

Written Questions for Amy C. Barrett
Submitted by Senator Patrick Leahy
September 6, 2017

1. You have written extensively on stare decisis and precedent. In a 2013 law review article you wrote that “superprecedents” are cases that “no justice would overrule,” even if she disagrees with them.¹ Your article declined to put *Roe v. Wade* into this category, and instead cited those who argue that *Roe* is not superprecedent. They argued this in part because some politicians still call for *Roe* to be overturned. This seems to suggest that the politics of an issue should be considered when deciding whether precedent is worth following.

(a) **Do you believe it is relevant for a judge to consider political leaders’ thoughts on the value of precedent such as *Roe v. Wade*?**

No. For an explanation of the context in which I wrote about “superprecedent,” see Answer to Question 4(a) from Senator Feinstein.

(b) **Do you believe that *Roe* should be considered a superprecedent? Why or why not?**

I have neither offered my own definition of superprecedent nor undertaken an independent analysis of whether any particular case qualifies as a superprecedent under the definition employed by the scholars whose work I cited. If I am confirmed as a circuit judge, all Supreme Court precedent will be equally binding.

2. Chief Justice Roberts wrote in *King v. Burwell* that

[o]ftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

King v. Burwell would be binding upon me as a circuit judge if I were to be confirmed, and I would fully and faithfully apply it and any other Supreme Court precedent.

¹ Amy Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711, 1712 (2013).

3. President Trump has issued several attacks on the independent judiciary, including calling a judge who ruled against him a “so-called judge,” stating that a judge should be blamed if “something happens” as a result of issuing a constitutionally required court order, and attacking a judge’s ethnicity. Justice Gorsuch described some of the President’s remarks as “disheartening” and “demoralizing.”

(a) **Is this rhetoric appropriate?**

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.”).

(b) **In your view, does such rhetoric have any impact on respect for the rule of law?**

See Answer to Question 3(a).

(c) **While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a federal judge or court?**

Although I cannot ethically opine on this question for the reasons noted in my Answer to Question 3(a), I can note that federal judges and courts have been criticized frequently throughout American history. A principal function of Article III’s guarantee of life tenure and salary protection is to facilitate their ability to remain independent and impartial without fear of consequence. The proven ability of federal courts and judges to maintain their independence and impartiality even when their decisions are unpopular is a mark of our Nation’s success in upholding the rule of law.

4. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial and will not be questioned.” **Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?**

No person is above the law. In all decisions, including those related to national security, the President is bound by the laws of the United States. If I am confirmed and a question related to executive power in a matter of national security comes 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.

5. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

This question appears to ask me to weigh in on issues that are or could be the subject of litigation, and thus upon which I cannot comment. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *see also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

6. Many are concerned that the White House’s denouncement earlier this year of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President’s first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders. **If a President or any other executive branch official refuses to comply with a court order, how should the courts respond?**

I have not had occasion to confront this issue. If I am confirmed and such a question comes before me in the context 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.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

- (a) **Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

Hamdan establishes that the President “may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers.” 548 U.S. 557, 593 n.23 (2006) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). If I am confirmed, that decision would bind me as a circuit judge, and I would faithfully follow it and any other Supreme Court precedent.

Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

- (b) **In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

See Answer to 7(a).

8. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women. **Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has repeatedly applied the Equal Protection Clause to classifications based on gender, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996), and if I am confirmed as a circuit judge, I will faithfully follow that Supreme Court precedent.

9. **Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”**

I do not know what Justice Scalia meant by that phrase, and it would accordingly be inappropriate for me to express any opinion about it.

10. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The Emoluments Clause provides that “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” The meaning of this Clause is an issue that has been raised in pending litigation and thus not one on which I can comment. *See* Canon 3(A)(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); *see also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

11. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.” **When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

As a judicial nominee, it would be inappropriate for me to express a view about whether I agree with the Supreme Court’s treatment of factual findings in this or any other case. If am confirmed to the Seventh Circuit, I will faithfully follow *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

12. **How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?**

Each of these amendments grants Congress the power to enforce the amendment “by appropriate legislation.” If I am confirmed and a case involving Congress’s authority under one or more of these amendments comes before me, I will consult relevant Supreme Court and Seventh Circuit precedent.

13. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.” **Do you believe the Constitution protects that personal autonomy as a fundamental right?**

If I am confirmed to the Seventh Circuit, I will faithfully follow *Lawrence v. Texas* and all other Supreme Court precedent.

14. In the confirmation hearing for Justice Gorsuch earlier this year, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

- (a) **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis?**

If I am confirmed to the Seventh Circuit, I would be absolutely bound by Supreme Court precedent, see *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), and 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) **Does your answer vary depending on the court or depending on whether the question is one of statutory or constitutional interpretation?**

See Answer to Question 14(a).

15. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I am interested in specific examples, not just a statement that you would follow applicable law.

If I am confirmed, I will recuse from any cases in which applicable law requires me to do so, including cases in which I have a financial interest; cases in which my husband, Jesse Barrett, participated; and, for a period of time, from cases in which my current employer, the University

of Notre Dame, is a party. If confirmed, I will be vigilant about my recusal obligation, and to determine its full scope, I will consult all relevant law, including 28 U.S.C. § 455 and the Code of Conduct for United States Judges. Where necessary, I will seek advice from those designated to give it, both in the Seventh Circuit and at the Administrative Office of the United States Courts.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” Can you discuss the importance of the courts’ responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

The courts have the responsibility to faithfully apply all law, including law that guarantees citizens fair and effective representation. The courts have historically played a vital role in the context of civil rights because of their willingness to do so. If confirmed, I will be unwavering in my discharge of the judicial oath, which forcefully reinforces a judge’s duty to, among other things, “administer justice without respect to persons, and do equal right to the poor and to the rich” 28 U.S.C. § 453.

- 17. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Supreme Court has extensive case law interpreting congressional power under these clauses. If I am confirmed and a case involving Congress’s authority under one or more of these provisions comes before me, I will consult that precedent, as well as any relevant Seventh Circuit precedent.