

Senator Mazie K. Hirono

*Questions for the Record following the hearing on May 14, 2017 entitled:
“Nominations”*

Kevin C. Newsom

1. You wrote an article for the *Yale Law Journal* in 2000 which said that the doctrine of substantive due process, upon which the *Roe v. Wade* decision was based, is “much and rightly maligned,” and that it connected *Roe* to *Dred Scott*, the case in which the Court determined that African- Americans could not be citizens of the United States.
 - a. As a judge, what would be your approach to legal doctrines that you personally consider to be wrong?

My personal views or opinions about any particular case or legal doctrine will not be relevant to my job as a circuit-court judge, should I be fortunate enough to be confirmed. My role will be to apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

- b. *Dred Scott* is widely considered the worst decision every made by the Supreme Court, and its holding that African-Americans could never be citizens of the United States was rejected by Americans in the Civil War and in the Constitutional Amendments that followed. In contrast, the core holding of *Roe*, as reaffirmed in *Casey*, is the law of the land, and based on the Constitution’s protections for making intimate and personal decisions. If confirmed, would you be able to apply this important legal precedent which your writings suggest you find on par with the worst decision in the Supreme Court’s history?

Yes. The connection that the article drew between *Roe* and *Dred Scott* was purely methodological, a connection that commentators from across the ideological spectrum have drawn. See, e.g., Laurence H. Tribe, *American Constitutional Law* § 7-6, at 1331 (2000) (noting the substantive due process doctrine’s “inauspicious pedigree – which infamously includes both *Dred Scott* and *Lochner*”).

2. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe* that the right to an abortion is constitutionally protected. The Court held that these decisions are protected because they are among “the most intimate and personal choices a person makes in a lifetime.”
 - a. Do you believe that the Constitution protects the right to make “intimate and personal” decisions”?

My personal views or opinions about any particular case or legal doctrine will not be relevant to my job as a circuit-court judge, should I be fortunate enough to be confirmed. My role will be to apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

- b. Does the Constitution define what a “person” is? Has the Supreme Court ever ruled that the Fourteenth Amendment confers personhood on a fetus?

So far as I am aware, no.

3. In *Hobby Lobby*, the corporation made claims about contraception based on religious beliefs which are directly contravened by scientific research. Are there any limits—and what are the limits—on what a corporation may claim as a belief in justifying its denial of health care for its employees?

My understanding is that this question is 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.”).

4. What is the appropriate level of scrutiny to apply to challenges on campaign contribution limits or bans?

My understanding is that the Supreme Court held in *Buckley v. Valeo* that restrictions on campaign contributions to political candidates are subject to a “rigorous standard of review.” 424 U.S. 1, 29 (1976). It is also my understanding that the Court has distinguished between contribution limits, on the one hand, and expenditure limits, on the other—subjecting the latter to more heightened scrutiny than the former. See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). If I am fortunate enough to be confirmed, I will follow Supreme Court and Eleventh Circuit precedent in this area—and all areas—faithfully and to the best of my ability.

5. When Congress reauthorized the key expiring provisions of the landmark Voting Rights Act in 2006, it did so with a nearly unanimous vote. Before reauthorizing the protections of Section 5 in jurisdictions with a long history of discrimination in voting, the Judiciary Committee alone held 9 hearings on the Voting Rights Act. The thousands of pages of material the Senate reviewed, together with the record developed in a dozen hearings in the House, clearly established the continuing need for Section 5. And yet, in *Shelby County*, the Court ignored this evidence and the Court’s long precedent, made its own determination about the value of the extensive evidence reviewed by Congress.

- a. Does the *Shelby County* decision raise concerns about the limits of judges as policy-makers and the problems that arise when a Court steps outside of the judicial role and acts as a legislative body?

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. *Shelby County* 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. You were reported as having called the *Shelby County* decision the “standout win for conservatives” of that Supreme Court term. What did you mean by that?

I have frequently given “Supreme Court Review/Preview” talks to interested groups. Typically, in describing the Supreme Court’s term, I begin by running through the statistics—how many total decisions the Court issued, how many of those were unanimous, how many were 5-4, who voted with whom most often, etc. To give the audience a “sense” of the term, I also highlight a few of the more high-profile decisions—especially those that were decided 5-4. So far as I recall, I always ask the audience’s advance forgiveness for using terms like “conservative” and “liberal”—because, I tell them, that is not the way I view judging. For better or worse, though, lay audiences—by which I mean even audiences comprising lawyers who are not avid Court “watchers”—often think about Supreme Court decisions in “conservative” and “liberal” terms based on the voting alignment, and so I will often highlight notable decisions that, in the popular consciousness, might be deemed one or the other. Although I do not recall making the comment attributed to me, in reviewing the notes of that talk, it seems clear to me that I was simply remarking that (1) the *Windsor* decision, which invalidated the Defense of Marriage Act, could be counted as a “liberal” win and (2) that *Shelby County* could be counted a “conservative” win.

6. The Supreme Court’s decision in *Korematsu* has never been overturned, but has joined the short list of the most regrettable decisions in the Court’s history.

- a. Does *Korematsu* hold any precedential value?

Although *Korematsu* has never formally been overruled, it is my understanding that it has been limited to its facts. I am not aware that the Supreme Court has ever cited it affirmatively. It is also my understanding that in 2011, the then-Acting Solicitor General of the United States, Neal Katyal, issued a “confession of error” in which he apologized, on behalf of the Department of Justice, for the government’s litigation tactics in the *Korematsu* case.

- b. Are there other Supreme Court decisions that have not been overruled that you believe lack precedential value? If so, which ones, and why?

Except in the case of constitutional or statutory change, it is not the role of a lower-court judge to determine if and when Supreme Court decisions have lost precedential value. The Supreme Court has made clear that only it can overrule its own decisions. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts should “leav[e] to th[e] Supreme] Court the prerogative of overruling its own decisions”).

7. What remedies are available should the President or Executive Branch disregard a ruling of the Supreme Court or a lower federal court?

It would be inappropriate for the President or Executive Branch to disregard a ruling of the Supreme Court or a lower federal court. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

8. Do you believe that when analyzing a statute, and choosing to use the construction of original public meaning, such a choice reflects your values?

No. I am firmly committed to the notion that my own personal views, opinions, and values should not inform decisions that I will (if confirmed) make as a judge. My role will be to follow the law—text, history, applicable precedent—wherever it leads, without respect to my own personal preferences.

9. Do you believe that life experiences and unconscious biases play a role in judging?

As I said to Senator Durbin during my hearing, I would never deny that every judge is a human being—not a robot—and comes to the bench with a “bucket” of life experiences. However, I also believe that judges must be self-aware, so that personal preferences do not creep into their judicial decisionmaking. Adherence to the “rule of law” means that, should I be fortunate enough to be confirmed, I must apply governing legal principles, not my personal preferences, to all litigants who appear before me.

10. Should a judge attempt to discern the original meaning of the Constitution, rather than considering tradition, current norms, and precedent as the baseline or foundation of constitutional analysis?

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), my principal role will be to apply Supreme Court and Eleventh Circuit precedent, which I will do faithfully and to the best of my ability.

11. Do you believe that you will be able to separate ideological and partisan views when judging?

Yes.