Nomination of Richard Sullivan to the U.S. Court of Appeals for the Second Circuit Questions for the Record
August 8, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. 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?

   It is never appropriate for a lower court to depart from Supreme Court precedent. Lower courts have an obligation to "follow the [Supreme Court] case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989).

   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?

   Although lower court judges are bound to follow all Supreme Court precedents, there may be occasions when it is appropriate for a lower court judge to identify inconsistencies, confusion, or unintended consequences engendered by the Supreme Court's precedents. Nevertheless, I think such criticism should be rare, and always respectful.

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

   As a general matter, a federal circuit court of appeals panel decision on questions of federal law binds subsequent panels of that court (and district courts within that circuit), and may be disregarded or overturned only in the event of intervening contrary authority in the form of a federal statute, a decision from the court of appeals sitting en banc, or the Supreme Court of the United States.

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

   The Supreme Court has made clear that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Whether and when it is appropriate for the Supreme Court to do so has been a subject of great debate by Justices and legal scholars for nearly two centuries. But for lower court judges, it is a purely academic question, since lower court judges are emphatically bound to follow Supreme Court precedent.

2. 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 text book 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 Law of Judicial Precedent, Thomas West, p. 802 (2016).) 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"? Do you agree it is "superprecedent"?

   From the perspective of a lower court judge, ALL Supreme Court precedent is binding and effectively "super-precedent."

   b. Is it settled law?

   Yes.

3. 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?**

Yes.

4. 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 a district judge and nominee to an appellate court, I do not believe it is appropriate for me to publicly disclose my personal views on particular Supreme Court opinions. *See* Code of Conduct for United States Judges, Canon 3(A)(6); *see also* Testimony of Elena Kagan Before the Senate Judiciary Committee, June 29, 2010 ("I think that it wouldn't be appropriate for me to talk about what I think about past cases – you know, to grade cases . . . ."). As with all Supreme Court precedents, *Heller* is controlling authority that I am bound to faithfully uphold and apply.

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

   In *Heller*, the Supreme Court indicated that "the right secured by the Second Amendment is not unlimited," and that "nothing in our 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." 554 U.S. 570, 626-27 (2008). For the reasons stated in my answer to Question 4(a) above, I do not think it would be proper for me to comment beyond that.

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

The majority and dissenting opinions in *Heller*, and numerous legal scholars and commentators, have disagreed over the meaning of prior Supreme Court cases and whether the majority decision in *Heller* constitutes a departure from that precedent. For the reasons stated in my answer to Question 4(a) above, it would not be appropriate me for provide my personal views on this subject.

5. At the 2014 Second Circuit Judicial Conference, you displayed a PowerPoint presentation to introduce new judges. The presentation included photo-shopped images of incoming federal judges. While each of the new male judges was depicted in suits or judicial robes, two female judges were photo-shopped so that their heads were placed on the bodies of an ice skater and an Irish dancer, respectively.

a. Why did you superimpose the images of the incoming female judges on the bodies of an ice skater and Irish dancer?

In 2014, Chief Judge Robert Katzmann asked me and another federal judge (Judge Roslynn Mauskopf from the Eastern District of New York) to serve as Toastmasters for the Second Circuit's Annual Judicial Conference. As Toastmasters, our chief function was to introduce – somewhat humorously – those judges who had assumed the bench in the past year. As is customary in such introductions, we received photographs, anecdotes, and stories from the judges' colleagues, staff, friends, and families in an effort to provide a good-natured introduction that combined the judges' professional resumes with "fun facts" involving their past lives, hobbies, and interests. Because there were 22 new judges appointed in the year before the 2014 conference, Judge Mauskopf and I divided up the newly appointed judges for purposes of the introduction. Although the slides were consolidated into a single powerpoint presentation, each of us took primary responsibility for the slides of our assigned judges, and the slides referenced in this question were not prepared by me. Nevertheless, I recall that the images described above were inspired by the fact that those judges had previously participated in the activities depicted – namely, figure skating and Irish step dancing.

Respectfully, it is inaccurate to suggest that "each of the new male judges was depicted in suits or judicial robes." In fact, there were multiple photos of all the new judges – male and female – including baby photos, Halloween photos, and high school and college photos. One male judge was featured as a six-year old in a Batman costume; another was shown in a football uniform;

one had his photo displayed along with characters from Sesame Street; one male judge had his head photo-shopped onto the body of a bike messenger; ride-sharing judges from one district in the Circuit were depicted as circus clowns crammed into a tiny car; one female judge was introduced as "fearless" with the photo of a toreador staring down a bull; one male judge with the surname Hummell was introduced alongside a photo of a porcelain figurine; the chief judge from the "figure skating judge's" district was photo-shopped onto a Zamboni, tasked with cleaning up after her figure-skating colleague. The powerpoint ended with a slide displaying photos of all the new judges – all in robes or business attire – under the legend "The Baby Bench" while the theme from "The Brady Bunch" played in the background.

In all, the program was a tame introduction of new colleagues that seemed to be well received by the 500 or so judges and lawyers in attendance, including Chief Judge Katzmann and Justice Ginsburg. It was of course intended to convey, among other things, that humor, humility, and the ability to laugh at oneself are important qualities in judges, and in all human beings. No reasonable reviewer of the powerpoint could believe it reflected sexism, on my part or anyone else's.

6. In a 2012 speech to the Yale Law School Federalist Society, you discussed issues of prosecutorial discretion, especially as it relates to corporate criminal liability. You stated that prosecutors often function as the "judge, jury, [and] executioner" and that there is "virtually no judicial oversight" and "potential for abuse" when prosecutors pursue criminal cases against corporations.

   a. How does discretion over the decision whether to pursue a criminal prosecution of a corporation present a "potential for abuse" on the part of prosecutors?

   These remarks were made during a program on "Corporate Criminal Liability," which included another speaker, Preet Bharara, then United States Attorney for the Southern District of New York, who had previously written an article on the subject entitled *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. R. 53 (2007). The starting point of the article, and the program, was the observation that under US law "a business organization is criminally liable for the illegal acts of any of its agents so long as those actions were within the scope of his duties and were intended, even only in part, to benefit the corporation." *Id.* at 57. As a result, prosecutors have been vested with the power "to prove virtually any corporate entity guilty upon showing criminal conduct on the part of at least one employee" – with potentially catastrophic collateral consequences for innocent shareholders and employees. *Id.* at 71.

   The point I was making in the excerpts cited above was that, in recognition of those drastic collateral consequences, prosecutors rarely bring criminal charges against corporations. Nevertheless, the threat of such charges – and the accompanying

collateral consequences – has resulted in many corporate investigations concluding with the imposition of significant monetary penalties via civil settlements and non-prosecution agreements, typically with no judicial involvement or oversight. Although many, perhaps most, of those settlements can be justified, the concern with any extrajudicial resolution of criminal charges is that the lack of judicial scrutiny could lead some defendants to eschew valid legal defenses "to avoid the economic death sentence that indictment may bring," *id.* at 104, while emboldening prosecutors to press overly aggressive legal theories without consequence. Each of these is at least potentially problematic for a criminal justice system that is premised on the presumption of innocence and the right to due process, including the right to a trial by an impartial jury or judge.

How is that different from the "potential for abuse" from prosecutorial discretion over the decision to prosecute (or not prosecute) an individual?

I think the principal difference is that prosecutors in corporate criminal investigations have more discretion over whether to bring charges in the first place, which is determinative as to whether there will be judicial oversight. As noted above, the Department of Justice has promulgated guidance to prosecutors that results in very few corporations ever being charged. As a result, the vast majority of corporate criminal investigations are resolved without indictments and without judicial intervention of any kind, even though the resolutions may involve heavy fines that would appear to be punitive. By contrast, Department of Justice policies regarding the prosecution of individuals ordinarily require prosecutors to charge the most serious readily provable criminal offense at the outset. This policy results in the filing of formal criminal charges in the vast majority of cases, thereby triggering the full panoply of constitutional and statutory rights afforded to criminal defendants. These include the right to proceed by grand jury, which requires the government to present its evidence to citizen grand jurors who may balk at overly aggressive legal theories or factual assertions; the right to a speedy presentment before a neutral judge, who will advise the defendant of his rights and address the issue of bail, which will typically involve at least a limited inquiry into the strength and theory of the government's case; the right to pre-trial discovery pursuant to the Federal Rules of Criminal Procedure; the right to make pre-trial motions, including motions to dismiss based on erroneous legal theories and motions to suppress evidence obtained in violation of the Fourth Amendment; and of course the right to a speedy and public trial by a jury, with its corresponding presumption of innocence and the right to confront one's accusers. If found guilty – at trial or as a result of a guilty plea – the defendant will still have the opportunity to make sentencing arguments to a judge, who will be obliged to consider a variety of sentencing factors before stating the reasons for her sentencing decision on the record. Finally, the defendant will ultimately have the right to appeal his conviction and sentencing, and even pursue a habeas petition where necessary to prevent a miscarriage of justice. Each of these interactions with the judicial branch provides a potential check on government overreach. That is the hallmark of our system of justice, and the administrative model frequently applied in the context of corporate criminal investigations risks short-circuiting the constitutional model that

is supposed to apply in criminal cases. That was the focus of the program up at Yale.

Of course, none of this is meant to suggest that "the potential for abuse from prosecutorial discretion" doesn't also exist for individual defendants. It does. I have spoken about such potential abuses on other occasions in remarks that have been provided to the Committee.

b. How should courts ensure that prosecutors do not abuse their power?

I think the best way to ensure that prosecutors do not abuse their power is to carefully adhere to the safeguards and rights enshrined in the Constitution, which contemplates an active judicial role in an adversarial system. Judges must remember that they are a separate branch of government and that open and transparent court proceedings are essential to the true administration of justice. In ex parte proceedings, such as applications for search warrants, wiretaps, and sealing requests, courts must be particularly vigilant and scrupulous in holding the government to its burdens. But our system is also multi-faceted and requires the active participation of various actors, including prosecutors, defense lawyers, grand juries, and juries as well. Each must be conscientious and zealous in the performance of their duties.

7. You moderated an event in July 8, 2014 entitled "Terrorism Trials in Federal Courts." In a PowerPoint presentation from that event, you raised the possibility of a type of hybrid court that could try terrorism cases, one that combined aspects of Article III courts with aspects of military commissions.

a. Please expand on what this hybrid court would look like.

This slide reflected a proposal previously made by former Assistant United States Attorney Andrew McCarthy during a 2012 program on the same topic that I also moderated and that included Richard Zabel, then Deputy United States Attorney for the Southern District of New York and the author of a white paper published by Human Rights First entitled "In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts."

In 2014, I moderated the panel referenced above, which was sponsored by the Yale Law School Alumni Association and featured former U.S. Attorney General Michael Mukasey, Mr. Zabel, and Yale Law School professors Fiona Doherty and Eugene Fidell. During the course of that program I asked the panelists to comment on Mr. McCarthy's proposal for a national security court. As the moderator, I expressed no views on the subject.

8. You presided over the insider trading trial of Michael Steinberg, a trader at SAC Capital Advisors. Prosecutors pursuing charges against Steinberg tacked his indictment onto the existing indictment for two other traders who had been convicted of insider trading, Todd Newman and Anthony Chiasson. In challenging that move, Steinberg's attorney alleged

that prosecutors had essentially engaged in judge-shopping because they were aware that in prior rulings, you had interpreted the insider trading statutes in a way that made it easier for prosecutors to meet their burden of proof. Further, the New York Council of Defense Lawyers sent a letter to Chief Judge of the Southern District Loretta Preska, writing that tacking indictments "creates at least an appearance of impropriety."

a. How should circuit courts ensure that prosecutors are not "judge-shopping" to find a judge who will rule more favorably to the prosecution?

So long as the assignment of a superseding indictment comports with the district court's local rules, there would seem to be little for a circuit court to do in this regard. At the very least, a circuit court would need to wait for a party to file an appeal or a mandamus motion challenging the district court's denial of a recusal motion, something that never happened here. Absent such an appeal or mandamus motion, the circuit court would have no jurisdiction to reverse the district court.

As to the *Steinberg* matter, perhaps some background would be helpful. According to the Local Rules of the United States District Court for the Southern District of New York, superseding indictments are properly assigned to the same district judge to whom the original indictment was assigned. Superseding indictments are neither unusual nor improper, and are particularly appropriate when the grand jury wishes to add new defendants or charges to an existing conspiracy indictment. The use of a superseding indictment, and its assignment to the judge who is already familiar with the case, promotes judicial efficiency, continuity, and the consistency of rulings on common evidentiary and legal issues. It also ensures that the same judge will sentence all members of the conspiracy in the event of conviction, which likewise promotes consistency, efficiency, and fairness.

In this case, Mr. Steinberg was superseded into an indictment that included Mr. Newman, Mr. Chiasson, and three other defendants who were all alleged to be part of the same insider trading conspiracy. The conspiracy involved all the same inside sources, all the same material non-public information, and all the same stocks, with all trades occurring during the same relevant time periods. Mr. Steinberg's late arrival into the case was the result of his analyst, John Horvath, who was charged in the original indictment, pleading guilty and cooperating with the government against Steinberg. At the time of the superseding indictment, each of the other defendants had either pleaded guilty or been convicted at trial, but none had yet been sentenced. During Mr. Steinberg's first court appearance, the government indicated that trial against Steinberg would be a virtual replay of the previous trial of Mr. Horvath and Mr. Chiasson, and immediately provided Mr. Steinberg and his lawyer with all the materials that had been previously produced at the prior trial. At the end of that conference, Mr. Steinberg's attorney requested that the Court reassign the case to another judge, on the grounds that the government had improperly obtained a superseding indictment in violation of the court's local rules in order to take advantage of rulings made in connection with the previous trial. The government immediately opposed the request, noting that the new indictment comported with the district court's local rules while explaining that superseding Mr. Steinberg into the existing indictment was "the obvious thing to do" in light of

the fact that the trial of Mr. Steinberg would be "almost identical" to the prior trial and would include virtually all of the same witnesses and evidence. Although I invited the parties to make further submissions on the subject, I indicated that it was unlikely that I would reassign the case since it seemed to me that the superseding indictment was appropriate in light of the local rule and longstanding practice.

After receiving further submissions from the parties, I conferred with the Chief Judge of the district, who presides ex officio as a member of the Court's assignment committee, concerning the propriety of the superseding indictment and whether it was appropriate for me to keep the case. The Chief Judge agreed that the superseding indictment was consistent with the Court's local rule and that there was no basis for reassigning the case. I so informed the parties, and observed that the use of a superseding indictment seemed particularly appropriate in light of the enormous overlap in evidence, witnesses, and legal issues. I noted that the allegation of judge shopping might also be leveled against the defendant, since the principal motivation for the motion seemed to be a desire to avoid the rulings that I had made with respect to Steinberg's co-conspirators.

Significantly, no party ever suggested that I was biased or made a motion for recusal on those grounds. Nor did Steinberg ever seek an interlocutory appeal or mandamus motion based on the alleged appearance of impropriety occasioned by the alleged violation of the Court's local rule. I was not surprised by this, given the numerous instances in which superseding indictments have been returned under similar circumstances in organized crime, terrorism, and white collar crime cases in this district. *See, e.g., United States v. Khalid Sheikh Mohammed, et al.*, S14 93-cr-180 (KTD) (superseding five new defendants into World Trade Center bombing conspiracy 16 years after original indictment); *United States v. Bin Laden, et al.*, S13 98-cr-1023 (LAK) (superseding Sulaiman Abu Ghayth nearly 15 years after the original indictment on charges relating to conduct that took place in 2001, approximately three years *after* the 1998 embassy bombings that formed the basis for the original indictment); *United States v. Levin, et al.*, 10-cr-31 (SHS) (returning superseding indictment against two new defendants 11 days after the original defendants pleaded guilty to securities, wire, and mail fraud charges based on the same fraudulent scheme at the same hedge fund).

Ultimately, the Steinberg trial closely tracked the prior trial, and involved virtually identical evidentiary rulings, voir dire questions, witnesses, exhibits, and jury instructions. The efficiencies were considerable, and it was, in my view, appropriate that all members of the alleged conspiracy were subject to consistent legal rulings and sentenced by the same judge. At no time did any party or lawyer ever suggest that I had been biased or unfair in any way.

b. What steps can and should courts — district or circuit — take to assure the public and litigants that tacking indictments has not created any impropriety?

The most important thing that courts can do to avoid any appearance of impropriety in connection with the filing of superseding indictments is to have

clear rules on the subject. To this end, the Southern District of New York amended its rules to make the assignment of superseding indictments more explicit. Rule 6(e) of the Southern District of New York's Rules for the Division of Business Among District Judges now provides: "An indictment or information designated by the grand jury or the United States Attorney as a superseding indictment or information will be assigned to the same judge to whom the original indictment or information was assigned and may not be reassigned from that judge except pursuant to the order of that judge . . . . Any questions with respect to such designation as superseding indictment or information shall be decided by that judge subject to appellate review where applicable. The judge may require the United States Attorney to explain in writing, either under seal or otherwise, the reasons for proceeding by superseding indictment or information before that judge rather than in another manner." Although the amendment was designed merely to clarify the prior rule, there can be no doubt that I complied with all aspects of the rule to the letter, as I always have before and since.

9. At your hearing, in response to a question from Senator Hirono, you stated that "everybody has blind spots," adding that every judge has an obligation to reflect on whether there is something he or she "might be overlooking."

a. Please describe specific instances in your judicial career in which you have identified and corrected for "blind spot[s]."

Two come to mind. First, as an Assistant United States Attorney from 1994 to 2005, I participated in numerous criminal sentencings from the government's table at the front of the courtroom. I took that obligation seriously, and I never took for granted the solemnity of the occasion or the impact it had on defendants and their families. Nevertheless, it wasn't until I became a judge that I realized what a difference a change in perspective can make. Unlike the prosecutor, whose seat at the front table necessitates him having his back to the defendant, a district judge sits up on the bench, facing everyone in the courtroom. That perspective makes the defendant the central participant – not just a voice or shadow over the prosecutor's shoulder. From the bench, it is impossible not to see the humanity of the defendant, and it becomes obvious that he is the most important person in the room, always worthy of respect and always entitled to be treated with dignity. From the bench, it's impossible to ignore the family members who are present in the gallery. They too will be affected by this sentencing, and they too are worthy of respect and courtesy. From the bench, you realize that a sentencing – which may seem ordinary and technical to lawyers – can be terrifying and emotional. Since becoming a judge, I now know to make sure we have extra tissues, because defendants and their families sometimes cry. I now make sure that the interpreters bring extra headsets, because a Spanish-speaking defendant may well have Spanish-speaking relatives who deserve to know what's happening and to follow it in their own language. I now know that the Sentencing Guidelines and the 3553(a) factors are complicated and confusing and full of jargon, and that it's important to explain them plainly, so that everyone in the room can understand

them. I now know that sentencings can't be rushed; because no matter what else is on the calendar or waiting for me back in chambers, this is the most important thing I will do all day. I learned all that up on the bench, about 15 feet from where I sat for eleven years as a prosecutor. The view is different from there; and I'm wiser for it.

The second example is something I learned at a criminal trial about a civil statute. The Americans with Disabilities Act ("ADA") was passed by Congress in 1990. It prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public. I get a lot of ADA cases, many involving allegations that a particular establishment – perhaps a restaurant, store, or coffee shop – is inaccessible. But it wasn't until I was picking a jury in a criminal case that I fully appreciated the impact of that statute. The criminal case obviously had nothing to do with the ADA, which is a civil statute. But on the morning of jury selection, as I was calling the names of prospective jurors to take a seat in the jury box for voir dire, I noticed that one of my prospective jurors was in a wheel chair. It suddenly dawned on me that my courtroom, in which I'd been holding conferences on ADA cases for several years, was woefully inadequate to meet the needs of that juror. The jury box had a step that she couldn't get over; we had no ramp to make it accessible; and even if we did, the box would have been too small and narrow to accommodate her chair. She was gracious about it, even though the temporary solution had us leaving her alongside the jury box, about six inches lower than the other prospective jurors. I had my clerk scramble to try to find us a different courtroom – one that could properly accommodate the juror – but before we could do that, the juror ended up getting excused because of a scheduling conflict. So she ended up leaving, while the rest of us stayed in my non-ADA compliant courtroom, where we ended up trying the criminal case. We had a very diverse jury in terms of race, age, gender, ethnicity, education, income, national origin, and neighborhood. That's the beauty of New York; it's a diverse place. But we couldn't properly accommodate a juror in a wheelchair. I believe in the jury system; the jury is probably the most democratic and diverse institution in American government, which is the genius of our system of justice. But that day we weren't as good as we needed to be. I'm reminded of that day every time I pick a jury, and I find myself looking at every new space I enter – whether a restaurant, a theater, or a hearing room at the Dirksen Senate Building – with an eye toward how that juror would manage the space. I also try to put myself in the shoes of a landlord or small business owner, and remind myself that this isn't always so easy, and that sometimes good people can overlook things as obvious as the step in my jury box.

10. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the

President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

I was never asked about my views on administrative law.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

Although I cannot account for all of the informal conversations I have had since 2016 – or the group memberships of every individual to whom I have spoken in that period – I have no recollection of being asked about my views on administrative law by anyone.

c. What are your "views on administrative law"?

Only that I will continue to fully and faithfully apply all precedent on this subject from the Supreme Court and the Second Circuit.

11. When is it appropriate for judges to consider legislative history in construing a statute?

The Second Circuit has held that courts may consult legislative history and other tools of statutory construction to discern Congress's meaning where the meaning of a statutory provision is ambiguous. *United States v. Gayle*, 342 F.3d 89, 93-94 (2d Cir. 2003); *see also United States v. Nelson*, 277 F.3d 164, 186 (2d Cir.2002), cert. denied, 537 U.S. 835 (2002). Specifically, resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application. As a general matter, courts in this circuit may consider reliable legislative history where the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant. *Cf., e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5 (1991); *Cheung v. United States*, 213 F.3d 82, 92 (2d Cir.2000).

12. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

I had no such discussions with anyone

13. Please describe with particularity the process by which you answered these questions.

I drafted answers to each of these questions. Then I solicited feedback from members of the Office of Legal Policy at the U.S. Department of Justice, as well as my wife. I ended up revising my answers in light of that feedback. My answers to each question are my own.

Senate Judiciary Committee
"Nominations"
Questions for the Record
August 1, 2018
Senator Amy Klobuchar

Questions for Richard Sullivan, Nominee to the Second Circuit Court of Appeals

- How would you view the importance of adhering to precedent – even precedent where you felt that the case was wrongly decided – if you are confirmed to the Second Circuit?

  I recognize that it is the duty of lower court judges to follow the controlling precedents of the Supreme Court (and prior panels of the Second Circuit), regardless of whether they agree with the particular outcome or reasoning of those cases. That is an essential feature of our system of justice, and I will have no hesitation in upholding and applying such precedents.

- If you are confirmed, you will be hearing cases as part of a panel of judges. In your view, is there value to finding common ground—even if it is slightly narrower in scope—to get to a unanimous opinion on appellate courts?

  Circuit court judges sit in panels of three and must obviously work collaboratively on cases. There is always value in finding common ground, and all judges should consider the views of fellow panelists in reaching a decision. During my eleven years on the district court, I have had the opportunity to sit by designation on the Second Circuit on a number of occasions. The vast majority of the cases we heard resulted in unanimous opinions in which each judge was able to make meaningful contributions that made the final opinion better – sometimes more narrow, but more often just clearer and more persuasive. And even on the two occasions in which I dissented, I was struck by the collegiality and courtesy of my fellow panelists, who offered helpful suggestions to improve the quality of the opinion. I look forward to working collaboratively with such gracious colleagues.

Nomination of Richard J. Sullivan
United States Court of Appeals for the Second Circuit
Questions for the Record
Submitted August 7, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

   a. Do you believe there is implicit racial bias in our criminal justice system?

      Yes. The criminal justice system is a human institution, and it undoubtedly reflects the flaws and biases of human beings, including racial bias. I therefore believe that racial bias, both conscious and unconscious, is present in the criminal justice system, and that is the responsibility of all participants in that system, including judges, to recognize and minimize the influence of such bias.

   b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

      Yes. My review of statistics from the United States Sentencing Commission reflects that people of color make up a higher percentage of incarcerated individuals than they do of the population generally. *See Demographic Differences in Sentencing*, United States Sentencing Commission (Nov. 2017). I believe this is equally true, and in fact more pronounced, across the various state court systems, though I am less familiar with the data for those systems.

   c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

      Since 2012, I have taught a sentencing seminar at Columbia Law School. In the course of preparing for this seminar, I have regularly reviewed articles in this area, including: Stith, *Disparity in Sentencing – Race and Gender*, Federal Sentencing Reporter, Vol. 15, 160-64 (2003); Rachlinski, et al, *Does Unconcious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009); Jerry Kang, et al, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 124 (2012); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. of Leg. Studies 75-111 (2015); Mark W. Bennet, *Implicit Racial Bias In Sentencing: The Next Frontier*, 126 Yale L. J. F. 391

(2017).

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[6]

    a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

    I am unfamiliar with these statistics and have not done any independent research in this area; consequently, I have not formed any conclusion as to the relationship between incarceration rates and crime rates.

    b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

    See answer to question 2(a) above.

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[1] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[2] *Id.*
[3] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[4] *Id.*
[5] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[6] *Id.*

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

   Yes.

4. Do you believe that *Brown v. Board of Education*[7] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

   As a district judge and nominee to an appellate court, I do not believe it is appropriate for me to publicly disclose my personal views on particular Supreme Court opinions. *See* Code of Conduct for United States Judges, Canon 3(A)(6); see also Testimony of Elena Kagan Before the Senate Judiciary Committee, June 29, 2010 ("I think that it wouldn't be appropriate for me to talk about what I think about past cases – you know, to grade cases . . . ."). (Note: Although I have not spoken publicly about *Brown v. Board of Education*, I regularly refer to Thurgood Marshall, Constance Baker Motley, and Martin Luther King, Jr., in my remarks to new citizens. I previously supplied the Committee with a copy of those remarks.)

5. Do you believe that *Plessy v. Ferguson*[8] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

   See answer to Question 4 above. The Supreme Court repudiated the doctrine of "separate but equal" in *Brown*. If confirmed to the Second Circuit, I will fully and faithfully apply *Brown* – and all other binding Supreme Court and Second Circuit precedent – as I have done as a district judge.

6. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

   Prior to my confirmation hearing, I met with attorneys at the Department of Justice, who discussed my hearing, including questions I might be asked. All answers I have given are my own.

7. President Trump stated recently on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[9] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

   The Supreme Court has held that, upon entering the United States, aliens are guaranteed due process of law under the Fifth and Fourteenth Amendment. As this general topic has been and may be the subject of further litigation in the future, I cannot comment further.

[7] 347 U.S. 483 (1954).
[8] 163 U.S. 537 (1896).
[9] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted August 8, 2018
For the Nomination of

Richard J. Sullivan, to the U.S. Court of Appeals for the Second Circuit

1. In *Floyd v. City of New York*, African American and Hispanic plaintiffs alleged that they were targeted for stop-and-frisks because of their race. A statistical study produced at trial showed that, in about 83 percent of stop-and-frisk cases, the person stopped was African American or Hispanic, even though the two groups accounted for 52% of the total population. The district court ultimately ruled that the police had violated the Fourth Amendment by conducting unreasonable searches and the Fourteenth Amendment by systematically conducting stop-and-frisks in a racially discriminatory manner.[1]

    a. Are you aware of the historically disproportionate stop-and-frisk rates for African Americans and Hispanics?

    Yes. Because the *Floyd* case was tried in my courthouse, and because my former law clerk participated as one of the trial lawyers for the plaintiffs in that matter, I am familiar with the case and the findings made by the Court. (Note: The judge in the *Floyd* case, Shira A. Scheindlin, has since retired from the bench and has written a letter in support of my nomination to the Committee.)

    b. Do these statistics raise concerns with you about the fairness and impartiality of stop-and-frisks as they are applied by law enforcement in our criminal justice system?

    Yes.

    c. Although the Code of Conduct for United States Judges prohibits judges from engaging in political activity, federal judges have been able to provide their observations when they have seen injustices in the criminal justice system.

    For example, former-Judge John Gleeson – when he was still serving as a federal judge – previously criticized mandatory minimums in various opinions he authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2]

    Do you believe that federal judges have a role to play in addressing the

[1] *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *see also* "Policing the Police on Stop-and-Frisk," NY Times, June 23, 2016, https://www.nytimes.com/2016/06/23/opinion/policing-the-police-on-stop-and-frisk.html.
[2] *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

disparate impact of stop-and-frisks on African American and Latino communities?

i. For example, do you believe a judge should:

1. Consider the disparate impact of stop-and-frisks when evaluating "reasonable suspicion" for a police stop?

As Judge Scheindlin noted in *Floyd*, "reasonable suspicion requires an individualized suspicion of wrongdoing." 959 F. Supp. 2d 540, 568. Therefore, "[c]ourts reviewing stops for reasonable suspicion must look at the totality of the circumstances of each case to see whether the detaining officer ha[d] a particularized and objective basis for suspecting legal wrongdoing." *Id.* (citations and quotations omitted). In making that assessment "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. 1 (1968). Because such issues may well come before me as a district judge (or, if confirmed, as a court of appeals judge), I do not believe it would be appropriate to comment further on this topic.

2. Raise awareness on the issue of the disparate impact of stop-and-frisks to the general public, federal prosecutors, and local law enforcement?

A judge's first obligation is to fairly and impartially preside over the cases before her. In most instances, I believe judges should limit themselves to their role as the impartial arbiters of disputes and speak through their written opinions. However, where judges have developed expertise in an area that is relevant to the administration of justice, I think it is appropriate for them to speak on such topics. As reflected in my Senate Questionnaire, I have on many occasions participated as a moderator, panelist, and speaker on matters relating to trial practice, civil and criminal procedure, and sentencing (on several occasions with Judge Gleeson and Judge Scheindlin). I think it would be equally appropriate for judges with expertise in the area of stop-and-frisk policies to do the same. Of course, Canon 3 of the Code of Conduct for United States Judges prohibits judges from publicly commenting on the merits of matters pending or impending in any court, and Canon 5 prohibits judges from engaging in overtly political activity. Nevertheless, the commentary to Canon 4 recognizes that "a judge should not become isolated from the society in which the judge lives" and that as a "person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice."

Senate Judiciary Committee – Questions for the Record
August 1, 2018

Hearing entitled: "Nominations"

Panel I

Questions for Richard Sullivan, to be United States Circuit Judge for the Second Circuit

1. Can you name something that is constitutional that you think should be unconstitutional?

   No. There is no particular constitutional amendment that I would propose at this time. As a sitting judge, I have principally focused on fulfilling my constitutional role in the criminal and civil cases assigned to me.

2. Why do you think it is okay for you to give your opinion about the death penalty?
   a. If a death penalty case comes before you and you've already announced that you're against the death penalty, doesn't that violate your rule that you shouldn't comment about constitutionality and unconstitutionality?

      I don't routinely give my opinion about the death penalty. The one time I recall commenting on the subject was in the context of a discussion on sentencing, in which I tried to explain that it is a judge's duty to uphold the law even if he or she disagrees with it. I have never suggested that the death penalty is unconstitutional. Indeed, I have had cases involving the death penalty come before me, both as a prosecutor and as a judge. As a prosecutor, I investigated, prosecuted, and tried numerous cases that were death penalty eligible at the time they were charged. Although the Justice Department ultimately determined not to seek the death penalty, I knew it was a possibility throughout my involvement in the case. As the Chief of the Narcotics Unit at the U.S. Attorney's Office, I supervised other death eligible cases, including one in which the Department of Justice did direct us to seek the death penalty. During the course of that case, the district judge dismissed the death penalty count of the Indictment on the grounds that the death penalty was unconstitutional. My Office appealed that ruling and got it reversed. The case ended up going to trial, and although the jury ultimately declined to impose the death penalty, we all understood that it was the jury's prerogative to make that determination. As a district court judge, I have likewise had several cases that involved death eligible counts at the time of indictment. Thus far, the Department of Justice has never elected to seek the death penalty, and the cases have proceeded with the maximum available sentence of life imprisonment. Nevertheless, I fully understand that it is for the government and grand jury to determine whether or not to seek the death penalty, and it is for the trial jury to determine whether or not to impose the death penalty. As a judge, my role is to make sure that the defendant's rights

are respected, that he receives due process, and that the defendant and the government receive a fair trial. If I ever think that my personal opinions may compromise my ability to carry out that function, I will recuse myself. But I am quite confident that that will not be the case, as it has not been in the eleven years I have served as a district judge.

3. What does the ninth amendment mean?

The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Although the Amendment implicitly recognizes the existence of unenumerated rights beyond those specifically referenced in the text of the Constitution, courts have concluded that "the Ninth Amendment is not an independent source of individual rights." *Jenkins v. C.I.R.*, 483 F.3d 90, 92 (2d Cir.2007).

a. What are those other rights in your opinion?

Among the unenumerated rights recognized by the Supreme Court are the right to privacy, the right to an abortion, the right to travel, and the right to marry. Nevertheless, in my eleven years on the bench, I can recall no case in which I have been called upon to apply or interpret the Ninth Amendment.

b. What's a penumbra?

Penumbra is a scientific term used in astronomy to describe the partially shaded outer region of the shadow cast by an opaque object. It is often used to describe elements of a partial eclipse. Nonetheless, the word has come to greater prominence in legal parlance after Justice Douglas used the term as a metaphor to describe the process by which the Court could discern certain fundamental though unenumerated rights. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

c. Are there other penumbras in the Constitution?

Since the term was used as a metaphor in *Griswold*, I do not know how to answer this question.

d. Can you see a penumbra?

When used as a metaphor as it was in *Griswold*, my understanding is that a penumbra cannot be seen.

e. Well if you can't see it, how do you know it's there?

Respectfully, I have not previously thought about this question and, although I have considered the question carefully, I don't know how to answer it.

f. What other penumbras are there in the Constitution?

Please see my response to Question 3(c) above.

4. A guy is walking down the street in a high crime area. We know statistically that it's a high crime area, it's not a subjective thing. It's the middle of August and he's wearing a really heavy coat and he's got a big satchel with him. Every now and then he looks into a car.

a. Can the police stop and talk to him?

The police are certainly free to speak with the individual and ask him questions. "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual . . . as long as the police do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991). In order to detain him, however, the police must have "a reasonable suspicion that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

b. Is there reasonable suspicion?

Perhaps. As noted above, *Terry* permits officers to detain an individual "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *United States v. Place*, 462 U.S. 696 (1983). To justify such a stop, police "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion [on that person's liberty]." *Terry*, 392 U.S. at 21. In reviewing such stops for reasonable suspicion, a court "must look at the totality of the circumstances . . . to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *see also United States v. Lee*, 916 F.2d 814, 819 (1990) ("the proper inquiry is not whether each fact considered in isolation denotes unlawful behavior, but whether all the facts taken together support a reasonable suspicion of wrongdoing").

Here, the fact that the individual is in a high crime area is clearly not enough, by itself, to justify a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Nor does his carrying of a big satchel add much to the equation. People carry bags, sometimes large ones, for a variety of reasons, and carrying such a bag in a high crime neighborhood is not enough to create a reasonable suspicion of criminal activity. That he is wearing a heavy coat in the middle of August is a more pertinent fact, since it could support an inference that he is trying to hide something, including a weapon. But without more facts – what did the coat look like, did it appear as though he was carrying something inside the coat, was that consistent with a weapon or some other illegal object, how hot was it, where was this (Seattle and New Orleans are very different places in August)

– this too would seem to fall short of the standard for reasonable suspicion to justify a stop.

The last fact in the hypothetical – that "every now and then he looks into a car" – is a salient one that is reminiscent of the facts in *Terry*, in which the officer "observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring." *Terry*, 392 U.S. at 5-6. But the facts in *Terry* were far more developed than the facts are here. In *Terry*, the officer observed the men repeating "this ritual alternatively between five and six times apiece – in all, roughly a dozen trips" – for "10 to 12 minutes." *Id.* at 6. Here, we only know that the individual occasionally looked into a car. As a district judge reviewing the legality of a stop based on these facts, I would want to know more details, such as to how many times he looked into cars, from what distance, for what duration, with what degree of attention and focus, and with what indicia of stealth or criminal intent. Presumably the officers would be able to answer those questions, and if it wasn't clear from the papers, I could hold a hearing to further develop the record.

Panel II

Questions for Diane Gujarati, to be United States District Judge for the Eastern District of New York, and
Questions for Eric Ross Komitee, to be United States District Judge for the Eastern District of New York, and
Questions for John L. Sinatra, Jr., to be United States District Judge for the Western District of New York, and
Questions for Rachel P. Kovner, to be United States District Judge for the Eastern District of New York, and
Questions for Lewis J. Liman, to be United States District Judge for the Southern District of New York, and
Questions for Mary Kay Vyskocil, to be United States District Judge for the Southern District of New York:

1. The following are yes or no answers.
    a. Do you believe that retribution is a legitimate purpose of our penal system?
    b. Do you believe that adult incest is protected by the Bill of Rights?
    c. If Brown v Board of Education were overruled and Plessy v Ferguson were reinstated, would you resign?
    d. Do you believe that the US Constitution should be interpreted in the context of an ever-changing world?

e. Do you believe that the founder's original intent is most important thing in interpreting the Bill of Rights?
f. Do you believe that the founder's original intent in drafting the Bill of Rights should determine today how the constitution is interpreted?