

**Nomination of Joseph Bianco to the U.S. Court of Appeals for the Second Circuit
Questions for the Record
February 20, 2019**

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.

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 a lower court judge must always fully and faithfully follow Supreme Court precedent, a circuit court judge, in rare circumstances, may respectfully suggest in an opinion that the Supreme Court may want to revisit some prior holding or clarify such holding because, for example, the holding is inconsistent with other prior Supreme Court precedent and/or is creating confusion in the lower courts in its application. As noted above, such instances will be rare and the circuit judge remains bound by the existing precedent notwithstanding any issues that prompted the circuit judge to write such an opinion.

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

In the Second Circuit, a panel's holding can only be overruled by the Supreme Court or the Second Circuit sitting en banc. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

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

The Supreme Court has emphasized that "it is this Court's prerogative alone to overrule one of its own precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), and has articulated various factors to guide its decision. As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views as to when the Supreme Court could properly overturn one of its own precedents.

2. In a January 2017 speech, you argued that federal judges are not well-positioned to oversee certain terrorism prosecutions. You said that "[c]ivilian courts are not well-equipped to try terrorists whose terrorist activity takes place entirely, or almost entirely overseas." ("The Second Circuit and Terrorism" (Jan. 11, 2017))

a. In what way are Article III courts not “well-equipped” to oversee these types of terrorism cases?

Although Article III courts are fully capable of handling most terrorism cases, there are some terrorism cases (especially where the terrorist activity took place overseas) in which practical problems limit the ability of the parties to utilize certain forms of evidence in Article III courts, such as classified information, evidence that was secured by U.S. military personnel, and evidence that is located in a foreign country (including in the custody or control of a foreign government).

b. On what basis did you reach that conclusion?

I based that conclusion on my years of being involved in the investigation and prosecution of terrorism cases in the United States Attorney’s Office for the Southern District of New York, including as Deputy Chief and then Chief of the Organized Crime and Terrorism Unit, as well as my tenure as Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice in Washington, D.C., where I, among other things, was involved in the supervision of the Counterterrorism Section.

3. In the same speech, you said that in cases involving overseas terrorism, the “rules of . . . evidence and other practical problems make it difficult for the U.S. government to prosecute in a civilian court and, in some significant percentage of cases, makes it impossible.”

a. What did you mean by “other practical problems”?

Please see my response to Question 2(a).

b. Was this a reference to the use of enhanced interrogation tactics or torture to obtain information from suspects?

No, I was not referring specifically to enhanced interrogation techniques.

c. Do you believe it is acceptable to prosecute a terrorism suspect outside of the Article III court system if that prosecution is able to proceed only because of information gained through torture?

As a sitting District Court judge and judicial nominee, to the extent that this question raises a policy issue, it would be inappropriate for me to comment on a political question. *See* Code of Conduct for United States Judges, Canon 5. Similarly, to the extent that this question raises a legal issue, it would be inappropriate for me to state my views regarding such an issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

4. In a 2006 case, *United States v. Bailey*, you found the seizure by police of a defendant to be lawful on the basis of a search warrant issued for the defendant's home, even though the defendant had traveled one mile from his home prior to the warrant's execution and his detention. In reaching your conclusion, you specifically cited a Supreme Court opinion, *Michigan v. Summers*, which permits the detention of a residence's owner during the search of his or her residence. After the Second Circuit affirmed your decision, the Supreme Court reversed, explaining that an officer's authority to detain an individual under *Summers* must be confined to "the immediate vicinity of the premises to be searched" and that the defendant in the present case was detained "at a point beyond any reasonable understanding of immediate vicinity." (568 U.S. 186, 201 (2013))

a. On what basis did you conclude that the detention of the defendant in *Bailey* was consistent with the Court's holding in *Michigan v. Summers*?

The Supreme Court in *Summers* held that the occupants of a residence may be detained during the execution of a search warrant. Neither the language of the decision, nor its rationale, limited such detention to situations where the occupants were still in the residence. In fact, in *Summers*, the defendant was descending the steps outside the residence when he was detained. In upholding that detention, the Supreme Court in *Summers* emphasized, "We do not view the fact that [the defendant] was leaving his house when the officers arrived to be of constitutional significance. The seizure of [the defendant] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." 452 U.S. 692, 702 n. 16 (1981). Similarly, in *United States v. Fullwood*, 86 F.3d 27 (2d Cir. 1996), as the officers arrived to execute a search warrant at a residence, the defendant was outside the residence entering his vehicle. *Id.* at 29. The Second Circuit held that "[i]t was permissible for the officers to require [the defendant] to reenter his home and to detain him while they conducted a search of the premises pursuant to a valid search warrant." *Id.* at 29–30.

Given the absence of any geographical bright line in *Summers*, other courts subsequently held that the *Summers* doctrine extended to the detention of departing occupants of the residence beyond the boundaries of the residence. *See, e.g., United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991) ("*Summers* does not impose upon police a duty based on geographic proximity (i.e., defendant must be detained while still on premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence. Of course, the performance-based duty will normally, but not necessarily, result in detention of an individual in close proximity to his residence."); *United States v. Sears*, 139 Fed. Appx. 162, 2005 WL 1427509, *3 (11th Cir. 2005) (detention under *Summers* was proper where individual left house about to be searched and police waited until individual drove about 100 feet from house in a vehicle before detaining him during execution of search); *United States v. Cavazos*, 288 F.3d 706, 711 (5th Cir. 2002) (detention of occupant of residence, after he left residence about to be searched and drove two

blocks in a car, was proper under *Summers*); *United States v. Harris*, 2004 WL 912809, at *1 (D. Mass. April 26, 2004) (defendant properly detained under *Summers* after he left his home and walked one or two dogs to adjacent yard about 30 yards from his house).

Thus, in *Bailey*, my interpretation of *Summers* was consistent with at least three circuit court decisions, and was upheld by the Second Circuit, although ultimately rejected by the Supreme Court.

b. In reaching your decision, on what basis did you conclude that a detention one mile from the defendant's home constituted a detention within "the immediate vicinity of the premises to be searched"?

As noted above, in response to Question 4(a), the Supreme Court in *Summers* did not articulate a geographical limit for detaining departing occupants of a residence at the time of the execution of a search warrant. Thus, other courts had concluded, as I did, that the detention of the departing resident under *Summers* could take place as soon as practicable (even though beyond the boundaries of the residence). The Second Circuit, as a matter of first impression, also affirmed my decision based upon its own understanding of *Summers*. It was only in the *Bailey* decision itself that the Supreme Court, for the first time, articulated that the detention must occur within "the immediate vicinity of the premises to be searched."

5. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2004. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I have never been employed by the Federalist Society, and I am not familiar with this statement on the website. Therefore, I am not in a position to explain any portion of the statement or elaborate on its meaning.

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

Please see my response to Question 5(a).

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

Please see my response to Question 5(a).

- d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?**

No.

6. 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 prospective of a lower court judge, all precedent is binding and, in effect, “superprecedent.”

- b. Is it settled law?**

Yes, from the perspective of a lower court judge, all Supreme Court precedent is settled law.

7. 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, from the perspective of a lower court judge, all Supreme Court precedent is settled law.

8. 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 sitting District Court judge and a judicial nominee, it would be inappropriate for me to comment on whether I agree or disagree with Justice Stevens’ dissent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). As with all Supreme Court precedent, lower court judges are bound to fully and faithfully follow the Supreme Court’s decision in *Heller*.

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

In *Heller*, the Supreme Court noted that “the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court further explained, “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.” *Id.* at 626-27.

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

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding the *Heller* decision. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

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

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding the *Citizens United* decision. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding the *Citizens United* decision. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this legal issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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?

Although I do not recall every topic that was discussed during my interview for this nomination, I do not recall any specific question 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?

No.

c. What are your “views on administrative law”?

My view on administrative law, as with all areas of the law, is that I will (as I have done as a sitting District Court judge) fully and faithfully follow all Supreme Court and Second Circuit precedent on this subject matter.

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

According to Second Circuit precedent, when the statutory language is ambiguous, it is appropriate for judges to consider legislative history and other tools of interpretation. Otherwise, the plain meaning of the statute controls. *See, e.g., Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir.1999) (“It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.”) (citations omitted).

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.

No.

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

I reviewed the questions, conducted research or reviewed materials where necessary, and drafted my responses. I then sent my draft responses to the attorneys at the Department of Justice's Office of Legal Policy and solicited feedback. I made edits that I considered appropriate, finalized my answers, and then authorized the submission of these responses on my behalf.

Senator Dick Durbin
Written Questions for Joseph Bianco
February 20, 2019

For questions with subparts, please answer each subpart separately.

Questions for Joseph Bianco

1. You gave a speech to the Nassau County Bar Association on May 24, 2017 in which you said that you were a “really big fan of Justice Scalia” and that “as a judge, I strongly share his originalist or textualist philosophy.”

a. Is it possible for a textualist judge to try to achieve a particular outcome by emphasizing some words in the text over others or by choosing a particular dictionary to define certain words?

It is possible for textualism, like any method of statutory interpretation, to be misused if it is not applied in a fair and objective manner in accordance with the binding precedent of the Supreme Court and Second Circuit.

b. Is it still your view that judges should be originalist and adhere to the original public meaning of constitutional provisions when applying those provisions today?

If fortunate enough to be confirmed to the Second Circuit, I will interpret constitutional provisions consistent with the binding precedent of the Supreme Court and Second Circuit (as I have always done as a District Court judge).

c. If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today? To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

...no Person holding any Office of Profit or Trust under [the United States], 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.

I have not researched this issue. In any event, as a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views with respect to this constitutional issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

2.

a. Do you interpret the Constitution to authorize a president to pardon himself?

I have not researched this issue. In any event, as a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views with respect to this constitutional issue. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

b. What answer does an originalist view of the Constitution provide to this question?

Please see my response to Question 2(a).

3.

a. Is waterboarding torture?

An interrogation technique would be considered torture if it is “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(1). In addition, my general understanding is that the Detainee Treatment Act, as amended, provides that no person in the custody or control of the United States government may be subjected to any interrogation technique that is not authorized by the Army Field Manual, 42 U.S.C. § 2000dd-2(a)(2), and that waterboarding is not authorized in the Army Field Manual. Therefore, as set forth in the Detainee Treatment Act, waterboarding is illegal under U.S. law.

b. Is waterboarding cruel, inhuman and degrading treatment?

Please see my response to Question 3(a).

c. Is waterboarding illegal under U.S. law?

Please see my response to Question 3(a).

4. **Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

I do not have a factual basis to evaluate the accuracy of this statement. In any event, as a sitting District Court judge and judicial nominee, it would be inappropriate for me to comment on political matters. *See* Code of Conduct for United States Judges, Canon 5.

a. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.

I have no knowledge of any such donations, and I am unaware as to whether the Judicial Crisis Network supports my nomination. With respect to whether any such donations by outside groups or special interests are problematic, it would be inappropriate for me to answer that question which is part of an ongoing political debate. *See* Code of Conduct for United States Judges, Canon 5.

- b. If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

With respect to any recusal issues, I have applied, as a sitting District Court judge (and will continue to apply as a Circuit Court judge, if confirmed), the recusal requirements set forth in 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other relevant sources. With respect to the more general question regarding the disclosure or nondisclosure of any donations, it would be inappropriate for me to comment on this matter which is part of an ongoing political debate. *See* Code of Conduct for United States Judges, Canon 5.

- c. Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my response to Question 5(a).

5. You say in your questionnaire that you have been a member of the Federalist Society since 2004.

- a. Why did you join the Federalist Society?**

I joined the Federalist Society because some of my friends were members and enjoyed being members of the organization, and I wished to attend and/or participate in their legal programs that address important issues in the law.

- b. Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to comment on the President's statement or the selection process for federal judges. *See* Code of Conduct for United States Judges, Canon 5.

c. Please list each year that you have attended the Federalist Society's annual convention.

None.

**Nomination of Joseph Bianco to the
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QUESTIONS FROM SENATOR WHITEHOUSE

1. In a speech to the Nassau County Bar Association in May 2017, you stated that you “strongly share” Justice Scalia’s “originalist or textualist” philosophy.

- a. Please describe your “originalist or textualist” judicial philosophy.

My judicial philosophy is to fully and faithfully follow the precedent of the Supreme Court and Second Circuit in each case. With respect to statutory interpretation, consistent with Supreme Court and Second Circuit precedent, my approach is to look first to the text and its plain meaning. *See, e.g., Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”) (citations and quotation marks omitted).

- b. Do you believe originalism is consistent with current equal protection jurisprudence?

As a sitting federal judge and judicial nominee, it would be inappropriate for me to state my views regarding the current equal protection jurisprudence. *See* Code of Conduct for United States Judges, Canon 3(A)(6). I will fully and faithfully follow all Supreme Court and Second Circuit precedent with respect to the equal protection jurisprudence, as well as every other area of the law.

- c. Do you believe current 8th Amendment jurisprudence is consistent with the original meaning of the Amendment?

As a sitting federal judge and judicial nominee, it would be inappropriate for me to state my views regarding the current 8th Amendment jurisprudence. *See* Code of Conduct for United States Judges, Canon 3(A)(6). I will fully and faithfully follow all Supreme Court and Second Circuit precedent with respect to the 8th Amendment jurisprudence, as well as every other area of the law.

2. You have advocated for the importance of judicial restraint.

a. What do you believe judicial restraint entails?

Judicial restraint requires a judge to ensure that he or she is making decisions in a manner that is consistent with the Constitutional boundaries of the judiciary, and precedent that binds that judge.

b. Do you believe in judicial restraint as the proper approach to judicial review? Please elaborate.

Principles of judicial restraint, including requirements of standing and ripeness, as well as the doctrine of separation of powers, are cornerstones of our constitutional framework. Moreover, to the extent that principles of judicial restraint also have been established by the precedent of the Supreme Court and Second Circuit, such principles must be followed by judges in connection with judicial review.

c. Is it ever appropriate for judges to raise issues not directly presented by the litigants? When?

The Second Circuit has made clear that judges should construe arguments of *pro se* litigants to raise the best arguments that they suggest. *See, e.g., Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471 (2d Cir. 2006). As the Court has explained, “[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.” *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

d. When is it appropriate for a judge to consider legislative history?

Both the Supreme Court and Second Circuit have made clear that, when the terms of the statute are ambiguous, a judge may look to legislative history and other tools of interpretation. *See, e.g., Lee v. Bankers Trust Co.*, 166 F.3d 540 (2d Cir. 1999).

e. When is appropriate for a judge to use dicta in an opinion?

Courts, including the Supreme Court and Second Circuit, use dicta to provide guidance to courts and litigants as to how a particular rule of law may be understood and applied.

f. Is use of dicta consistent with the ideals of judicial restraint?

Courts are permitted to use dicta in judicial opinions. However, it is important that the courts, when using dicta, not issue advisory opinions and also understand that such dicta is not binding precedent.

- g. If confirmed, what weight would you give to Supreme Court dicta in reaching your decisions?

If there is no binding Supreme Court precedent on a particular issue, I would consider any dicta by the Supreme Court to assist me in reaching a decision on an issue of first impression and, if I found that dicta to be persuasive in light of Supreme Court and Second Circuit jurisprudence, apply it.

3. During your confirmation hearing you stated that everyone has a basic dignity. How does this belief translate into your work as a judge?

During my 13 years as a District Court judge, I have done my best each day to ensure that every single person who walks through the doors of my courtroom -- whether a party, a witness, an attorney, a juror, court employee or any other participant in a court proceeding -- is accorded the same respect, professionalism, civility, and dignity by both me and my staff, and treated in a completely fair and impartial manner in every instance. This effort manifests itself in so many different ways in my courtroom in both criminal and civil proceedings. For example, at the start of each civil proceeding, I go out to the attorneys' tables, to shake their hand, and welcome them to the court. In criminal proceedings, it is my practice to ask the defendant personally at each conference whether he agrees with his attorney's statements regarding any request for an adjournment and whether he agrees to any waiver of time under the Speedy Trial Act, rather than simply having the attorney speak for the defendant. I firmly believe that these and other aspects of procedural justice are critically important to the fair adjudication of cases and the confidence of the public in our court system.

4. You have been an active member in the Federalist Society. Do you think it is appropriate for judges to actively maintain membership in a group with a stated ideological agenda?

My understanding of the Federalist Society is that it does not take positions on particular legal issues in litigation, but rather attempts to foster debate on important legal topics. I do not believe that my association with the Federalist Society or with other groups for lawyers (such as the Federal Bar Association) creates any conflict with my work as a judge.

- a. If confirmed, do you plan to remain an active participant in the Federalist Society?

If confirmed, I plan to maintain my membership in the Federalist Society and, when invited and consistent with my schedule, speak at Continuing Legal Education events that they sponsor, often with bar associations or other lawyers' groups.

- b. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing?

No.

5. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree with Justice Roberts’ metaphor to the extent that the metaphor is meant to convey that the role of a judge is to fairly and impartially adjudicate cases within the constitutional boundaries of the judicial branch, and not to place himself or herself in the role of an adversary.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

To the extent that Supreme Court and Second Circuit precedent allows a judge to consider the practical consequences in rendering a decision on a particular issue, a judge may do so.

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

Under Rule 56, a judge is required to construe the evidence most favorably to the non-moving party (without making any subjective credibility determinations) and determine in an objective manner, applying the law to the facts, whether there is a genuine dispute as to any material fact that precludes summary judgment.

6. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old.”
- a. What role, if any, should empathy play in a judge’s decision-making process?

A judge is required to follow the law, including binding precedent, regardless of any empathy that the judge may have. However, consistent with law and precedent, there are some situations where empathy may play a role in a judge’s decision-making process. For example, in sentencing, a judge may consider the impact of the crime from the standpoint of the victim, and the impact of the sentence from the standpoint of the defendant and his family.

- b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?

Every judge brings his or her life experiences to the bench with them. Consistent with law and precedent, those life experiences can sometimes assist a judge in making certain decisions in a case. For example, life experiences, as with jurors, may assist a judge in making credibility determinations. Moreover, trial experiences that an appellate judge may have had in the courtroom prior to becoming a judge may assist him or her in assessing the impact that some evidentiary issue may or may not have had in a particular case on the fundamental fairness of the trial.

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

I believe that my diverse personal and professional experiences have equipped me well to be a judge and to exercise my judicial role.

7. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

8. The Seventh Amendment ensures the right to a jury “in suits at common law.”

- a. What role does the jury play in our constitutional system?

The jury plays a fundamental and critical role in our constitutional system. The Seventh Amendment embodies that role.

- b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this issue. See Code of Conduct for United States Judges, Canon 3(A)(6).

- c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this issue. See Code of Conduct for United States Judges, Canon 3(A)(6).

9. What do you believe is the proper role of appellate courts with respect to fact-finding?

Under the law, except in rare instances (such as a contempt of an appellate order), appellate courts are not involved in fact-finding, but rather are reviewing a factual record developed in the district court.

10. Do you believe fact finding, if done by appellate courts, undermines the adversarial process?

Please see my response to Question 9.

11. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has issued several opinions analyzing the level deference that should be given to fact-findings by Congress in situations where they support expanding or limiting individual rights. I will fully and faithfully follow Supreme Court and Second Circuit precedent with respect to this issue.

- a. Is it appropriate for appellate courts to disregard Congressional findings of fact?

As noted above, I will fully and faithfully follow Supreme Court and Second Circuit precedent in determining the level of deference that should be given to findings by Congress.

12. In *Shelby County v. Holder* and *Citizens United v. FEC*, Congress, relying on evidence it had examined, legislated to address what it believed to be a serious problem requiring a national solution. In each case, the Court deemed Congress's facts irrelevant and concluded that Congress had, at least in part, acted unconstitutionally. Was it appropriate for the Supreme Court to deem congressional fact finding irrelevant?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this case. See Code of Conduct for United States Judges, Canon 3(A)(6).

- a. In *Shelby County* the Court's holding hinged largely on its understanding of the facts, but it ignored the very facts that had prompted Congress to reauthorize the VRA in the first place. Was it appropriate for the Court to ignore congressional findings of fact with regards to voting discrimination?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this case or this issue generally. See Code of Conduct for United States Judges, Canon 3(A)(6).

- b. *Citizens United* gave virtually no weight to Congress's findings documenting the pernicious role of money in our elections. The majority rejected the argument that Congress has a "compelling constitutional basis" to guard against corruption and the appearance of corruption in local and national elections. Instead, the Court summarily concluded "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." In so concluding, the Court entirely ignored the Senate Committee report's findings to the contrary. Was it appropriate for the Court to ignore congressional finding of fact regarding corruption and the appearance of corruption?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this case or this issue generally. See Code of Conduct for United States Judges, Canon 3(A)(6).

- c. Throughout the Court's analysis in *Citizens United v. FEC*, it reached factual conclusions with citation to only an amicus brief or without any citation at all. Is it appropriate for appellate courts to disregard the record below when reaching factual conclusions?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this case or this issue generally. See Code of Conduct for United States Judges, Canon 3(A)(6).

- d. In *McCutcheon v. FEC*, the Court ignored congressional fact finding and expertise in holding campaign limits unconstitutional. Was it appropriate for the Court to ignore congressional expertise and congressional findings of fact in regards to corruption and the appearance of corruption?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to state my views regarding this case or this issue generally. See Code of Conduct for United States Judges, Canon 3(A)(6).

Senate Judiciary Committee
Questions for the Record
February 6, 2019
Senator Amy Klobuchar

Questions for Judge Bianco, nominee to be U.S. Circuit Judge for the Second Circuit

I understand that in July 2017, you attended a panel on the “Role of the President and the Supreme Court.” In your notes from the discussion on “expanding Presidential power,” which you provided to the Committee, you wrote: (1) “need for quick and decisive action in modern world,” (2) polarized two party system and a “dysfunctional Congress,” and (3) the “ever-expanding federal bureaucracy.”

- In your view, does a “dysfunctional Congress” give the President the right to disregard constitutional limits on his or her authority?

No, I definitely was not suggesting that any of these practical realities give a President the right to disregard constitutional limits on his or her authority. Instead, I was simply explaining why I believe that a President may attempt to use Executive power in various situations in the modern world. Regardless of the reasons for the exercise of Executive power, a President must always operate within the limits of his or her constitutional authority.

- What authorities would you consult to determine whether a President’s action exceeds his or her authority?

As a judge, I would consult Supreme Court and Second Circuit precedent to determine whether a President’s action exceeds his or her authority. If no such precedent were available, I would also consult decisions from other courts that might provide helpful guidance in deciding a particular legal issue before the court.

**Nomination of Joseph F. Bianco, to be United States Circuit Judge
for the Second Circuit
Questions for the Record
Submitted February 20, 2019**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

I would utilize the framework set forth in numerous Supreme Court decisions for analyzing this issue, including, but not limited to, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

- a. Would you consider whether the right is expressly enumerated in the Constitution?

Yes, as directed by Supreme Court and Second Circuit precedent.

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes, as directed by Supreme Court and Second Circuit precedent. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997). I would consult the permissible sources that have been identified by the Supreme Court and Second Circuit.

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

Yes. A lower court is bound by Supreme Court or Second Circuit precedent recognizing a right. In the absence of such precedent, I would consider decisions of other courts as persuasive authority.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Yes.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

I would fully and faithfully apply *Casey* and *Lawrence*, which are binding precedent, along with all other binding precedent.

f. What other factors would you consider?

I would consider any other factors that are permissible under Supreme Court and Second Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Equal Protection Clause applies to both race-based classifications and gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

No response to that argument is necessary because such arguments do not have any impact on binding precedent discussed above, which I would fully and faithfully follow.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Please see my response to Question 2(a).

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

As a sitting District Court judge and judicial nominee, it would be inappropriate for me to comment on this legal issue which is the subject of ongoing litigation. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

Yes, under the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

Yes, under the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Yes, under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Question 3 above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

A lower court judge is to follow all precedent of the Supreme Court and Second Circuit as binding. Where such binding precedent allows consideration of such evidence, I would do so.

- b. What is the role of sociology, scientific evidence, and data in judicial analysis?

The role of sociology, scientific evidence, and data varies depends upon the particular circumstances of each case. In each case, I would look to binding Supreme Court and Second Circuit precedent to determine what role, if any, such evidence should play when considering the particular issue being analyzed.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their

own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

Obergefell is binding Supreme Court precedent, and I will fully and faithfully follow it, along with all other binding precedent. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”)

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

Please see my response to Question 5(a).

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not fully studied this legal issue and, in any event, from the perspective of a lower court judge, this debate is purely academic because *Brown* is binding precedent, which I will fully and faithfully follow.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Feb. 14, 2019).

I have not studied this article and, in any event, such criticisms require no response because, as a lower court judge, I will fully and faithfully follow Supreme Court and Second Circuit precedent as it relates to the definition and scope of these constitutional terms.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision

today?

As a lower court judge, the public's understanding of the meaning of a constitutional provision is dispositive when the Supreme Court or Second Circuit precedent has held that it is dispositive. In other circumstances, I would fully and faithfully apply the modes of interpretation which such precedent has decided is appropriate.

- d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to Question 6(c).

- e. What sources would you employ to discern the contours of a constitutional provision?

In discerning the contours of a constitutional provision, I would employ all sources that Supreme Court and Second Circuit precedent have determined are appropriate for such a determination.

- 7. In 2014, you issued an oral opinion holding that Title VII of the Civil Rights Act of 1964 does not protect against sexual orientation discrimination. The *en banc* Second Circuit subsequently disagreed. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

- a. Is it still your view that Title VII's protection against sex discrimination does not protect against discrimination based on sexual orientation?

No, the *en banc* Second Circuit overruled its own prior binding precedent and held that Title VII's protection against sex discrimination applies to discrimination based on sexual orientation.

- b. After the EEOC held that allegations of discrimination based on sexual orientation do state a claim under Title VII, Mr. Zarda moved to have his claim reinstated, but you denied that request. Why?

I denied that request because I was following the binding precedent in the Second Circuit, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which had held that Title VII did not cover claims of discrimination based on sexual orientation. On appeal, a three-judge panel reached the same conclusion, in holding that they also were bound by that prior precedent. *See Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017). It was only after that precedent was overturned by the *en banc* Second Circuit that such a claim could proceed.

- 8. The Second Circuit twice vacated conditions for release that you imposed in *United States v. Magner*. The Second Circuit found, for example, that prohibiting the defendant from texting had "neither a relationship to Magner's crime nor any basis in his history." 518 F. App'x 36, 38 (2d Cir. 2013). Have you subsequently prohibited defendants who have served their sentences from texting after they are released?

I do not recall any particular case in which I have imposed that specific condition of

supervised release since the Second Circuit's decision in *Magner*.

9. In an outline for a January 2017 speech to the Federal Bar Council that you produced to the Senate Judiciary Committee, you stated that “[c]ivilian courts are not well-equipped to try terrorists whose terrorist activity takes place entirely, or almost entirely, overseas” because “the rules of evidence and other practical problems make it difficult for the U.S. government to prosecute in a civilian court and, in some significant percentage of cases, makes it impossible.” Please explain your remarks, including what you meant by “other practical problems” that make it difficult or impossible for the federal government to prosecute terrorists in civilian courts.

I was referring to the practical problems that arise in terrorism cases with utilizing certain forms of evidence in a civilian court such as classified information, evidence that was secured by U.S. military personnel, and evidence that is located in a foreign country (including in the custody or control of a foreign government).

- a. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

As a lower court judge, the public's understanding of the meaning of a constitutional provision is dispositive when the Supreme Court or Second Circuit precedent has held that it is dispositive. In other circumstances, I would fully and faithfully apply the modes of interpretation which such precedent has decided is appropriate.

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Please see my response to Question 6(c).

- c. What sources would you employ to discern the contours of a constitutional provision?

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**Questions for the Record for Joseph Bianco
From Senator Mazie K. Hirono**

1. In *Zarda v. Altitude Express*, you issued an oral decision concluding that Second Circuit precedent required you to hold that Title VII of the Civil Rights Act does not protect against employment discrimination based on sexual orientation. In overturning this precedent, the Second Circuit explained, “[i]n the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.”

a. Do you now agree, as the Second Circuit has ruled, that “Title VII prohibits discrimination on the basis of sexual orientation as discrimination ‘because of . . . sex’”?

Yes, under current Second Circuit law, Title VII prohibits employers from discriminating on the basis of sexual orientation as discrimination “because of . . . sex.” See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).

b. Do you believe the same but-for analysis applies to discrimination on the basis of gender identity?

This legal issue is currently being litigated in the courts. See, e.g., *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). Therefore, as a sitting District Court judge and judicial nominee, it would be inappropriate for me to comment on that issue. See Code of Conduct for United States Judges, Canon 3(A)(6).

2. In *Zarda*, the Second Circuit invited the Equal Employment Opportunity Commission (EEOC) to share its views, and the EEOC filed an amicus brief arguing that Title VII protects against sexual orientation discrimination. The Justice Department under the Trump administration, without any invitation, separately filed an amicus brief arguing the opposite—that Title VII does not protect against sexual orientation discrimination.

In situations where there are conflicting arguments by the EEOC, which is a bipartisan commission, and a federal agency, how would you determine whose argument to give greater weight? For example, would you consider the fact that no career attorneys from the Civil Rights Division signed the Justice Department’s amicus brief?

I would apply Supreme Court and Second Circuit precedent to consider how such issues, including conflicting positions by federal agencies and/or commissions on the interpretation of a statute, should be weighed.

3. In your notes for a speech you gave at Fordham University School of Law in October 2017, you wrote the “importance of textualism” to “only resort to the text” or “plain meaning” of the statute. You suggested that considering the “general purpose” or “legislative history” of the statute would allow judges to “legislat[e] from [the] bench.”

a. Is it your view that “plain meaning” interpretations are never subjective?

When correctly interpreting a statute according to the plain meaning, a judge should give the words their ordinary meaning and can do so in an objective manner by, among other things, consulting a dictionary. *See, e.g., Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (holding that “[w]hen a term goes undefined in a statute, we give the term its ordinary meaning,” and then consulting “dictionaries in use when Congress enacted [statute in question]” to determine the ordinary meaning); *accord Cont'l Terminals, Inc. v. Waterfront Comm'n of New York Harbor*, 782 F.3d 102, 109 (2d Cir. 2015).

b. If a judge’s “plain meaning” interpretation of a statute conflicted with the stated purpose or legislative history of the law, in your view, would that constitute “legislating from [the] bench”?

According to Second Circuit precedent, a judge should not resort to legislative history or other tools of statutory interpretation if the plain meaning of the statute is unambiguous. *See, e.g., Arciniaga v. General Motors Corp.*, 460 F.3d 231, 236 (2d Cir.2006) (“When a statute's language is clear, our only role is to enforce that language according to its terms. We do not resort to legislative history to cloud a statutory text that is clear even if there are contrary indications in the statute's legislative history.”) (citations and quotation marks omitted); *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir.1999) (“It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.”) (citations omitted).

4. In your speeches, you have noted that you are a “[r]eally big fan” of Justice Scalia. In *Oncale v. Sundowner Offshore Services*, Justice Scalia wrote that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” He was explaining why Title VII’s prohibition of discrimination based on sex includes same-sex sexual harassment.

Do you agree with Justice Scalia’s statement in the context of other civil rights laws—in other words, do you believe civil rights laws must be interpreted to protect against “reasonably comparable evils”?

With respect to the *Oncale* case, and the legal analysis contained therein, it would be inappropriate for me to provide my personal views, including its potential application to other laws. See Code of Conduct for United States Judges, Canon 3(A)(6).

5. In a case brought against the National Labor Relations Board (NLRB) against Remington Lodging & Hospitality, you denied a preliminary injunction that would have required the hotel to immediately reinstate its housekeeping staff after firing the entire housekeeping department for trying to unionize. You criticized the NLRB for a 6-month “delay” in seeking the injunction, even though most of that time was spent investigating the case, and you deemed the injunction “unnecessary” because the employer was voluntarily reinstating employees in a “very short period.” The NLRB pointed out, however, that what you deemed reinstatement in a “very short period” was actually “piecemeal offers of employment -- made over a 12-month period.”

- a. **In concluding that an injunction requiring immediate reinstatement of the fired workers was “unnecessary” in light of the employer’s piecemeal offers of employment over a 12-month period, in what ways did you take into consideration the practical impact on the fired workers in your analysis of what was “unnecessary”?**

At the time of the my decision, only 16 of the 29 eligible housekeeping employees, who had been discharged, still needed to receive offers of employment and the employer estimated such offers would be completed in several months. *Paulsen ex re. N.L.R.B. v. Remington Lodging Hospitality, LLC*, 2013 WL 4119006, at *11 (E.D.N.Y. Aug. 14, 2013). Thus, I concluded that “[b]ecause respondent is essentially granting the relief that petitioner seeks from this Court, albeit on a slightly delayed basis, the Court believes it is not just and proper to force respondent to discharge the replacement employees who have committed no misconduct and may have foregone other job opportunities during this period of delay.” *Id.* I further noted that the discharged workers would also receive backpay should the ALJ’s decision be upheld. *Id.* at 12. Finally, I emphasized that I would actively supervise the rehiring process and would allow petitioner to renew the motion for immediate reinstatement if the employer did not follow its representations regarding its aggressive plan to rehire the discharged employees over the next several months. *Id.*

b. Is it your view that the time it takes the NLRB to investigate a matter before seeking relief in court constitutes a “delay” that should weigh against immediate relief?

No. In fact, in the decision, I noted that “delay is common in these cases because of the time required for the Board to investigate allegations of unfair labor practices.” *Paulsen ex re. N.L.R.B. v. Remington Lodging Hospitality, LLC*, 2013 WL 4119006, at *9 (E.D.N.Y. Aug. 14, 2013). Quoting and citing other cases, I then emphasized that “delay by itself is not a determinative factor in whether the grant of interim relief is just and proper. Delay is only significant if the harm has occurred and the parties cannot be returned to the status quo or if the Board's final order is likely to be as effective as an order for interim relief.” *Id.* (quotations and citations omitted). I ultimately concluded that there was excessive delay in this particular case because “[a]lthough some of this delay may not factor into the Court's determination because the Board was investigating the alleged unfair labor practice, petitioner completed its investigation in January when the complaint was brought before the ALJ and waited over 3 months before seeking relief in this Court. Petitioner admitted at oral argument that it ‘could have filed’ for this injunction in January, but that it wanted to ‘establish an administrative record’ due to the ‘logistical difficulties of the case.’” *Id.* at 10 (citation omitted).

Nomination of Joseph F. Bianco
United States Court of Appeals for the Second Circuit
Questions for the Record
Submitted February 20, 2019

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

You have served as a federal judge and as a federal prosecutor for many years, and you also served in a leadership role in the Criminal Division of the Justice Department during the second Bush Administration, where you supervised "hundreds of criminal matters."⁵

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

Yes.

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

Yes.

- 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.

I have not studied the issue of implicit racial bias, although I understand the important nature of this issue from my many years of experience in the criminal justice system and my general discussions with others.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.⁶ Based on your experience, why do you think that is the case?

I have not studied this specific issue and, therefore, do not believe that I can render an opinion with respect to the reasons for that disparity. I do know that the United States Sentencing Commission is continuing to study the causes of the disparity and I support those important efforts.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.⁷ Based on your experience, why do you think that is the case?

Please see my response to Question 1(d).

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 SJQ at 49.

⁶ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

⁷ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

- f. In your time as a federal judge, or in your previous work in the Justice Department, have you observed instances of implicit racial bias?

I cannot recall observing any particular instances of implicit racial bias, although I have no doubt that it has occurred. During my tenure as a District Court judge, I have made every effort to ensure that racial bias, whether conscious or unconscious, does not exist in any manner in my courtroom.

- g. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Federal appeals judges can play an important role in ensuring that there is no racial bias in our criminal justice system (including implicit racial bias) by, among other things, carefully reviewing the record in each case where such an issue is raised on appeal to ensure that racial bias has not infected the criminal proceeding in any way.

2. In 2017, you ruled that a gay employee alleging he had been fired because of his sexual orientation was *not* protected by Title VII of the Civil Rights Act, the landmark law that prohibits discrimination in the workplace. You were ruling as a district judge and following the precedent of your circuit at that time. But the full Second Circuit eventually reviewed this very case, overturned the old precedent, and reversed your ruling. The Second Circuit ruled that someone who was fired for being gay is protected by this important civil rights law.⁸

- a. When you issued this ruling in 2017, did you express any doubts or concerns that this existing precedent—which excluded sexual orientation—might have been wrongly decided or should be reconsidered?

No. As a District Judge, I followed the binding precedent of the Second Circuit under Title VII at the time of my ruling. With respect to the claim under the New York State Human Rights Law, because state law permitted a discrimination claim based upon sexual orientation, I denied summary judgment to the defendant and allowed the plaintiff to proceed to trial on that claim.

- b. Do you think the full Second Circuit’s ruling—recognizing that Title VII protects people who have faced discrimination in the workplace based on their sexual orientation—was correctly decided?

As a sitting District Court judge and judicial nominee, it would be inappropriate to comment on whether I believe a binding Second Circuit decision was correctly decided. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

3. You gave a speech in 2017 about the importance of judicial restraint. You talked about how courts, and especially district judges, should not “actively take on the role of the legislature and essentially make the law through judicial decisions.”⁹

If you are confirmed, you will go from being a district judge who presides over trials to an appeals judge who decides hard, unresolved legal questions.

- a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.¹⁰ Was that decision guided by the principle of judicial restraint?

As a sitting District Court judge and judicial nominee, it would be inappropriate to comment on my agreement or disagreement with the analysis contained in binding Supreme Court precedent. *See* Code of Conduct for United States Judges, Canon 3(A)(6). For that reason, in my speeches on judicial restraint, I focus on my own cases as examples, rather than commenting on specific cases by other courts.

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big money in politics.¹¹ Was that decision guided by the principle of judicial restraint?

Please see my response to Question 3(a).

- c. The Supreme Court’s decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹² Was that decision guided by the principle of judicial restraint?

Please see my response to Question 3(a).

⁸ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).

⁹ Speaker, *Judicial Decisionmaking: Researching the Law and Facts*, Fordham Univ. Sch. of Law (Oct. 24, 2017), in SJQ Attachments to Question 12(d), at 528.

¹⁰ 554 U.S. 570 (2008).

¹¹ 558 U.S. 310 (2010).

¹² 570 U.S. 529 (2013).

4. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

In a 2017 speech about Justice Scalia, you said, "As a judge, I strongly share his originalist or textualist philosophy."¹³ As you noted, Justice Scalia "[n]ever used legislative history."¹⁴ In another 2017 speech, you suggested that, if a judge could consider "legislative history," that judge could "make that statute mean what [he or she] think[s] it should mean," which you said would amount to "legislating from [the] bench."¹⁵

- a. In your view, what was the core of Justice Scalia's "originalist or textualist philosophy," which you "strongly share"?

I was referencing the method of legal analysis that focuses on the plain meaning of the text of the law in order to discern legislative intent.

- b. If you are confirmed to serve as a judge on the Second Circuit, would you be willing to consult and cite legislative history?

Both the Supreme Court and the Second Circuit have made clear that, when the statutory language is ambiguous, a judge may consult other sources to determine Congressional intent, such as legislative history. I will follow that binding precedent and would be willing to consult relevant legislative history in those circumstances and, if appropriate, cite to such history.

- c. If you are confirmed to serve as a judge on the Second Circuit, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Although I have expressed concerns about some of the problems with attempting to use legislative history to interpret statutes, consistent with Supreme Court and Second Circuit precedent, I am always willing to evaluate any relevant arguments about legislative history in each case that comes before me in order to determine whether it sheds light on Congressional intent with respect to an ambiguous statute in any particular case.

5. From 1979 until the start of the Trump Administration, the Senate confirmed just three judicial nominees—out of more than 2,000—without positive blue slips from both of their home-state Senators.¹⁶ Even those three nominees, all from the 1980s, had the support of one home-state Senator.¹⁷ During this time, the Senate *never* confirmed a judicial nominee over the objections of *both* home-state Senators.¹⁸

- a. Do you think the Administration meaningfully consulted with your home-state Senators about your nomination?

Yes.

- b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

No. During my nomination to the district court, I was fortunate to have the full support of both Senator Charles Schumer and Senator Hillary Clinton. During this nomination process, I was willing to meet with my home-state Senators but, to my knowledge, no request for a meeting was made. Beyond that, the selection and confirmation process for federal judges is left to the discretion of the President and the Senate and it would be inappropriate for me to comment on that political process.

¹³ Panelist, *Reflections Upon the Jurisprudence of Justice Antonin Scalia*, Nassau County Bar Ass'n (May 24, 2017), in SJQ Attachments to Question 12(d), at 660.

¹⁴ *Id.* at 666.

¹⁵ Speaker, *Judicial Decisionmaking: Researching the Law and Facts*, Fordham Univ. Sch. of Law (Oct. 24, 2017), in SJQ Attachments to Question 12(d), at 529.

¹⁶ BARRY J. McMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), <http://www.crs.gov/Reports/pdf/R44975>.

¹⁷ *Id.* at 8.

¹⁸ *Id.*

6. 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.¹⁹ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁰

- 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.

As a sitting District Court judge, I believe that there are many factors that can impact crime rates in a particular jurisdiction. However, I am not familiar with these statistics and have not studied this particular issue. Therefore, I am not in a position to render an opinion on this issue.

- 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.

Please see my response to Question 6(a).

7. 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.

8. Do you believe that *Brown v. Board of Education*²¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

The Supreme Court's decision in *Brown v. Board of Education* is binding precedent, and I would fully and faithfully follow it if I have the privilege to be confirmed to the Second Circuit. As a sitting District Court judge and judicial nominee, it would be inappropriate for me to comment on whether I agree or disagree with any current Supreme Court precedent. *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 in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases, because those cases themselves might again come before the Court.") However, in a Law Day Speech in 2017 at the Nassau County Bar Association, I gave an entire speech about the importance of the Equal Protection Clause in our nation, including noting the critical impact that the *Brown* decision has had in applying the Equal Protection Clause to our nation's schools. Racism, including segregation, has no place in our Constitution, our courts, or our society.

9. Do you believe that *Plessy v. Ferguson*²² was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Plessy v. Ferguson was wrongly decided and overruled by *Brown v. Board of Education*,

and is no longer binding precedent.

10. 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 from the Department of Justice and White House and discussed my hearing, including questions that I might be asked. The decisions regarding the responses to questions were made by me.

11. President Trump has stated 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.”²³ 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, undocumented immigrants are entitled to due process of law under the Fifth and Fourteenth Amendment. I would fully and faithfully apply that binding precedent. With respect to other specific issues relating to this topic, it would be inappropriate for me to comment because such issues may come before me as a judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

¹⁹ 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>.

²⁰ *Id.*

²¹ 347 U.S. 483 (1954).

²² 163 U.S. 537 (1896).

²³ 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 February 20, 2019
For the Nomination of

Joseph Bianco, to be United States Circuit Judge for the Second Circuit

1. In *Zarda v. Altitude Express*, a former employee argued that he had been fired from his job because he was gay. As a district judge, you ruled that Title VII does not prohibit sexual orientation discrimination. In your Senate Judiciary Questionnaire, you explained that your ruling was compelled by binding Second Circuit precedent at the time.

On appeal, a Second Circuit panel affirmed your ruling. However, the Second Circuit *en banc* later ruled that sexual orientation discrimination is prohibited by Title VII.

- a. **Do you agree that, under current Second Circuit law, Title VII prohibits employers from discriminating on the basis of sexual orientation?**

Yes, under current Second Circuit law, Title VII prohibits employers from discriminating on the basis of sexual orientation. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).

- b. **Do you believe that, under current Second Circuit law, Title VII prohibits employers from discriminating on the basis of gender identity?**

This legal issue is currently being litigated in the courts. *See, e.g., Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). Therefore, as a sitting District Court judge and judicial nominee, it would be inappropriate for me to comment on that issue. *See Code of Conduct for United States Judges, Canon 3(A)(6).*