

**Nomination of Terry Moorer to the
U.S. District Court for the Southern District of Alabama
Questions for the Record
Submitted November 8, 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: By law and oath a judge is bound by Supreme Court and relevant circuit court precedent. It is never appropriate to depart from Supreme Court precedent. A district court can only depart from circuit court precedent if that case has been overturned by the Supreme Court or subsequent legislation.

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

Response: A district court judge must at all times apply Supreme Court and relevant circuit court precedent. There may be rare and unusual times where a district court may note that intervening legislation may affect the precedential value of a superior court's decision or note alternative holdings of other circuits facing the same issue. Unless the intervening legislation clearly overturns that precedent, the district judge's responsibility is to follow the relevant circuit court precedent.

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"?

Response: I have not read Justice Gorsuch's textbook and am not familiar with designating some cases as "superprecedent" or "super-stare decisis." In my view as a current federal magistrate judge, a case is either precedent or not. And if not, persuasive or not. If it is precedent, then district judges are obligated and bound by Supreme Court and relevant circuit precedent. Further, however one characterizes it, *Roe v. Wade* and all other precedent of the Supreme Court are binding on district and circuit courts. If I am confirmed, I will faithfully adhere to such precedent.

b. Is it settled law?

Response: Yes.

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: Yes. *Obergefell* is Supreme Court precedent which district courts are obligated to follow.

- 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: As a currently sitting federal magistrate judge, I am bound by the judicial cannon of ethics. I cannot answer this question and remain within my ethical obligations. It would be inappropriate for me to provide my personal opinion or comment on any matter which may appear before me now or if confirmed.

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: As a currently sitting federal magistrate judge, I am bound by the judicial cannon of ethics. I cannot answer this question and remain within my ethical obligations. It would be inappropriate for me to provide my personal opinion or comment on any matter which may appear before me now or if confirmed. Further, I am bound (now and if confirmed) to apply the majority holding in *Heller* as that is current Supreme Court precedent.

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

Response: As a currently sitting federal magistrate judge, I am bound by the judicial canon of ethics. I cannot answer this question and remain within my ethical obligations. It would be inappropriate for me to provide my personal opinion or comment on any matter which may appear before me now or if confirmed.

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

Response: As a currently sitting federal magistrate judge, I am bound by the judicial canon of ethics. I do not believe I can answer this question and remain within my ethical obligations. It would be inappropriate for me to provide my personal opinion or comment on the merits of *Heller*. The case is Supreme Court precedent and I am obligated to 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?

Response: As a currently sitting federal magistrate judge, I am bound by the judicial canon of ethics. I cannot answer this question and remain within my ethical obligations. It would be inappropriate for me to provide my personal opinion or comment on any matter which may appear before me now or if confirmed. If confirmed, I would continue to follow *Citizens United* and all other precedent for the Supreme Court and the Eleventh Circuit.

b. What is the right way to balance individual's First Amendment rights when corporations can, in effect, silence an individual through monetary spending?

Response: As a currently sitting federal magistrate judge, I am bound by the judicial canon of ethics. I cannot answer this question and remain within my ethical obligations. It would be inappropriate for me to provide my personal opinion or comment on any matter which may appear before me now or if confirmed.

6. Please explain your view of the appropriate temperament of a judge. Do you believe you have the appropriate judicial temperament?

Response: In my view, a judge must be courteous and respectful to parties and attorneys. Unlike the passions one may display as an advocate, the judge must be patient, open-minded, tactful, and fair to all parties. A judge should listen carefully to the legal arguments, research the law, and then rule promptly based on the facts and the law. I believe that I have the appropriate judicial temperament and have tried to display that in my ten-plus years as a federal magistrate judge.

7. You currently serve as a federal magistrate judge. What are the most important lessons you have learned about serving as a judge from this experience? How are you a different judge today than you were when you first became a magistrate judge in 2007?

I can say my experience as a Magistrate Judge has reinforced for me the importance of remembering that at the bottom of all files and cases are people and their stories. In other words, judges and lawyers provide their greatest service to our society when they remember the humanity of the litigants – even opposing or difficult litigants. None of that ultimately affects my rulings, but it does help to remember that these cases involve real people and they deserve respectful and prompt rulings. Even an adverse ruling can provide closure.

Next, there are several differences I see from 2007 to now. When I was first appointed, I had less civil litigation experience than criminal litigation experience. I hired staff who had experience in those areas to help fill that gap. Now, my experience is more evenly balanced between civil and criminal litigation and I have more breadth to my legal experience. I also have an increased ability to mediate cases and thus bring parties together to resolve their cases without further expense and uncertainty. One of the great joys I derive from being a magistrate judge is mediating cases to conclusions where all parties feel the case ended in a result they can support.

8. You have extensive contacts with the Middle District of Alabama. You served as a Magistrate Judge in the Middle District of Alabama for the past ten years (2007-present). Prior to that, you served as an Assistant U.S. Attorney in the Middle District of Alabama for 27 years (1990-2007). You were born in Greenville, Alabama, which is in the Middle District. And at the time you were nominated, there were two vacancies in the Middle District of Alabama. Yet you were not nominated to either of them—you have been nominated to be a District Court judge in the Southern District of Alabama.

a. Do you have any connections to the Southern District of Alabama?

Response: Yes. I clerked for Legal Services in Mobile, Alabama during the summers between my first and second years of law school. Additionally, Kristi Dubose (Chief United States District Judge for the Southern District of Alabama) and I attended Huntingdon College at the same time. We have remained friends and colleagues throughout the years. Chief Dubose was an Assistant United States Attorney (AUSA) in Mobile, Alabama while I was an AUSA in Montgomery before she ascended to the bench. From judicial conferences, meetings, and workshops, I am familiar with other judges and members of the Southern District of Alabama bar. In 2003, I deployed for a year with a National Guard unit from Mobile Alabama and still remain in touch with people from that deployment.

b. Did anyone at the Department of Justice or the White House ever discuss with you the possibility of being nominated to one of the Middle District vacancies?

Response: Yes.

- c. Did you ask to be nominated to a different district than the one you have served in?**

Response: No. I did not initiate the decision-making process which led to my nomination in the Southern District of Alabama. I learned in late August 2017 my name would go forward as a nominee for the Southern District of Alabama. My response – then and now – is that to serve in the Southern District of Alabama would be quite an honor which I would humbly accept if the Senate were to confirm me.

- d. Conversely, did you ever express a preference for being nominated to serve on the bench of the Middle District—the district where you had already served as either a federal magistrate or a federal prosecutor for 37 years?**

Response: Yes. While I would have preferred to have been nominated in the Middle District of Alabama as that is where I currently reside, to me, the chance to serve as a District Judge in the Southern District of Alabama is a tremendous honor which I am more than willing and pleased to accept if the Senate were to confirm me.

- e. In your observation, how do the dockets of the Southern District of Alabama and the Middle District of Alabama differ? Are there certain types of cases the Middle District is more likely to hear than the Southern District, or vice versa?**

Response: To my knowledge, the dockets are not dramatically different between the two districts as many kinds of federal civil and criminal cases are the same nationwide. Montgomery is the capital city of Alabama; therefore, a few different types of cases may more likely be heard in the Middle District of Alabama such as redistricting cases or public corruption cases involving statewide elected officials. Such cases may more likely be brought in the Middle District of Alabama, it is still possible for them to be brought in the Southern District of Alabama. Mobile is a port city and thus would have some admiralty and/or maritime cases which do not occur in the Middle District of Alabama because of geography and the lack of proximity to a port.

- f. Do you know why you weren't nominated to the Middle District? Did you ask? If the answer is "yes" to either question, please describe.**

Response: I can only speak to what I was told when I was notified I would be nominated for the district court in Southern District of Alabama as opposed to the Middle District of Alabama. I do not recall if I initiated the inquiry or if I was simply told. When I was told that I would be nominated for the Southern District of Alabama, I was also informed that my criminal law background provided

additional diversity to the Southern District of Alabama bench as the other nominee had a primarily civil litigation back ground.

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

Response: I received these questions on November 8, 2017. The Department of Justice's Office of Legal Policy (OLP) emailed the documents containing the questions. Upon receipt, I read the questions and formulated my answers. I then sent my responses via email to OLP.

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QUESTIONS FROM SENATOR WHITEHOUSE

1. 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?

Response: Yes, to a degree, as I have also used that analogy. However, all metaphors at some point are inept and imperfect. My role, as I see it, is to decide cases fairly and impartially based on the facts and the law.

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

Response: Ultimately, my role is to decide cases fairly and impartially based on the facts and the law. The consequences (practical or not) are for the parties, legislative bodies, and the public to consider.

- 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?

Response: As a federal magistrate judge, I have decided many summary judgment motions under the standard set out in Federal Rule of Civil Procedure 56 and precedential cases interpreting the rule. Under that rule and precedent, a court must view the disputed facts in favor of non-movant. Thus, any subjectivity to the facts would necessarily preclude summary judgment. Whether confirmed as a district judge or remaining as a magistrate judge, I plan to continue following the rule, caselaw, and to fairly apply them to the facts of each case.

2. 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?

Response: Judges are human beings and may have empathy for a party. but must

issue rulings based on the law and precedent rather than bias or sympathy. Therefore, empathy plays no role in the decision.

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

Response: A judge must decide matters based on the facts and law. While a judge is still a person and cannot be expected to fully divorce themselves from all life experiences, their life experiences should play no role in the decision-making process.

- 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?

Yes, I believe I can empathize. As a black person who grew up in a poor, rural neighborhood, I encountered persons from each walk of life mentioned in this question. However, I cannot claim that my experiences will be the same as all other black persons. Most importantly, that empathy or personal feelings cannot and will not play a role in in my judicial role because I must determine cases based on the facts and law.

3. 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?

Response: No. Judges are bound to apply relevant Supreme Court and Circuit precedent.

4. As a magistrate judge, you recommended dismissing a sexual orientation discrimination case brought under Title VII, arguing that Title VII does not protect against discrimination based on sexual orientation or perceived sexual orientation. How does that square with the Supreme Court's precedent in *Price Waterhouse v. Hopkins*? Do you believe that under current federal law, it is lawful to discriminate against an employee because of their sexual orientation or gender identity?

Response: As a currently sitting federal magistrate judge, I am bound by the judicial canon of ethics. I cannot answer this question and remain within the judicial canon of ethics. It would be inappropriate for me to provide my personal opinion or comment on any matter which may appear before me now or if confirmed.

5. I commend your work on the All Rise Reentry Court to help high-risk offenders recently released from prison adjust to reentry. How has that work impacted your views on rehabilitation and to what extent will it influence your sentencing decisions as a district court judge?

Response: My work with All Rise Reentry Court is some of the most gratifying work I've

done as a federal magistrate judge, but it has not changed my view on rehabilitation. I have always felt that as a society and members of the court family that we should make every effort to help those who've been incarcerated to rejoin society in a productive manner. It simply makes sense to do so inasmuch as the costs of incarceration are quite high and more than 90% of people sent to prison will not remain prisoners for life. My work with All Rise Reentry Court has reinforced my long-held belief that we should do more on the front-end to prevent people from becoming criminals and repeat offenders.

As to sentencing, I must only consider statutes passed by Congress, the United States Sentencing Guidelines, relevant Supreme Court and circuit cases interpreting the guidelines, and the facts before me to fashion an appropriate sentence for each specific case.