brief I have filed as an attorney, the arguments made in the *Roper* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. See ABA Model Rules of Professional Responsibility 1.2(b). Moreover, it appears that the word “regret” is NPR’s. In any event, *Roper* is binding precedent that I (if I am fortunate enough to be confirmed) will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

b. Was Alabama harmed by the *Roper* decision?

The State of Alabama was “harmed” by *Roper* only in the sense that the decision set aside the Legislature’s determination that capital punishment may, in certain circumstances, be appropriate for 16- and 17-year-old offenders. I recognize, of course, that legislative determinations must give way when inconsistent with the Constitution, as the Supreme Court held was the case in *Roper*.

4. At your hearing, I asked you about a law review article you authored in 2000 criticizing the doctrine of substantive due process. You wrote that the doctrine is “at loggerheads with the intentions of those who framed the [Fourteenth] Amendment.”

You further criticized the Supreme Court’s use of substantive due process to “ground[] protection for a substantive right in what is, by all accounts, a purely procedural provision” and cautioned that “courts invoking substantive due process... would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*.”

- a. Do you still believe the Due Process Clause should operate as a “purely procedural provision?”**

The Supreme Court has held that the Due Process Clause contains a substantive component. The Supreme Court’s decisions in that respect are binding on lower courts, and if I am fortunate enough to be confirmed, I will apply the Supreme Court’s decisions so holding faithfully and to the best of my ability.

- b. If confirmed as a judge, would you have any problem applying and upholding Supreme Court precedents grounded in substantive due process?**

No.

- c. If you are confirmed, and you have a substantive due process case before you, how will you follow your own advice to “remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*?”**

If I am fortunate enough to be confirmed, I will apply the Supreme Court’s substantive due process precedents faithfully and to the best of my ability.

- d. Do you believe the Constitution should be interpreted based on the Framers’ intent?**

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.). Should I be fortunate enough to be confirmed, I will apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

5. Your article concludes “I leave for another day the question whether the Court’s privacy decisions (including, most infamously, *Roe v. Wade* ... and its progeny) might find support in a resurrected Privileges or Immunities Clause.”

- a. What did you mean that *Roe* was the “most infamous” decision in the Court’s privacy rights jurisprudence?**

Roe is perhaps the most well-known decision in the Supreme Court’s privacy rights jurisprudence, and it has been the subject of much controversy. Of course, as a precedent of the Supreme Court, *Roe* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

- b. Do you believe that a resurrected Privileges or Immunities Clause would support the right to privacy as extended under *Roe v. Wade*? How do you understand an originalist reading of the Constitution to support this right?**

As the article explains, I have not had occasion to consider that question. But again, *Roe* is precedent that (if I am fortunate enough to be confirmed) I will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

- c. In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right? Would a resurrected Privileges or Immunities Clause support this right?**

I have not had occasion to consider that question. *Obergefell* is precedent that (if I am fortunate enough to be confirmed) I will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

- d. In *Loving v. Virginia* (1967), the Supreme Court upheld a constitutional right to marry persons of a different race. **How do you understand an originalist reading of the Constitution to support this right? Would a resurrected Privileges or Immunities Clause support this right?**

I have not had occasion to consider that question. *Loving* is precedent that (if I am fortunate enough to be confirmed) I will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

- 6. The Eleventh Circuit vacancy to which you are nominated has been vacant for almost four years. After years of trying unsuccessfully to negotiate with then-Senator Sessions and Senator Shelby on a compromise nominee, President Obama finally nominated Abdul Kallon, a federal judge in the Northern District of Alabama, in 2016. Judge Kallon would have been the first African-American judge to sit on the Eleventh Circuit from Alabama. Both Senators Shelby and Sessions supported Judge Kallon's nomination to the Northern District of Alabama. Nonetheless, they refused to return their blue slips on Judge Kallon's nomination to the Eleventh Circuit.

- a. **Do you know, or have you ever appeared before Judge Kallon?**

Yes. Judge Kallon—Abdul, as I have always known him—is a former law partner of mine. To my recollection, I have never appeared before Judge Kallon in court.

- b. **Do you have any reason to doubt that he would have been extremely well qualified and able to serve as a circuit court judge?**

I do not know the specific circumstances surrounding Judge Kallon's nomination or its consideration by this Committee, and I cannot comment on any political questions surrounding that nomination or consideration. I can say, however, that when word began to circulate in Birmingham that I might be considered for this nomination, Judge Kallon reached out to offer his congratulations. I appreciated that very much.

7. On your Senate Questionnaire, you indicate that you have a member of the Federalist Society since 1999, and the President of the Birmingham Lawyers Chapter of the Federalist Society from 2012 to 2015. The Federalist Society's "About Us" webpage, explains the purpose of the organization as follows: "Law 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." It says 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. Could you 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 had no role in authoring that statement, and I do not know precisely what the Federalist Society means by it.

- b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?**

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

- c. What "traditional values" does the Federalist society seek to place a premium on?**

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

8. Please respond with your views on the proper application of precedent by judges.

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

I cannot envision any circumstance in which it would be appropriate for a lower court to depart from governing Supreme Court precedent. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should "leav[e] to th[e] Supreme] Court the prerogative of overruling its own decisions").

- b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

Lower-court judges—like the courts on which they sit—are bound to apply Supreme Court precedent, and if I am fortunate enough to be confirmed, I will do so faithfully and to the best of my ability. I can envision circumstances in which it might be appropriate for a circuit-court judge to question the advisability of a Supreme Court precedent in a separate writing. *See, e.g., Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring) (criticizing mandatory two-step “order of battle” for deciding qualified-immunity cases); *compare Pearson v. Callahan*, 555 U.S. 223, 236-43 (2009) (overruling earlier decisions that had made two-step procedure mandatory). But if a Supreme Court decision is on point, a lower-court judge must follow it.

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

Under the Eleventh Circuit’s “prior-panel-precedent rule,” a “prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by [the Eleventh Circuit] sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). I would be bound to follow that rule if I am fortunate enough to be confirmed to the Eleventh Circuit, which I would do faithfully and to the best of my ability.

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

If I am fortunate enough to be confirmed as a circuit-court judge, I will not be in a position to opine on the circumstances in which the Supreme Court should overturn its own precedent.

9. 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”?

As already explained, *Roe* is a precedent of the Supreme Court, which I will be bound to apply faithfully and to the best of my ability if I am fortunate enough to be confirmed. For judges on lower courts, it really does not matter whether a decision of the Supreme Court is labeled “super-stare decisis,” “super-precedent,” or just (plain old) “precedent”—all such decisions are binding.

b. Is it settled law?

Please see the response to No. 9(a) above.

10. 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?

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 as a circuit-court judge, should I be fortunate enough to be confirmed. *Heller* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

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

Although I have not had occasion to consider *Heller* in detail, the Supreme Court stated that "nothing in [its] 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).

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

Again, I have not had occasion to consider *Heller* in detail. *Heller* is Supreme Court precedent, which, if fortunate enough to be confirmed as a circuit-court judge, I will be bound to apply faithfully and to the best of my ability.

11. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

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 as a circuit-court judge, should I be fortunate enough to be confirmed. *Citizens United* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see the response to No. 11(a) above.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

Please see the response to No. 11(a) above.

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

I received the questions in the evening on Wednesday, June 21, 2017. I reviewed the questions, drafted answers, and (where necessary) conducted research. I shared the answers with the Office of Legal Policy at the Department of Justice. After conferring with lawyers there, I made revisions and authorized them to submit the responses on my behalf.