

Senator Dick Durbin
Written Questions for Amy Coney Barrett, Joan Larsen, and Eric Dreiband
September 13, 2017

For questions with subparts, please answer each subpart separately.

Questions for Amy Coney Barrett

1. Question 17 of the Senate Judiciary Committee questionnaire asks each nominee to “[d]escribe the ten most significant litigated matters you personally handled, whether or not you were the attorney of record.” You responded to this question by saying “Although I worked on many litigation matters during my time as an associate at Miller Cassidy and then Baker Botts, I no longer have records of the matters upon which I worked. I recall only three significant litigated matters that I personally handled.”

It is rare for a judicial nominee to fail to describe ten litigated matters in response to Question 17. This question helps establish that a judicial nominee has practical experience handling litigated matters. It is not necessary that each matter described be significant, only that the matters described be among the most significant out of those matters the nominee has personally handled.

- a. **Please provide a complete answer to Question 17. To the extent you may no longer have complete records of litigation matters you handled, please provide at least “a capsule summary of the substance of each case” and a description of “the nature of your participation in the litigation” per the instructions in Question 17.**

My response to Question 17 of the Senate Judiciary Committee Questionnaire is complete as filed with the Committee. As I explained in my answer, “Although I worked on many litigation matters during my time as an associate at Miller Cassidy and then Baker Botts, I no longer have records of the matters upon which I worked. I recall only three significant litigated matters that I personally handled.”

- b. **Please describe in detail your efforts to gather the information required to respond to this question, including whether you have contacted your former firms to request this information.**

In addition to searching my own records, I contacted lawyers with whom I worked at my former firm to request information. I also searched legal databases for cases in which my own name or the name of one of the lawyers with whom I worked appeared.

2. It was unclear from your questionnaire whether you have ever argued a case before an appellate court. **Have you argued any cases before an appellate court? If so, please provide a summary of the substance of each case and the nature of your participation in it.**

As I testified at my hearing, I have not argued an appellate case.

3. **Have you ever served as a counsel of record in a case before an appellate court? If so, please provide a summary of the substance of each case and the nature of your participation in it.**

I have not served as counsel of record in a case before an appellate court. *See* Response to Question 17 on my Senate Judiciary Questionnaire.

4. You wrote in a 2013 law review article that “I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”

- a. **If you are confirmed, would you consider yourself bound by Supreme Court and 7th Circuit precedent all of the time or just some of the time?**

I would be absolutely bound by Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). I would also be bound by Seventh Circuit precedent, consistent with the circuit’s doctrine of stare decisis. *See, e.g., McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005) (“We require a compelling reason to overturn circuit precedent.”).

- b. **If some of the time, what principles would guide how you decide whether stare decisis should apply?**

See Answer to Question 4a.

- c. **Do you consider Supreme Court justices to be bound by Supreme Court precedent all of the time or just some of the time?**

The Supreme Court has said that “[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

- d. **If some of the time, what principles should guide justices in deciding whether stare decisis should apply?**

See Answer to Question 4c.

5. **Is the 2012 case *NFIB v. Sebelius*, in which the Supreme Court upheld the constitutionality of the Affordable Care Act, a precedent that should be adhered to by Circuit Court judges under the doctrine of stare decisis?**

Yes.

6. In the 1998 law review article you co-authored, “Catholic Judges in Capital Cases,” you wrote on p.340: “A judge will often entertain an ideological bias that makes him lean one way or another. In fact we might safely say that *every* judge has such an inclination.” **Is it your current view that every judge has an ideological bias that makes him or her lean one way or another?**

I believe that every judge, like every person, possesses some ideological convictions, but that no judge should allow those ideological convictions to dictate the outcome of a case.

7. In “Catholic Judges in Capital Cases,” you wrote on p. 345: “Catholic judges are not forbidden to have *anything* to do with the death penalty....But the judge’s cooperation with evil passes acceptable limits when he conducts a sentencing hearing- the issue with which we are now concerned.” **Are there other contexts in which you believe that a judge’s cooperation with evil passes acceptable limits?**

As I testified at my hearing, I cannot think of any cases or categories of cases in which I would feel obliged to recuse myself on grounds of conscience if I am confirmed as a circuit judge. If I ever confronted such a case, I would recuse.

8. In “Catholic Judges in Capital Cases,” you recounted on p. 347 what Justice Brennan said “during his confirmation hearing in 1957, when he was asked whether he could abide by his oath in cases where ‘matters of faith and morals’ got mixed with ‘matters of law and justice.’” You quoted Justice Brennan saying: “Senator, [I took my] oath just as unreservedly as I know you did...And...there isn’t any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.” You then wrote “We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty.” It is unclear from the context whether you did not defend Justice Brennan’s position because you did not believe his position was the proper response, or rather that you did not defend Justice Brennan’s position because you were simply citing his position to make a “sociological observation” in the last paragraph of p. 347 and thus you did not need to opine whether Justice Brennan’s position was proper for purposes of making that sociological observation. **Please explain your citation of Justice Brennan’s position on p. 347 of this article.**

The article expressed no view about the merits of Justice Brennan’s statement. It quoted him in the course of discussing whether a judge could be disqualified 28 U.S.C. § 455(a), which requires disqualification “in any proceeding in which [the judge’s] impartiality might reasonably be questioned,” from participating in a capital case merely because he or she was Catholic.

9.
 - a. **Can a president pardon himself?**

I have not studied that issue. If confirmed and that issue were to come before me as part of a case or controversy, I would resolve that issue as I would any other—by engaging in the judicial process, which includes examining the facts, reading the briefs, conducting necessary research, listening to the arguments of litigants, discussing the matter with colleagues, and writing and/or reading opinions.

b. If the original public meaning of the Constitution does not provide a clear answer to this question, to what should a judge look next?

A circuit judge must always first consult Supreme Court and circuit precedent in resolving a constitutional question. If a prior case has not decided the issue, the judge should consider factors such as text, history, and constitutional structure.

10. 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 like the Judicial Crisis Network in support of your nomination?

I am unaware of any outside groups or special interests having made donations on my behalf. I have not and will not solicit donations from anyone. Indeed, doing so would be a violation of my ethical responsibilities as a judicial nominee. *See* Canon 5 of the Code of Conduct for United States Judges; *see 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?

See Answer to Question 10a.

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?

See Answer to Question 10a.

11. You say in your questionnaire that you were a member of the Federalist Society from 2005-2006 and then again from 2014-present. **Why did you rejoin the Federalist Society in 2014?**

It gave me the opportunity to speak to groups of interested, engaged students on topics of mutual interest. The Federalist Society's approach to public lectures is consistent with my approach to teaching. I don't tell my students what to think; I help them see the strengths and weaknesses of competing positions and let them choose. That is how Federalist Society talks work. Almost every talk I have given to a student chapter included a professor with a different perspective presenting his or her competing view to the student audience.

12. The Federalist Society describes itself on its website as "a group of conservatives and libertarians interested in the current state of the legal order." **Do you agree with this characterization of the Federalist Society?**

It has been my experience that student and faculty members of the Federalist Society take a conservative or libertarian approach to many of the questions in which the Society is interested. For example, with respect to the separation of powers, many share the view that "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." (See "Our Purpose," www.fed-soc.org, last visited on September 17, 2017). That is not to say that members of the Federalist Society have a uniform view about how a given principle should apply in particular circumstances. For example, law professors affiliated with the Federalist Society routinely debate with one another on academic panels.

13. **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 is a political issue about which I cannot ethically opine. See Canon 5, Code of Conduct for United States Judges; see also Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

14. **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?**

I do not know what message, if any, the President's announcement sent to lawyers and judges who might aspire to serve on the Supreme Court.

15. **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?**

See Answer to Question 13.

16. **Please list all years in which you attended the Federalist Society's annual national convention.**

None.

17. 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 is a political issue about which I cannot ethically opine. *See* Canon 5, Code of Conduct for United States Judges; *see also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).