

**Nomination of Timothy Kelly to the U.S. District Court for the District of Columbia**  
**Questions for the Record**  
**Submitted July 5, 2017**

**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 a district court to depart from Supreme Court or the relevant circuit court's precedent?**

I do not think it is ever appropriate for a district court to depart from Supreme Court precedent. *See, e.g., Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (explaining that Supreme Court precedent remains binding on lower courts until it sees fit to reconsider that precedent).

**b. When, if ever, is it appropriate for a district court judge to question Supreme Court or the relevant circuit court's precedent?**

Again, I do not think it is ever appropriate for a district court to depart from Supreme Court or its relevant circuit court precedent. However, I can envision a rare set of circumstances where many other circuits have arrived at a consensus alternative view that might properly present a district court the opportunity to bring that alternative view to its own circuit's attention.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A textbook 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 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”? “superprecedent”?**

I am not familiar with those terms and have not studied them. However, for the purposes of a district judge's function, I do not think they matter. If I am confirmed, I would faithfully and to the best of my ability adhere to *Roe v. Wade*, and all other precedent established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit. However characterized, *Roe v. Wade* is binding precedent on all federal district judges.

**b. Is it settled law?**

*Roe v. Wade* is settled as a binding precedent of the United States Supreme Court.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry.

**a. Is the holding in *Obergefell* settled law?**

*Obergefell* is settled as a binding precedent of the United States Supreme Court.

- b. On Friday, June 30, the Texas Supreme Court issued a decision in *Pidgeon v. Turner* which narrowly interpreted *Obergefell* and questioned whether states were required to treat same-sex couples equally to opposite-sex couples outside the context of marriage licenses. The Texas Supreme Court stated that “The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and... it did not hold that the Texas DOMAs are unconstitutional.” Is this your understanding of *Obergefell*?**

I have not had the opportunity to study this question. In any event, it would be inappropriate for me to comment on a matter which is the subject of pending litigation or that could come before me if I am fortunate enough to be confirmed as a district judge. See Canon 3(A)(6), Code of Conduct for Federal Judges. The Code is “designed to provide guidance to judges and nominees for judicial office.” Canon 1, Commentary.

4. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”

**a. Do you agree with Justice Stevens? Why or why not?**

Whatever personal views I hold would not be relevant to my position as a district judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability adhere to *Heller*, and all precedent established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

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

I have not had the opportunity to study *Heller* closely. However, it is well known that

the opinion includes the following passage: “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.” *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

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

I have not had the opportunity to study *Heller* and prior case law in this area closely. Regardless of how the law in this area has developed over time, *Heller* is Supreme Court precedent. If I were fortunate enough to be confirmed as a district judge, I would adhere to it faithfully and to the best of my ability.

5. 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?**

Whatever personal views I hold would not be relevant to my position as a district judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability adhere to *Citizens United*, and all precedent established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

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

Please see my answer to Question 5(a).

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

Please see my answer to Question 5(a).

6. Federal law generally requires federal district court judges to live in the district where they have been appointed. The District Court for the District of Columbia is one of the few exceptions. (28 U.S.C. § 134)

I understand that Representative Eleanor Holmes Norton, who represents the District of Columbia, was not consulted on nominations to the D.C. federal district court, including yours. During the last three Administrations, she was consulted. And during the Obama and Clinton Administrations, she was not just consulted but also recommended candidates to the White House who were then nominated by the President. Her

candidates were either District residents or committed to relocating to the District.

It is my understanding that you currently reside in Washington, D.C.

**If you are confirmed, do you commit to maintain your residency in D.C. during your tenure as a federal district judge for the District of Columbia?**

I have no present intention of moving out of the District of Columbia, where – with the exception of the year I clerked for a federal judge in Philadelphia – I have lived and raised my family since 1994. In addition, by virtue of her current position working for Mayor Bowser, my wife is required to live in the District of Columbia.

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

After receiving the questions on July 5, I conducted research and drafted answers. I provided those answers to the Department of Justice's Office of Legal Policy. After consulting with them, I made edits to those answers and then authorized my answers to be submitted on my behalf.

**Senator Dick Durbin**  
**Written Questions for Jeffrey Clark, Beth Williams, Trevor McFadden, and Tim Kelly**  
**July 5, 2017**

For questions with subparts, please answer each subpart separately.

**Questions for Tim Kelly**

1. You say in your questionnaire that you have been a member of the Federalist Society since 2009. **Why did you join the Federalist Society?**

I joined the Federalist Society because I found the debates, panels, symposia, and other programming it sponsors to be highly interesting and informative. In my experience, this programming has encompassed a wide range of viewpoints.

2. **Do you agree with the views espoused by the Federalist Society?**

Whatever personal views I hold would not be relevant to my position as a district judge, should I be fortunate enough to be confirmed. In any event, I have not understood the Federalist Society to espouse views on specific legal issues; rather, it provides a forum for open debate. According to its website, the Federalist Society was “founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.” These appear to be commonly accepted principles.

3.
  - a. **Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?**

I understand the Code of Conduct for United States Judges to prohibit me from commenting on political matters. *See* Canon 5, Code of Conduct for Federal Judges. The Code is “designed to provide guidance to judges and nominees for judicial office.” Canon 1, Commentary.

3.
  - b. **Do you believe that the President’s announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?**

Please see my answer to Question 3(a). In any event, in accordance with my answer to Question 2, I am unsure to what “views” of the Federalist Society the question refers. I have not felt any pressure, as a lawyer, to join the Federalist Society. I chose to do so because I appreciate its role in promoting open debate. If I am fortunate enough to be confirmed, my principal obligation as a judge will be to apply United

States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit precedent faithfully and to the best of my ability.

**c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?**

Please see my answer to Question 3(a). Indeed, adhering to Canon 5 helps to preserve the independence and integrity of the federal judiciary.

4. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." **Do you agree or disagree with this statement? Please explain your answer.**

I do not know precisely what the Federalist Society means by that statement.

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

To the best of my recollection, I attended the Federalist Society's annual national convention in the years 2013 through 2016.

6. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

**a. Do you want outside groups or special interests to make undisclosed donations to front organizations in support of your nomination?**

I have not solicited and am not aware of any such donations.

**b. Would you discourage donors from making such undisclosed donations?**

Please see my answer to Question 6(a).

**c. If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?**

Please see my answer to Question 6(a).

7. I believe it is important for judicial nominees to demonstrate that they will be independent of President Trump. One of the ways to demonstrate this independence is for nominees to answer honestly whether they believe in the President's most outrageous assertions.

**Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?**

I understand the Code of Conduct for United States Judges to prohibit me from commenting on political matters. *See* Canon 5, Code of Conduct for Federal Judges. The Code is "designed to provide guidance to judges and nominees for judicial office." Canon 1, Commentary. In addition, it would be inappropriate for me to comment on a matter that is the subject of pending litigation or that could come before me if I am fortunate enough to be confirmed as a district judge. *See* Canon 3(A)(6), Code of Conduct for Federal Judges.

8. In 1886, the Supreme Court noted that the right to vote "is regarded as a fundamental political right, because [it is] preservative of all rights," a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

**a. Do you believe that the right to vote is fundamental?**

The Supreme Court has held that it is. *See, e.g., Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).

**b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?**

Whatever personal views I hold would not be relevant to my position as a district judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability adhere to the precedent governing the standard of review in these cases established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

**c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?**

Again, whatever personal views I hold would not be relevant to my position as a district judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability adhere to the precedent governing the timing of review in these cases established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

9. **Do you believe that systemic racial discrimination still exists in America today?**

I believe that racial discrimination still exists in America today.

10. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuetz v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

**Do you agree with Justice Sotomayor’s statement, or are your views closer to Chief Justice Roberts’ statement in *Parents Involved*?**

Whatever personal views I hold would not be relevant to my position as a district court judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability apply *Parents Involved* and all other precedent in this area established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

**11. Do you believe that courts should interpret the Constitution according to its original public meaning?**

Whatever personal views I hold concerning constitutional interpretation according to its original public meaning would be irrelevant to my position as a district judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability adhere to the precedent established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit. Certainly, in many of those cases, courts have looked to history, as well as the text and structure of the constitution, in order to interpret it. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Souter, J.).

**12. Do you believe that the original public meaning of the Constitution evolves or changes over time?**

Please see my answer to Question 11.

**13. What is your understanding of the original meaning of the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution?**

I have not had the occasion to study this question. In any event, it is my understanding that the meaning of the Foreign Emoluments Clause is currently the subject of active litigation in federal court; accordingly, it would be inappropriate for me to comment. *See* Canon 3(A)(6),



Code of Conduct for Federal Judges. The Code is “designed to provide guidance to judges and nominees for judicial office.” Canon 1, Commentary.

- 14. Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?**

Please see my answer to Question 13.

**Nomination of  
Timothy J. Kelly  
Nominee to the United States District Court for the District of Columbia  
Questions for the Record  
Submitted July 5, 2017**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. You spent a year working at the Legal Aid Society of the District of Columbia in 1999-2000.

a. What led you to seek out that experience?

I believed that working at Legal Aid would be a rewarding way to give back to the District of Columbia community by making justice more accessible to low-income clients. I also thought that it would provide me with valuable “first-chair” experience litigating and negotiating on behalf of those clients when I was just a few years out of law school.

b. What impact did that experience have on your view of the proper role and function of a judge?

I do not think that experience had a major impact on my view of the proper role of a judge. But certainly, in conjunction with my prior experience representing large companies, it underscored for me the need for judges to administer justice without respect to persons, and do equal right to the poor and to the rich, as required by the federal judicial oath. *See* 28 U.S. Code § 453.

c. Did you have clients during that year whose cases you would handle differently today?

I cannot think of any specific case that I would handle differently today. However, it is likely that I would do so, simply because of my additional years of experience as a lawyer.

2. You report having tried a substantial minority of the cases in your legal career before juries (approximately 30% of the cases you've brought to trial).

a. What do you see as the judicial role in a jury trial?

In a jury trial, the jury is the finder of fact. The judge, in contrast, is responsible for ensuring that the law and the applicable rules are followed during the proceedings through which the jury determines the facts. The specific tasks for the judge include ensuring the selection of a fair and impartial jury, determining the admissibility of evidence, instructing the jury as to the law to be applied, and, if a guilty verdict is returned in a criminal case, determining the defendant's sentence.

b. With jury trials a diminishing portion of the total federal docket, how absolute do you consider the Seventh Amendment jury right to be, following Supreme Court precedent which has limited this right (e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979))?

Many of the Founders believed that the right to a trial by jury was critical to preserving liberty. However, whatever personal views I hold on this topic would not be relevant to my position as a district judge, should I be fortunate enough to be confirmed. If I am confirmed, I would faithfully and to the best of my ability adhere to *Parklane Hosiery*, and all precedent relating to the Seventh Amendment established by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.

3. Since 2013 you have worked on the Senate Judiciary Committee in various roles.

a. How, if at all, has that work changed your view of proper judicial behavior?

I do not think my work on the Senate Judiciary Committee has had a major impact on my view of proper judicial behavior. If I am fortunate enough to be confirmed, my role as a district judge would not permit me to make federal law in any way, but would instead require me to faithfully interpret and apply federal law passed by Congress to cases and controversies before me. Given my observation of the careful consideration that is given to the text of a bill that becomes law, my work here has underscored for me the importance of a judge focusing on the text when interpreting a statute passed by Congress.

b. What differences do you expect in your approach to working on the bench as compared to your roles with the Judiciary Committee?

Should I be fortunate enough to be confirmed, my work as a district judge would be dramatically different than my present work as a staff member for the Chairman on the Senate Judiciary Committee. In my current position, I play a small role in assisting the Chairman and other members of the committee write federal law. My role as a district judge would not permit me

to make federal law in any way, but would instead require me to faithfully interpret and apply federal law passed by Congress to cases and controversies before me.