Nomination of Joan L. Larsen to the U.S. Court of Appeals for the Sixth Circuit
Questions for the Record
Submitted September 13, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. When President Bush signed the Detainee Treatment Act of 2005, he issued a statement that preserved the President's ability to ignore the Act's prohibition on torture if it would interfere with the President's constitutional authorities as Commander in Chief. According to press reports, Administration officials confirmed "the President intended to reserve the right to use harsher methods in special situations involving national security." In other words, the signing statement reflected the President's belief that he had the power to **not** comply with the law he had just signed. You wrote an opinion piece in 2006 defending this specific signing statement that President Bush issued.

    a. Do you still believe the President has the authority not to comply with laws passed by Congress if he believes those laws interfere with national security?

The op-ed to which this question refers did not take the position that the President has the authority not to comply with laws passed by Congress if he believes those laws interfere with national security, and I do not believe that position to be an accurate statement of the law. The President must comply with the Constitution and the laws passed by Congress that are consistent with it, and both of these sources of law can limit his authority in the realm of national security. The op-ed also did not take a position on any particular signing statement but instead discussed signing statements more generally. If a case came before my court, I would evaluate any allegation that the President had failed to faithfully execute a law passed by Congress by applying the relevant Supreme Court precedent on the topic, Justice Jackson's three-part typology in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

    b. The President justified his Muslim travel ban on the grounds that national security required it. From your perspective, are there any limits on what the President can do in the name of national security?

This question appears to request that I weigh in on a matter that is or could be the subject of litigation, which I cannot do consistent with my ethical obligations. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court. . . ."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). In general terms, however, both statutes and the Constitution can limit the President's authority in the field of national security.

2. President Trump has said he wants to bring back waterboarding and a "hell of a lot worse."

    a. Does the President have the authority to issue such an order?

Please see my response to Question 1b.

    b. Would such an order be lawful?

Please see my response to Question 1b.

3. When I asked you to confirm that you had not worked on Office of Legal Counsel opinions related to torture, interrogation practices, detention policies and practices, rendition, warrantless wiretapping, and any other topics related to the War on Terror—you said 'no' to all but the final category. You listed one other public opinion you had written, stating: "As to any topic related to the war on terror, one of my opinions, for example, is an interpretation of the Patriot Act, asking whether or not the Patriot Act authorizes grand juries to issue subpoenas to foreign banks. Is that an opinion related to the War on Terror? I'm not sure. But I want to answer your question as faithfully as I can." However, when I asked you specifically about another opinion you had not previously referenced—an opinion related to detention and habeas corpus which you authored, whose existence (though not the text) has been publicly disclosed in litigation—you also indicated that you had written this memo as well.

    a. What is your understanding about what you can disclose about nonpublic formal OLC opinions you drafted, reviewed, or otherwise contributed to?

My understanding is that the Office of Legal Counsel and the Department of Justice have the responsibility to decide, subject to whatever legal constraints may apply, whether to disclose the contents of nonpublic formal OLC opinions. It is my understanding that I have an ethical obligation not to disclose the contents of any such opinions without the permission of the Office of Legal Counsel and the Department of Justice.

    b. How many nonpublic formal OLC opinions did you draft, review, or otherwise contribute to, in your estimation?

I do not recall how many nonpublic formal OLC opinions I drafted, reviewed, or otherwise contributed to during my time at OLC.

    c. How many of those nonpublic formal OLC opinions could be broadly construed as related to the War on Terror, in your estimation?

As I suggested during my hearing, I am not sure how to categorize opinions "related to the War on Terror," even broadly construed. I arrived at the Department of Justice in January 2002, less than four months after the terror attacks of September 11, 2001. Much of the work of the Justice Department from that time until I left in May 2003 involved issues that might be broadly construed as relating to the War on Terror, even if they would not be so understood in a more conventional sense. As an example, I referred in my hearing to a public opinion asking whether the Patriot Act, passed in response to the September 11 terror attacks, authorized grand juries to issue subpoenas to foreign banks. I nevertheless believe it accurate to say that the overwhelming majority of my formal opinions could not be construed, even broadly, as having any relationship to the War on Terror.

4. In 2012, you gave a speech to a chapter of the Federalist Society in which you criticized the Obama Justice Department's refusal to defend the Defense of Marriage Act (DOMA) in

court.

a. Do you believe that the Obama Administration's refusal to defend DOMA was appropriate?

Whether the Obama Administration's refusal to defend DOMA was appropriate is a political question upon which I cannot ethically comment. *See* Canon 5, Code of Conduct for United States Judges ("A Judge Should Refrain from Political Activity."); Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). The 2012 remarks explored whether the Obama Administration's decision was consistent with the traditional view of the Solicitor General's office that "the Department of Justice defends Acts of Congress in all but the rarest of cases," so long as "professionally respectable arguments can be made in support of its constitutionality." Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 (2001).

b. When do you believe it is appropriate for the President to refuse to defend a federal law?

Please see my response to Question 4a.

c. When do you believe it is appropriate for the President to refuse to enforce a federal law?

The President does not have a general dispensing power, *see Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), and is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. In other words, the President must comply with the Constitution and all federal statutes consistent with it. Please see also my response to Question 1.

5. The Department of Justice's Civil Rights Division had a long-running lawsuit against Sheriff Joe Arpaio because it found that the Maricopa County Sheriff's Office had engaged in systematic, unconstitutional racial profiling of Latinos. The Division was also part of the lawsuit that resulted in a federal judge holding Sheriff Arpaio in criminal contempt for failing to comply with a federal court order. As you know, President Trump recently pardoned Sheriff Arpaio.

a. In general, do you believe that complying with federal court orders is important for the rule of law?

Yes.

b. What message do you think the President's pardon of Sheriff Arpaio sends to judges? To law enforcement officers? To other officers of the court and legal practitioners?

This question appears to request that I weigh in on a matter that is or could be the subject of litigation, which I cannot do consistent with my ethical obligations. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court. . . ."); Canon 1, Commentary ("The Code is designed to

provide guidance to judges and nominees for judicial office.").

6. You have described yourself as a judge who "searches for the original meaning" when interpreting the law. (Acceptance Speech for Nomination to Michigan Supreme Court)

    a. With respect to constitutional interpretation, do you believe all judges should employ an originalist method of reading the Constitution?

As a Justice of the Michigan Supreme Court, I am bound by the precedent of that Court with respect to interpretation of our state constitution and statutes. That precedent instructs that the "'primary objective'" of interpreting our state constitution is to "'determine the text's original meaning to the ratifiers, the people, at the time of ratification.'" *See, e.g.*, *Adair v. Michigan*, 860 N.W.2d 93, 99 (Mich. 2014) (quoting *Wayne Cty. v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)). If confirmed as a circuit judge, I would follow any binding precedent of the Supreme Court and the Sixth Circuit regarding the methods to be employed when interpreting the Constitution. To the extent that precedent suggests that the focus is on the original meaning of the text, *see, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), I will employ that method. To the extent the Court holds that another method is to be followed, I will follow that method.

    b. How do you decide when an originalist reading of the Constitution should be controlling?

Please see my response to Question 6a.

7. Your fellow nominee, Professor Amy Coney Barrett, wrote "I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."

    a. If you are confirmed to the Sixth Circuit, would you apply precedent, even if you believed it conflicted with your "best understanding" of the Constitution?

Yes; if confirmed to the Sixth Circuit, I would faithfully and fully follow U.S. Supreme Court precedent without regard to whether I believed it to be correctly decided.

    b. Do you agree with Professor Barrett that justices have a different duty—that Supreme Court Justices are free to apply their "best understanding" of the Constitution rather than precedent that, in their mind, conflicts with that "best understanding"?

I have not read Professor Barrett's article, and, therefore, do not feel qualified to opine on whether I agree or disagree with it. The Supreme Court has identified factors that it considers in deciding whether to reconsider its own precedent. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009).

8. In 2010, you wrote: "Originalists do not believe judges to be licensed to expand [constitutional] rights beyond their original understanding." (Ancient Juries and Modern

Judges, 2010.) Your mentor, Justice Scalia, appears to have agreed with you: in a 2011 interview, he said that, because the Framers of the 14th Amendment did not understand equal protection to apply to women, women do not have a constitutional right against sex discrimination. (California Lawyer, Jan. 2011)

a. Do you agree with Justice Scalia that the Constitution does not prohibit discrimination on the basis of sex?

I am unfamiliar with that interview. The Supreme Court has held that legislation discriminating on the basis of sex is subject to a heightened level of scrutiny under the Equal Protection Clause, *see United States v. Virginia*, 518 U.S. 515, 531 (1996), and I will faithfully apply that and all other binding precedent of the Supreme Court in my current position and if confirmed to the Sixth Circuit.

b. Do you believe that *Brown v. Board of Education* was correctly decided from an originalist perspective?

There is considerable debate, even among originalists, about how originalism should operate in general and how it should apply in any particular case. *Brown v. Board of Education* is a precedent of the Supreme Court that binds me as a Justice of the Michigan Supreme Court and would bind me if I were confirmed to the Sixth Circuit. My duty and commitment to follow Supreme Court precedent does not and would not depend upon whether a precedent comports with any particular theory of constitutional interpretation.

c. In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right?**

There is considerable debate, even among originalists, about how originalism should operate in general and how it should apply in any particular case. *Obergefell v. Hodges* is a precedent of the Supreme Court that binds me as a Justice of the Michigan Supreme Court and would bind me if I were confirmed to the Sixth Circuit. My duty and commitment to follow Supreme Court precedent does not and would not depend upon whether a precedent comports with any particular theory of constitutional interpretation.

d. In *Loving v. Virginia* (1967), the Supreme Court upheld a constitutional right to marry persons of a different race. **How do you understand an originalist reading of the Constitution to support this right?**

There is considerable debate, even among originalists, about how originalism should operate in general and how it should apply in any particular case. *Loving v. Virginia* is a precedent of the Supreme Court that binds me as a Justice of the Michigan Supreme Court and would bind me if I were confirmed to the Sixth Circuit. My duty and commitment to follow Supreme Court precedent does not and would not depend upon whether a precedent comports with any particular theory of constitutional interpretation.

9. You have written that "the people think the Constitution guarantees a fundamental right to

abortion because the Supreme Court told them it does." (Constitutionalism Without Courts, 2000) **Does that statement mean that you do not believe the Constitution actually guarantees a woman's right to choose?**

The article to which the question refers was a review of claims made by Professor Mark Tushnet in a book entitled "Taking the Constitution Away from Courts." *See* Mark Tushnet, Taking the Constitution Away from the Courts (1999). In that book, Professor Tushnet proposed the abolition of judicial review. But, exercising the power of judicial review, which has been central to the American constitutional tradition since at least the time of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court has repeatedly held that the Constitution protects the right to abortion. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As a judge, I will faithfully follow these, and all, binding precedent of the Supreme Court.

10. In your 2016 campaign for the Michigan Supreme Court, the Michigan Chamber of Commerce spent more than $660,000 on broadcast television ads backing you and your fellow Republican nominee David Viviano. It also contributed $25,000 directly to you. In addition, Secretary of Education Betsy DeVos and her family, the billionaire founders of Amway, donated at least $22,500 to your campaign. **Why do you believe these conservative, pro-business groups and individuals thought that donating so much money to your campaign would be a good investment?**

I cannot speak for the people who contributed to my campaign. I can say, however, that people of various political persuasions supported me with contributions ranging from $10 to the maximum allowed by law. I believe what I told people on the campaign trail: It is "odd to be a judge seeking election. Because I can make only one promise. I can never promise you a particular result. My duty as a Justice on our State's highest Court is only to follow the law – and that is all I can promise. You should expect no more, and no less, from all your judges."

11. In a 1994 law review article entitled *One Person, One Office: Separation of Powers or Separation of Personnel?*, you argued that the congressional committee system, including its oversight function, might be unconstitutional because it was not contemplated in the text of the Constitution and it impinges on Executive Branch authority.

    a. Could you please elaborate on this argument?

I prepared a draft of that article as a third-year law student and was fortunate to be able to publish a co-authored version with my professor, Steven G. Calabresi. In the article, we noted that the congressional committee system is nowhere contemplated in the text of the Constitution, but we did not argue that the congressional committee system is unconstitutional for that or any other reason.

    b. Do you still believe that the congressional committee system is unconstitutional?

Please see my response to Question 11a.

12. Your name appeared on President Trump's short list of Supreme Court nominees. As a

presidential candidate, President Trump made clear that conservative interest groups played a significant role in choosing who made that list. In June 2016, for instance, he stated "we're going to have great judges, conservative, all picked by the Federalist Society," and, last September, President Trump specifically thanked both the Heritage Foundation and the Federalist Society for their work on the list.

a. Before the President issued his list of potential nominees, did you have any contact with anyone from the Heritage Foundation, including John Malcolm, or the Federalist Society, including Leonard Leo, about your possible inclusion on that list, or your potential nomination to the Supreme Court generally?

No.

b. Why do you think the Federalist Society and Heritage Foundation recommended you for inclusion on then-candidate Trump's list?

I do not know. My inclusion on the list was a complete surprise.

c. From 2008 to the present, did you have any contact with anyone at the Federalist Society or the Heritage Foundation about your possible nomination to the Sixth Circuit?

I do not recall any such contact.

13. On January 9, 2017, the Judicial Crisis Network announced that it planned to spend at least $10 million to confirm President-elect Trump's as-yet-unannounced Supreme Court nominee. This money was spent on the heels of the Judicial Crisis Network's $7 million campaign to prevent Chief Judge Garland from ever getting a confirmation hearing.

    Then, on June 30, 2017, the Judicial Crisis Network announced that it was launching a $140,000 ad campaign in Michigan to "encourage" Senators Stabenow and Peters to return blue slips on your nomination.

    a. Please identify all communications you have had with individuals from the Judicial Crisis Network—or any of the affiliated groups listed on their January 9 press release (https://judicialnetwork.com/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/) announcing their campaign—since February 2016.

On Sunday, August 27, 2017, I was introduced to Carrie Severino at a barbeque to honor the thirty years of judicial service of Judge Sentelle, for whom Ms. Severino and I both clerked in different years. I have had no communications with Ms. Severino, other individuals from the Judicial Crisis Network, or any groups listed in the January 9 press release, regarding support for my nomination or any advertising strategy.

b. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please

identify such people, the nature of the communications, and when the communications occurred.

I am not aware of any such communications.

c. If you have not had any communications with any individual from the Judicial Crisis Network or an affiliated group, why do you believe that a $140,000 ad campaign was undertaken on your behalf this summer?

I had no advance notice of or involvement with the advertising campaign referenced in your question and do not know why such a campaign was launched.

14. President Trump repeatedly stated that he would apply a litmus test in selecting only Supreme Court nominees who will oppose a woman's right to choose and overturn *Roe v. Wade*. President Trump also repeatedly stated that he would apply a litmus test in selecting Supreme Court nominees who would be "very pro-Second Amendment."

    You were on President Trump's Supreme Court shortlist, which was drawn up by the Heritage Foundation and the Federalist Society.

a. In your meetings with any Trump administration officials, please answer whether there was any mention or discussion of:

i. Abortion, contraception, or the right to privacy
ii. Second Amendment

There was no mention or discussion of the topics listed above.

b. Have you ever spoken with anyone at the Heritage Foundation about how you would approach a case involving:

i. Abortion, contraception, or the right to privacy
ii. Second Amendment

Not to my recollection.

c. Have you ever spoken with anyone at the Federalist Society about how you would approach a case involving:

i. Abortion, contraception, or the right to privacy
ii. Second Amendment

Not to my recollection.

d. If you have not had conversations with any officials in the Trump Administration, the Heritage Foundation, or the Federalist Society about these issues—why do you believe your name was included on a list of candidates who purportedly shared

President Trump's views on these issues?

I do not know and am not able to speak to the thought processes of those who compiled the list.

15. Please respond with your views on the proper role of precedent.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

I do not believe it is appropriate for a lower court to depart from Supreme Court precedent. *See People v. Lewis*, __ N.W.2d __, slip op. at 4 (Mich. July 31, 2017) (recognizing "the Supreme Court's admonition that other courts should not conclude that the Court's 'more recent cases have, by implication, overruled an earlier precedent' but should instead leave to the Supreme Court 'the prerogative of overruling its own decisions'" (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997))).

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

It is my understanding that the Sixth Circuit may overrule its own precedent, in accordance with the doctrine of stare decisis, only if it is sitting *en banc*. *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

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

The Supreme Court has explained that it will overturn its own precedent only in accordance with the doctrine of stare decisis. The Court generally considers not only whether a case is wrongly decided, but also factors such as whether the rule it creates is practically unworkable and whether the reliance interests at stake counsel in favor of or against upholding the precedent. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009).

16. 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"?

As a Justice of the Michigan Supreme Court, and as a nominee to the Sixth Circuit, I do not believe that the precedent of the Supreme Court needs to have achieved any special status for me to be

bound to follow it faithfully. As a lower court judge, all precedent of the Supreme Court is "super precedent."

b. Is it settled law?

Roe v. Wade is settled as a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

17. 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 precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

b. In *Mabry v. Mabry,* 499 Mich. 997 (2016), you voted to deny review in a case where the lower court refused to recognize that non-biological parents who are part of same-sex couples have the same parental rights as non-biological parents who are part of heterosexual couples. How do you reconcile that vote with *Obergefell*?

An order of the Michigan Supreme Court denying leave to appeal is not a decision on the merits and has no precedential effect. *See Haksluoto v. Mt. Clemens Reg'l Med. Ctr.*, __ N.W.2d __, slip op. at 5 n.3 (Mich. June 27, 2017). The Michigan Supreme Court receives nearly 2,000 applications for leave to appeal each year and hears argument in roughly 55 cases per year. I cannot reveal the internal deliberations of the Court, but there are a variety of factors, apart from the merits, that we consider when deciding whether to take further action on a case in our Court.

18. 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?

It would be inappropriate for me, as a judicial nominee, to comment on the merits of any particular Supreme Court opinion. *Heller* is a precedent of the Supreme Court, and I will faithfully follow it and all other Supreme Court precedent.

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

In *Heller*, the Supreme Court explained that the "right secured by the Second Amendment is not unlimited" and stated that "nothing in [its] opinion should be taken to cast doubt on longstanding

prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626–27 (2008).

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

Please see my response to Question 18a.

19. In addition to being picked by the Heritage Foundation and the Federalist Society for the President's Supreme Court short list, you indicate on your Senate Questionnaire that you were a member of the Federalist Society "intermittently" from 1994 to 2003. The Federalist Society's "About Us" webpage, states that, "[l]aw 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." The same page states 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. You taught as a law school professor for many years. 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 do not know what the Federalist Society meant by this statement, and so I do not feel qualified to comment. As a law professor, I sought to facilitate a robust exchange of ideas in my classroom.

b. As a former member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

I do not know what the Federalist Society meant by this statement, and so I do not feel qualified to comment.

c. As a former member of the Federalist Society, explain what "traditional values" you understood the organization placed a premium on.

I do not know what the Federalist Society meant by this statement, and so I do not feel qualified to comment.

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

I received the questions on the evening of September 13, 2017. I reviewed the questions, conducted research where necessary, and drafted answers. I shared the answers with the Office of

Legal Policy in the Department of Justice. After conferring with them, I made revisions and then authorized the submission of my responses.