

Nomination of Trevor McFadden 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?**

Response: A district court may only depart from a Supreme Court precedent if the precedent has been overridden by a subsequent Supreme Court decision. A district court may only depart from the relevant circuit court's precedent if the precedent has been overridden by a subsequent Supreme Court or circuit court decision.

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

Response: Please see my response to Question 1(a).

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"?**
- b. Is it settled law?**

Response: I have not read *The Law of Judicial Precedent* and am unfamiliar with the distinctions made in this book. In any event, should I be confirmed to be a judge, I will faithfully apply all binding precedent, including *Roe v. Wade*, without regard to whether scholars consider the precedent to be "super-stare decisis," "superprecedent," "settled law," or something else.

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?**

Response: Please see my response to Question 2 and my response to Question 1 from Senator

Whitehouse.

- 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*?**

Response: It would be improper for me to give my personal understanding of a legal issue that may come before me, should I be confirmed to be a judge. If this issue were to come before me, I would consider the arguments of the parties and any relevant precedent, including *Obergefell*.

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?**

Response: It would be improper for me to state my personal views about a legal issue that may come before me, should I be confirmed to be a judge. I will pledge to apply any applicable binding precedent, including *Heller*.

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

Response: While it would be improper for me to state my personal views about a legal issue that may come before me, I note that the majority opinion in *Heller* states that the “right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). It added that “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?**

Response: I have not studied this issue with sufficient care to opine on this question. *Heller*, however, is binding Supreme Court precedent and if confirmed I would faithfully apply it.

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?**
- b. **Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**
- c. **Do you believe corporations also have a right to freedom of religion under the First Amendment?**

Response: It would be improper for me to state my personal views about legal issues that may come before me. If confirmed, I pledge to weigh any such legal questions carefully and impartially, by considering the legal arguments made by the parties and applying any applicable legal precedents from the Supreme Court and the D.C. Circuit, including but not limited to *Citizens United v. FEC*.

6. According to your Senate Judiciary Questionnaire, you "volunteered as a vetter for President Trump's transition team" both before and after Election Day in November.

Please say more about what your work on the transition team involved.

Response: I reviewed public-source information regarding potential political appointees to the Executive Branch for evidence that may disqualify them or reflect poorly on the President should they be appointed to office.

7. On your Senate Questionnaire, you indicate that you have a member of the Federalist Society since 2003.

At your nominations hearing, Senator Tillis asked of you and your fellow nominees at the hearing: "Can you all think of instances where maybe you've gone into venues where you were probably in the minority in terms of your line of thought." You responded, "Every day at law school."

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. **When you said “every day at law school” you were in the minority in your line of thought, were you referring to what the Federalist Society describes as law schools being “strongly dominated by a form of orthodox liberal ideology”?**

Response: I do not know what the Federalist Society meant by this statement. My prior experience as a police officer gave me a different perspective from a majority of my fellow students on various legal issues discussed in my law school classes.

- b. **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?**

Response: I do not know what was meant by this statement, and I am not in a position to speak to the state of law schools more generally.

- c. **How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

Response: I do not know what was meant by this statement.

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

Response: I do not know what was meant by this statement.

8. In 2008, while you were serving as Counsel to then-Deputy Attorney General Mark Filip, he issued what is commonly referred to as the “Filip Memo.” This memo, building upon the earlier McNulty, Thompson, and Holder Memos, addresses prosecutorial decisions to pursue criminal charges against corporations. The Filip Memo specifically revised the measures that a corporation would have to take to receive cooperation credit from the Justice Department, and also addressed the issue of a corporation’s waiver of privilege: “[W]hile a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product – if and only if the corporation voluntarily chooses to do so – prosecutors should not ask for such waivers and are directed not to do so.”

- a. **In your capacity as Counsel to the Deputy Attorney General, did you work on the Filip Memo? If so, what was your role?**

Response: To the extent I had any role in working on the Filip Memo, it was in a review and line-editing role only. I was not substantively involved in the preparation of the Memo.

b. Do you believe that prosecutors should be permitted to ask corporations to waive the attorney-client privilege?

Response: It would be improper for me to state my personal views about an issue that may come before me. Should I be confirmed as a judge, I will apply applicable binding Supreme Court and D.C. Circuit precedent.

9. While you were serving as Counsel to then-Deputy Attorney General Mark Filip, you authored a piece in the November 2008 U.S. Attorneys' Bulletin. The "About the Author" section of your piece stated that you "advised the Deputy Attorney General on a variety of issues, including immigration, civil rights, prisons, identity theft, and tribal justice." **Please say more about the specific issues you advised the Deputy Attorney General on in these topic areas.**

Response: I advised and assisted the Deputy Attorney General on an assortment of issues as they arose. In the context of the issues identified in the November 2008 U.S. Attorney's Bulletin, I assisted the Deputy Attorney General with his coordination with the Department of Homeland Security; oversight over the Executive Office of Immigration Review; oversight criminal immigration enforcement, including but not limited to the Department's "Fast Track Programs;" oversight of the Civil Rights Division; oversight of the Bureau of Prisons; coordination with the Federal Trade Commission on identity theft issues; and oversight of federal criminal enforcement on tribal reservations.

10. 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 Virginia.

If you are confirmed, do you plan to move to the District of Columbia?

Response: I will abide by the applicable statutes regarding judicial residence. I have no present plans to move.

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

Response: I received the questions on the afternoon of July 5, 2017. I reviewed them, conducted research, and drafted answers. I then shared the answers with the Department of Justice's Office of Legal Policy ("OLP"). After speaking with attorneys in OLP, I made revisions, finalized my responses, and authorized OLP to submit my responses.

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 Trevor McFadden

1. You say in your questionnaire that you have been a member of the Federalist Society since 2003. **Why did you join the Federalist Society?**

Response: I joined the Federalist Society as a law student because the group sponsored debates on important legal issues and I was interested in going on the group's annual trip to the Supreme Court.

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

Response: I have not studied the views espoused by the Federalist Society. In any event, it would be improper for me to state a personal belief about matters that may come before me. If confirmed as a judge, I pledge to apply binding precedent to the facts before me.

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?**

Response: This is a political question about which it would be improper for me to opine.

- 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?**

Response: A federal judge's job is to apply the law without regard to political interests or pressure. The lifetime tenure of judges granted by the Constitution protects judges from such pressures. *See* U.S. Const., art. III.

- 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?**

Response: Please see my answer to Question 3(b).

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.**

Response: Please see my answer to Question 2.

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

Response: I estimate that I have attended the annual convention approximately five times over the last 14 years. I do not recall the exact years, although I have not attended since at least 2015.

6. In 2008 while you were serving as counsel to the Deputy Attorney General, you wrote an article in the United States Attorneys’ Bulletin entitled “Immigration Enforcement and the Department of Justice.” In this article you said:

Decisions about the most effective way to tackle local problems are best made by the local prosecutors and agents who know the situation. Because of this, the Department does not micromanage local enforcement efforts from Washington or require enforcement initiatives that have been successful in certain areas to be replicated in areas where they may be less suitable.

a. Do you stand by this statement?

Response: My recollection is that this statement accurately described the policy of then-Deputy Attorney General Mark Filip, for whom I worked. To be clear, my recollection is that the above-quoted statement referred to efforts of local *federal* prosecutors and agents, not those of local state prosecutors and law enforcement officers.

b. How would you compare the Bush Administration Justice Department’s approach of not micromanaging local law enforcement with the Trump Administration trying to compel local law enforcement to participate in the federal government’s immigration enforcement efforts?

Response: Please see my response to Question 6(a).

7. 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?

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

- 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?**

Response: I have never solicited and would never solicit political contributions in support of my nomination, and I am not aware of any such donations having been made in support of my nomination. If confirmed, I pledge to faithfully uphold my duty to rule independently based solely on the law and facts before me.

8. 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?

Response: This is a political question about which it would be improper for me to opine.

9. 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?**

Response: The Supreme Court has repeatedly recognized that voting is a fundamental right. If confirmed, I pledge to adhere to binding precedent, including applicable Supreme Court decisions.

- 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?**

Response: I will apply the level of scrutiny dictated by the Supreme Court and the D.C. 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?**

Response: A court's authority to consider the constitutionality of a law before it goes into effect will depend on various issues, including whether the challenge to the law meets the justiciability requirements of Article III. If such a case were presented to me, I would consider the arguments of the parties and apply the binding precedent of the Supreme Court and the D.C. Circuit.

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

Response: There is no question that racial discrimination continues to exist in this country.

11. 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 *Schuette 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*?

Response: It would be improper for me to state my personal views about an issue that may come before me. Should I be confirmed as a judge, I pledge to faithfully apply the precedents of the Supreme Court and the D.C. Circuit.

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

Response: It would be improper for me to state my personal views about an appropriate mode of constitutional interpretation. The Supreme Court has used various tools when interpreting the Constitution in different contexts. Should I be confirmed, I will apply any appropriate binding precedents regarding the methods to be employed when interpreting the constitutional provision in question.

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

Response: Please see my response to Question 12.

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

Response: The meaning of this clause is the subject of litigation currently pending in federal court. See, e.g., *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 17-cv-00458 (S.D.N.Y. 2017). Thus, it would be inappropriate for me to comment on this question.

15. 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?

Response: Please see my response to Questions 12 and 14.

**Nomination of
Trevor Neil McFadden
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 are an elected member (until 2020) of the Falls Church Anglican, which broke away from the Episcopal Church largely due to the denomination's consecration of an openly gay bishop. The Falls Church Anglican considers "marriage to be a life-long union of husband and wife" intended for "the procreation and nurture of godly children" and entailing "God-given" "roles of father and mother." In 2015, the associate pastor of the Falls Church Anglican agreed that "if the U.S. Supreme Court decision includes a redefinition of marriage, this will constitute an intrusion of the state on God's institution of marriage 'from the beginning'."
 - a. Do you understand the majority of the Supreme Court in *Obergefell v. Hodges* to have held that the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that same-sex couples may not be deprived of that right?

Response: Yes.

- b. Do you believe that the Supreme Court's decision in *Obergefell v. Hodges* that the Fourteenth Amendment requires every state to perform and recognize marriages between individuals of the same sex "constitute[d] an intrusion of the state on God's institution of marriage 'from the beginning'"?

Response: It would be improper for me to state my personal opinions. If I am confirmed as a judge, I will faithfully apply the applicable Supreme Court and D.C. Circuit precedents, including *Obergefell v. Hodges*.

- c. *Obergefell* is not a decision grounded in "natural law." Should legal precedents that are, in your view, consistent with "natural law" receive greater weight than decisions that may be deemed inconsistent with natural law?

Response: As a district judge, it would be my duty to faithfully apply all applicable, binding precedents, regardless of whether they are grounded in "natural law."

- d. Do you agree with the analysis of the majority of the Supreme Court in *Lawrence*

v. Texas that, under the U.S. Constitution, religious or moral beliefs cannot be the sole basis for the enactment and enforcement of criminal laws?

Response: It would be improper for me to state my personal opinions. If I am confirmed as a judge, I will faithfully apply the applicable Supreme Court and D.C. Circuit precedents, including *Lawrence v. Texas*.

- e. In your view, what limits (if any) are there on the government's ability to intrude upon personal decisions regarding the creation of personal relationships, family formation and procreation?

Response: It would be improper for me to state my personal views about an issue that may come before me as a judge. If I am confirmed, I will consider the arguments of the parties before me and faithfully apply the applicable Supreme Court and D.C. Circuit precedents.

- f. Do you understand the holding of the majority of the Supreme Court in *Roe v. Wade*, that the constitutional right to privacy encompasses a woman's decision whether or not to continue a pregnancy, is maintained by the Court's current doctrine following *Whole Woman's Health v. Hellerstedt*?

Response: My understanding is that *Whole Woman's Health v. Hellerstedt* did not purport to overrule *Roe v. Wade*.

- g. How do ideas about "God-given" "roles of father and mother" accord with the legal precedent established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination prohibited by Title VII?

Response: It would be improper for me to state my personal views about an issue that may come before me as a judge. If I am confirmed, I will consider the arguments of the parties before me and faithfully apply the applicable Supreme Court and D.C. Circuit precedents.

- 2. On your questionnaire you did not disclose any of your clients from your work at Baker & McKenzie.
 - a. Please provide a list of the most significant clients you represented.

Response: A representative sample of the clients I represented at Baker & McKenzie include Cooperatieve Rabobank, U.A.; Danaher Corp.; Jones Lang LaSalle Inc; and Pentair, Inc. Please see also by answer to Question 2(b).

- b. In particular, please provide all clients whom you represented in FCPA investigations.

Response: I cannot list all clients whom I represented in FCPA investigations due to attorney-client confidentiality protections. *See e.g.*, D.C. Bar Rule 1.6. I can say, however, that I represented corporate clients in the following publicly reported FCPA investigations: Beam Suntory Inc.; Braskem S.A.; Embraer S.A.; and VimpelCom Ltd. I was also represented an individual client in the publicly reported FCPA investigation of JPMorgan Chase.

- c. Do you continue to believe, as you wrote in a 2016 newsletter distributed to firm clients, that the Justice Department should prioritize the prosecution of individuals, rather than corporations, under the FCPA?

Response: I believe you are referring to an article I co-authored entitled, “Holding Corporate Officers Accountable: Challenges for the Justice Department’s FCPA Prosecutors.” In that article, I expressed the widely accepted view that individual prosecutions are an important part of any effective anti-corruption enforcement strategy. The article noted that “a reasonable argument *can* be made that the Justice Department should elevate the importance of individual prosecutions above corporate settlements...,” but did not necessarily advocate that position. In any event, should I be confirmed as a judge, I would not be in a position to decide whether individuals and/or corporations should be prosecuted; that is the role of the Executive Branch. My role as a judge would be to apply the law impartially to the facts in the case before me.