

Nomination of Mark Norris to the Western District of Tennessee
Questions for the Record
November 8, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be “originalist”? If so, what does that mean to you? If not, how would you describe your approach?

If I am fortunate enough to be confirmed as a district judge, my approach to constitutional interpretation would be to begin first and foremost with the precedent established by the United States Supreme Court and the Sixth Circuit. I would faithfully apply that precedent to the best of my ability. If there were no governing precedent on point, I would attempt to discern the original meaning of the text from the words used, the history, and the constitutional structure.

2. You have held elected office since 1994 — six years on the Shelby County Commission, and the past seventeen in the Tennessee State Senate. Prior work in a partisan political role does not disqualify someone from serving as a federal judge, but the Senate Judiciary Committee is usually very interested in whether judicial nominees can separate the work of an elected official from the work of a federal district court judge.

- a. **What evidence can you offer the Committee that you are capable of being a neutral arbiter of federal law, and will not advance a partisan agenda from the bench?**

Many federal judges, nominated by Presidents of both parties, engaged in political careers before they joined the federal bench. But upon taking the judicial oath of office, they became bound to “faithfully and impartially discharge and perform all the duties incumbent” upon them as federal judges, 28 U.S.C. § 453, and to comply with the canons of judicial ethics for federal judges, which provide that judges “should not engage in . . . political activity,” Canon 5(C), Code of Conduct for United States Judges. If fortunate enough to be confirmed, I would take the same oath and be bound by the same canons, and I would fully and faithfully comply with these obligations.

I also believe that the insights I have gained from these experiences will be extremely valuable in my transition to the bench, if fortunate enough to be confirmed. My work as a legislator has given me a deep appreciation for the distinction between the work of an advocate—whether as a lawyer on behalf of clients or a Senator on behalf of my constituents—and the role of a judge. It has also given me the opportunity to work with and learn from people who hold views across the political spectrum. This experience should provide further assurance to this Committee and future litigants that I would approach each case before me

fairly and impartially.

- b. If confirmed, what steps will you take to assure the public that you will not favor the interests of the Republican Party, litigants who are affiliated with the Republican Party, or the agenda of Republican legislators?**

As a judge, I would be duty-bound to set aside my previous political work and affiliations, faithfully applying the precedents of the Supreme Court and the circuit. I pledge to do so.

3. As a Tennessee State Senator, you have sponsored or cosponsored at least five resolutions or bills that would curtail women's access to reproductive healthcare. For instance, in 2015, you introduced SB 1280, which required any facility at which a surgical procedure to terminate a pregnancy is performed to be licensed as an "ambulatory surgical treatment center." And in 2009, you cosponsored SJR 0127, a resolution proposing to amend the Tennessee Constitution by adding language that would severely restrict abortion rights. That resolution stated: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother."

- a. At the time you cosponsored SJR 0127, did you consider whether the amendment you proposed to the Tennessee Constitution would violate the federal Constitution in light of the Court's opinion in *Roe v. Wade*? How did you understand *Roe* to apply to SJR 0127?**

In my role as a legislator representing constituents, I cosponsored this bill, which was intended to ensure proper health standards at any facility at which surgical procedure to terminate a pregnancy is performed. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents. I would fully and faithfully apply *Roe v. Wade*, along with any other binding precedents of the United States Supreme Court and Sixth Circuit.

- b. Please explain what you understand the United States Supreme Court to have held in the *Whole Woman's Health v. Hellerstedt* decision.**

I have not had the occasion to study *Hellerstedt* closely, but it is my general understanding that the Court held that an admitting-privileges requirement and surgical-center requirement in Texas law imposed an undue burden upon a woman's right to seek an abortion. If I am confirmed, I would faithfully follow *Hellerstedt* along with any other binding precedents of the United States Supreme Court and the Sixth Circuit.

- c. SJR 0127 did not contain a health exception—i.e., an exception for abortions that are necessary to protect the health of the mother. What is your current understanding of Supreme Court case law regarding health exceptions in abortion restrictions?**

Please see my answer to Question 3(b) above.

4. In 2015, you also supported SB 1222, which prevented a woman from obtaining an abortion (other than in medical emergencies) “unless she has first been informed orally and in person” by a physician of certain “facts and has signed a consent form.” The facts identified in the bill included claims about viability “if 24 or more weeks have elapsed from the first day of her last menstrual period or 22 or more weeks have elapsed from the time of conception”; claims about the services “available to assist her during her pregnancy and after the birth of her child, if she chooses not to have an abortion” and claims about “[t]he normal and reasonably foreseeable medical benefits, risks, or both of undergoing an abortion or continuing the pregnancy to term.”

- a. What was the source of these “facts”?**

My understanding is that this matter is the subject of active litigation in federal court. Accordingly, under the canons, I cannot comment on the issue. *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.”); *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. Please describe what you understand to be the “normal and reasonably foreseeable medical benefits, risks, or both of undergoing an abortion or continuing the pregnancy to term”?**

Please see my answer to Question 4(a) above.

5. In 2009, you introduced SB 0554. Among other things, that bill sought to eliminate the requirement that gun purchasers provide thumbprints to the Tennessee Bureau of Investigation as part of the background check process.

- a. Why did you want to eliminate the requirement that gun purchasers provide thumbprints as part of the background check process?**

In my role as a legislator representing constituents, I introduced this bill, which was intended to respond to testimony from the Tennessee Bureau of Investigation that fingerprints were not being used in, and were not needed for, state background checks. If I am fortunate enough to be confirmed, I would set aside both my own

preferences and those of my former constituents and apply the law fairly and impartially to the best of my ability.

b. Do you believe that a requirement to provide thumbprints as part of the background check process is consistent with the Supreme Court's 2008 decision in *D.C. v. Heller*?

It would not be appropriate for me to express any views on the subject because a similar issue might come before me as a district judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If I am confirmed, I will apply *Heller* and all other Supreme Court and Sixth Circuit precedent faithfully.

6. In 2016, you cosponsored SJR 0467, a resolution directing Tennessee's Attorney General to challenge the resettlement of refugees in Tennessee under the federal government's Refugee Resettlement Program. After introducing the resolution, as part of your push to have the Tennessee Attorney General bring a lawsuit, you created a website, keptnsafe.com, which included a petition urging the Attorney General to take action. The petition appeared to equate refugees with terrorists. It stated: "Don't let potential terrorists come to Tennessee." It also stated: "Reports that terrorists posing as refugees from Syria may infiltrate Western nations, including the United States, are cause for concern and call for increased protection." And the website you set up also juxtaposed images of ISIS fighters with what appeared to be refugees waiting in line.

a. What are the "reports" that you referenced in the petition calling on the Tennessee Attorney General to challenge the resettlement of refugees in Tennessee?

The concerns expressed in the petition were based on statements by numerous public officials, including former acting Director of the Defense Intelligence Agency David Shedd, former Secretary of Homeland Security Jeh Johnson, and former FBI Director James Comey, in interviews and Congressional testimony.

b. Do you have any evidence that any refugees resettled in Tennessee are "terrorists"? If so, please describe that evidence.

I do not.

7. According to an article in the *Memphis Daily News*, you highlighted that while ten percent of the Syrian population is Christian, only one percent of Syrian refugees are Christian. The article then quotes you as saying: "We need to look into that and understand: Why the variables? We know what they're doing to Christians, and it's

‘not pretty.’” (“Refugee Lawsuit Proceeds in Spite of Obstacles,” *Memphis Daily News*, December 1, 2016)

a. Do you believe that the United States should take a refugee’s religion into account in determining whether to admit that refugee?

It is my understanding that Section 208(a) of the Refugee Act of 1980 provides the governing standard for determining refugee status. Should I be so fortunate to be confirmed, I will faithfully apply that and any other relevant provisions of law, along with Supreme Court and Sixth Circuit precedent in this area.

b. Do you believe that a policy which took a refugee’s religion into account would be consistent with the U.S. Constitution?

Please see my answer to Question 7(a) above.

8. In 2011, you supported SB 0016, a bill requiring Tennessee voters to present photo ID at the polls. The bill excluded student IDs from the list of acceptable forms of identification. In defending the bill, you dismissed those who “claim that fraud at the polls caused by someone impersonating a voter has never been a problem in Tennessee,” saying that what those opposed to the photo ID requirement “don’t tell you is that, until this legislation became law, we had no reliable mechanism to catch” fraud. (“ID Law About Citizenship, Not Partisanship,” *Commercial Appeal*, October 7, 2011)

a. Why did you support a voter ID bill that excluded student IDs from the list of acceptable forms of identification?

In my role as a legislator representing constituents, I supported this bill, which, among other things, identified which forms of identification were sufficiently reliable for voting purposes. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and apply the law fairly and impartially to the best of my ability.

b. Do you believe that voter fraud is a problem in Tennessee? If so, on what basis have you reached that conclusion?

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts.

c. Do you believe that 3-5 million people voted illegally in the 2016 Presidential

election? If so, on what basis have you reached that conclusion? If not, do you believe it is appropriate for President Trump to make that claim?

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

9. **a.** In 2006, you sponsored SB 2426, which sought to empower Tennessee highway patrol officers “to enforce federal immigration and customs laws while performing within the scope of their authorized duties.” After the bill passed the State Senate, you issued a press release claiming that the State’s “troopers must have the authority in the course of their regular duties to detain, interrogate and arrest illegal aliens. What is your understanding of federal case law regarding state and local law enforcement of federal immigration and customs laws? Did you consider the state of the law before sponsoring the bill?

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Should I be so fortunate to be confirmed, I will faithfully apply Supreme Court and Sixth Circuit precedent in this area.

10. During your time in the Tennessee State Senate, you have been a frequent opponent of same-sex marriage. In 2004, you were a leading sponsor of SJR 0027, calling upon Congress to pass the Federal Marriage Amendment defining marriage as between one man and one woman, and permitting states to give no legal effect or recognition to same-sex marriages performed in other states. That same year, you supported SB 2661, which prohibited Tennessee from recognizing any same-sex civil union or domestic partnership, even if valid in another state. Speaking about that bill, you said that unless Tennessee refused to recognize same-sex civil unions, “marriage may fall by the wayside in favor of civil unions,” and “if marriage falls by the wayside, so does our society.”

- a. Given your past support for bills that would discriminate against LGBTQ Americans, how can you assure LGBTQ litigants that you will be impartial and unbiased if they appear before you?**

As I testified at my confirmation hearing on November 1, 2017, *Obergefell* is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge, if I am so fortunate to be confirmed.

- b. Why would recognition of same-sex civil unions cause marriage to “fall by the wayside”?**

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the

relevant law and facts. Should I be so fortunate to be confirmed, I will faithfully apply *Obergefell*, and any other relevant Supreme Court and Sixth Circuit precedent in this area.

c. Do you have similar concerns regarding marriage “fall[ing] by the wayside” in light of the Supreme Court’s decision in *Obergefell*?

Please see my answer to Question 10(b) above.

11. In 2006, you cosponsored SJR 0542, a resolution urging Congress to pass the Constitution Restoration Act of 2005. That Act would have prohibited the Supreme Court or any federal district court “from reviewing any matter involving the federal, state, or local government, or agent thereof, acknowledging God as the sovereign source of law, liberty, or government.” The resolution itself stated that the Act would protect the ability of Tennesseans and all Americans to, among other things, “[d]isplay the Ten Commandments in public buildings and public places in this State and Nation.”

a. What is your understanding of federal case law regarding the public display of the Ten Commandments, especially in light of the U.S. Supreme Court’s 2005 decisions in *McCreary County v. ACLU* and *Van Orden v. Perry*?

I have not had the occasion to study these precedents carefully. If I am confirmed, I would carefully review the relevant precedents, informed by briefing from both parties and discussion with my law clerks. As in all cases, I would faithfully and to the best of my abilities follow the precedent established by the United States Supreme Court and the Sixth Circuit in this area.

b. Do you believe would be appropriate for a federal district court judge to display the Ten Commandments in his or her courtroom?

Please see my answer to Question 11(a) above.

c. What kind of message do you think it sends to litigants who may adhere to a faith that does not recognize the Ten Commandments — or who practice no faith at all — for a courthouse to display the Ten Commandments? Do you think those litigants can expect to be treated fairly, impartially, and without bias or prejudice?

It is my understanding that the Supreme Court has declined to hold that the display of the Ten Commandments violates the Establishment Clause in all circumstances, noting that the Court’s own frieze includes a depiction of “the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments.” *See, e.g., McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844,

874 (2005). It would be improper for me to state my personal views of these precedents. If I am confirmed, I would faithfully and to the best of my abilities follow the precedent established by the United States Supreme Court and the Sixth Circuit regarding the public display of the Ten Commandments.

12. In 2016, you cosponsored SB 2138, which would prohibit the removal of Confederate monuments in Tennessee.

a. Why did you cosponsor this bill?

In my role as a legislator representing constituents, I sponsored this bill, which established a framework under which such monuments can be evaluated for preservation or removal, including a right of judicial review. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and apply the law fairly and impartially to the best of my ability.

b. Do you believe the government's public display of Confederate monuments serves any government interest? If so, please describe the interest(s).

This question appears to call for me to give an advisory opinion about an issue that could come before me as a district judge, and therefore it would be inappropriate for me to answer it. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

13. In a June 2009 speech, you referred to the American Civil War as the "War Between the States."

a. Why did you refer to the Civil War as the "War Between the States"?

In a speech given at McGavock Cemetery in Franklin, Tennessee, I quoted that language from the Charter of the Daughters of the Confederacy, which identifies one of the purposes of that organization as "collecting and preserving the material for a truthful history of the War Between the States." The Daughters of the Confederacy maintain that cemetery, which is the burial site of nearly 1,500 Confederate soldiers who died at the Battle of Franklin. I am a descendant of an ancestor whose Battery fought *against* the Confederacy in that Battle, and the speech focused on history and reconciliation.

b. What do you understand to have been the cause for the Civil War?

It is my understanding that the primary cause of the Civil War was the dispute over slavery, which has been referred to as America's original sin.

14. In 2004, you introduced a bill, SB 3169, to reform Tennessee’s workers’ compensation scheme. The bill reduced the compensation multiplier and disallowed a construction of the statute that favored the injured employee. In speeches to the National Federation of Independent Business (NFIB), you stressed that the “reforms are projected to save your businesses as much as \$60 million per year.” In 2009, reflecting back on the bill, you told the NFIB that “Tennessee businesses [had] saved an estimated \$490 million” as a result of your legislation.

a. In drafting your legislation, did you consider the need to protect injured workers? If so, explain how you met this need in your legislation.

In my role as a legislator representing constituents, I introduced this bill, which sought to benefit employers and employees by simplifying and streamlining the workers’ compensation process. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and apply the law fairly and impartially to the best of my ability.

15. In 2013, you voted for SB 0035, a bill prohibiting Tennessee municipalities from requiring private employers to pay a higher minimum wage than the minimum required under state or federal law.

a. Why did you vote for this legislation?

In my role as a legislator representing constituents, I voted for this bill, which was intended to provide statewide uniformity in our ability to recruit and retain employers. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and apply the law fairly and impartially to the best of my ability.

b. Do you believe local communities should not have control over the minimum wage in their areas and must be subject to state control?

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

16. In 2014, you introduced SJR 0002, a resolution urging Congress to propose the so-called “Regulation Freedom Amendment.” The amendment would require a majority of the House and Senate to approve a regulation “[w]hensoever one-quarter of the Members of the United States House of Representatives or the United States Senate transmit to the President their written declaration of opposition to a proposed federal regulation.” In arguing for the resolution, you claimed it would “protect our constitutional rights and personal freedom against infringement by federal regulators.”

a. What are examples of federal regulations that infringe on Americans’ constitutional rights or personal freedom?

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

b. What role do federal agencies play in ensuring protection for Americans’ workplace safety, clean drinking water, and food safety?

Federal agencies have various enforcement obligations and authority under the Occupational Safety and Health Act, the Clean Water Act, and the Federal Food, Drug, and Cosmetic Act, among others.

c. What is your understanding of lower court judges’ role in reviewing agency regulations under the U.S. Supreme Court’s *Chevron* doctrine?

It is my general understanding that *Chevron* establishes a two-step process for evaluating the validity of agency regulations. If I am confirmed, I would faithfully and to the best of my ability apply *Chevron* and all other binding precedents of the United States Supreme Court and the Sixth Circuit in this area.

17. In a November 2015 speech, you highlighted your work “strengthening Tennessee law (not Sharia law) for Tennessee courts.”

a. Why did you reference “Sharia law” in your speech?

In my role as a legislator representing constituents, I made speeches emphasizing the need for Tennessee state courts to interpret and enforce state law, and to refrain from consulting religious laws in so doing.

b. Has any Tennessee court ever tried to impose Sharia law on litigants?

Not to my knowledge.

c. Is it ever proper for federal judges to base their rulings on religious texts—any religious texts—rather than laws?

No. A federal judge must base his rulings on the applicable federal or state law, including all relevant precedent of the Supreme Court and (in my case, if I am so fortunate to be confirmed) the Sixth Circuit.

18. Your name appears to be listed in a 2011 directory of the members of the American Legislative Exchange Council (ALEC's) Civil Justice Task Force.

- a. To confirm: Have you ever served as a member of ALEC's Civil Justice Task Force? If so, please list the years you served, and explain your role in that Task Force.**

I have not.

- b. What policies and legislation did that Task Force work on during your tenure?**

Please see my answer to Question 18(a) above.

- c. Have you ever served on any other decision-making bodies of ALEC? If so, please list.**

Please see my answer to Question 18(a) above.

- d. What ALEC-developed legislation have you introduced or supported in Tennessee?**

As explained above, I am not a member of ALEC and am not aware of having introduced or supported any ALEC-developed legislation.

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

Well-established precedents of the Supreme Court and the Sixth Circuit set forth the proper methods of statutory construction. If I am so fortunate to be confirmed, I will faithfully apply the instructions of the Supreme Court and the Sixth Circuit in reading and interpreting statutes.

20. Please respond with your views on the proper application of precedent by judges.

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

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 that Court sees fit to reconsider its precedent).

- b. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

As a district court nominee, I am ill equipped to advise circuit court judges on whether and how to question Supreme Court precedent.

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

Please see my answer to Question 20(b) above.

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

Please see my answer to Question 20(b) above.

21. 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?”

For a district court judge, all Supreme Court precedent is “superprecedent,” entitled to “super-stare decisis” respect. A district judge has no discretion to deviate from Supreme Court precedent.

b. Is it settled law?

Roe v. Wade is settled as precedent of the Supreme Court and binding on all lower court judges.

22. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Please see my answer to Question 10(a) above.

23. In Justice Stevens’s dissent in *District of Columbia v. Heller* he wrote: “The Second Amendment was adopted to protect the right of the people of each of the several States

to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

As a judicial nominee, it would be inappropriate for me to offer my personal views on any particular Supreme Court opinion. If I am confirmed, I will apply *Heller* and all other Supreme Court and Sixth Circuit precedent faithfully.

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

The Court in *Heller* stated, "[N]othing 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, 625–26 (2008).

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

In *Heller*, the Supreme Court asserted that "nothing in our precedents" foreclosed the holding in the case, concluding, rather, that the question had never been squarely addressed as it "did not present itself." *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). As noted above, it would be inappropriate for me as a district court judicial nominee to offer a personal opinion about the correctness of that reasoning.

24. According to your Senate Questionnaire, you have been a member of the Federalist Society since 1989. 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. 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 am not now, nor have I ever been, a member of the Federalist Society. I do not know what the Federalist Society means by that statement.

- b. As a member of the Federalist Society, explain how exactly the organization seeks to “reorder priorities within the legal system.”**

Please see my answer to Question 24(a) above.

- c. As a member of the Federalist Society, explain what “traditional values” you understand the organization places a premium on.**

Please see my answer to Question 24(a) above.

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

After receiving the questions on November 8, 2017, I conducted research, sat down, and typed my answers. I then provided those answers to the Department of Justice’s Office of Legal Policy. After consulting with that office, I made edits to these answers and authorized my answers to be submitted on my behalf.

Senator Dick Durbin
Written Questions for Mark Norris
November 8, 2017

For questions with subparts, please answer each subpart separately.

Questions for Mark Norris

1. In 2016 you cosponsored Tennessee Senate Joint Resolution 467, a resolution directing the Attorney General of Tennessee to sue the federal government on the theory that the Refugee Resettlement Program violates the 10th Amendment by placing refugees in Tennessee. As you know, Tennessee withdrew from the Refugee Resettlement Program in 2007, and the federal government appointed Catholic Charities of Tennessee to help resettle refugees in lieu of the state. The resolution you cosponsored provided that if the state Attorney General did not sue the federal government, the state legislators could hire outside counsel to bring suit.

The Tennessee Attorney General – a Republican – refused to file a lawsuit, despite your creation of a website on which you posted a petition urging a lawsuit and saying “don’t let potential terrorists come to Tennessee”. The legislature then hired the Thomas More Law Center to sue, and you issued a statement in support of the litigation. The suit against the federal government is currently pending, and the U.S. Department of Justice, even under U.S. Attorney General Jeff Sessions, has moved to dismiss the suit, saying that the lawsuit’s claim under the Spending Clause and the 10th Amendment “lacks merit.”

- a. **Why have you pursued this lawsuit against the Department of Justice?**

This matter is the subject of active litigation in federal court. Accordingly, under the canons, I cannot comment on the issue. *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.”); *cf. also* Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- b. **Why are you so concerned about refugees – people fleeing war and terrorism who are the most thoroughly vetted travelers to the United States - living in Tennessee?**

Please see my answer to Question 1(b) above.

- c. **Do you believe there is a legal basis for a state to deny entry to refugees once they are admitted to the United States?**

Please see my answer to Question 1(b) above.

2. Earlier this year, you opposed bipartisan legislation in the Tennessee state legislature to provide DACA students who grew up in Tennessee with access to in-state tuition rates. You were quoted in the *Memphis Daily News* on April 20, 2017 saying “it doesn’t make sense to

have that many illegals in the state of Tennessee.” But here’s what President Donald Trump said about the Dreamers that you call “illegals”:

We’re going to work something out that’s going to make people happy and proud. They got brought here at a very young age, they’ve worked here, they’ve gone to school here. Some were good students. Some have wonderful jobs. And they’re in never-never land because they don’t know what’s going to happen.

a. **Do you disagree with President Trump?**

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

b. **What do you think is the right approach for immigrant students who grew up in Tennessee and are American in every way except their immigration status?**

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

c. **Given your apparent bias against the Dreamers who you call “illegals,” would you recuse yourself, if confirmed, from any case involving the DACA program?**

28 U.S.C. § 455(a) requires a federal judge to “disqualify himself in any proceeding in which his impartiality might be questioned.” The next subsection lists additional grounds for disqualification. *See* 28 U.S.C. § 455(b). If fortunate enough to be confirmed, I would apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics, in deciding whether to disqualify myself from a particular case.

3. On September 12, 2016, *The Tennessean* reported that you were one of 53 Republican state legislators that filed a motion to intervene in the divorce proceeding of a same-sex couple, Sabrina and Erica Witt. The Witts were legally married in Washington DC in 2014 when same-sex marriage was prohibited in Tennessee, and in their divorce there was a dispute over the custody of their child, who was born via artificial insemination to Sabrina Witt.

Your motion, filed by a legal group, tried to intervene in the case. You argued that as legislators, your “unique and substantial interest in the legislative power and process will be impeded, impaired, and/or nullified” if courts interpreted a state law “to apply to any persons other than a man and woman joined together as husband and wife.” You took the position that the relevant state statute dealing with parenting rights in cases of artificial insemination speaks only to “husbands” of the birth mother and does not cover a mother’s same-sex spouse. This position was contradicted by the state Attorney General’s Office.

In May of this year, a Knox County judge found that that Erica Witt had legal rights to see her daughter (and to pay child support). The judge also refused to allow your motion to

intervene, saying it “constitutes an attempt to bypass the separation of powers provided for by the Tennessee constitution.”

Did you really think it was appropriate for you, as a legislator, to file a motion to intervene in a divorce and child custody case in your state?

In my role as a legislator representing constituents, I filed the motion to intervene in an attempt to clarify the legislature’s authority to regulate matters of family law. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and faithfully follow to the best of my ability *Obergefell* and all other precedents of the United States Supreme Court and the Sixth Circuit.

4.

a. **Was the Supreme Court’s decision in *Obergefell* rightly decided?**

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Please see my answer to Questions 11(a) and 11(b) from Senator Feinstein. *Obergefell* is a binding precedent of the Supreme Court, and I will follow it faithfully if I am so fortunate to be confirmed as a district judge.

b. **Do you pledge, if you are confirmed, that you will not take steps to undermine the Court’s decision in *Obergefell*?**

Please see my answer to Question 4(a) above.

5. In 2016, you cosponsored a bill called the Tennessee Heritage Protection Act, which prohibits local jurisdictions from removing any memorial “regarding a historic conflict.” The debate over removing Confederate monuments has intensified after the violence and death that took place this summer when white supremacist groups rallied around a Confederate monument in Charlottesville. **Do you stand by your cosponsorship of this legislation in light of the developments in Charlottesville?**

Please see my answer to Question 12(a) from Senator Feinstein.

6. You have voted in support of Voter ID laws, including a bill in 2011 that required Tennessee voters to present a photo ID at the polls. President Trump has claimed—without any evidence—that three to five million people voted unlawfully in the 2016 election. **Do you believe, as a factual matter, that President Trump is correct in his claim that 3 to 5 million people voted illegally in the 2016 election?**

Please see my answer to Question 8(c) from Senator Feinstein.

7. You have on a number of occasions said that you have worked on “strengthening Tennessee law, not Sharia law, for Tennessee courts.” **What do you mean by this comment?**

Please see my answer to Question 17(a) from Senator Feinstein.

8. In 2010, in response to an attempt to consolidate Memphis schools with those in Shelby County, you authored legislation, SB0025, governing the consolidation of those school systems and allowing new municipal school districts to be formed in the suburbs.

Former Tennessee House Speaker Jimmy Naifeh described this legislation to the *Memphis Daily News* on March 23, 2012 as follows: “I hope they’re proud of what they did. The only thing they were doing with that bill was segregation....This is to allow those four or five towns in Shelby County to be able to form their white school districts.”

Are you proud of this legislation that you authored?

In my role as a legislator representing constituents, I authored legislation, which was intended to facilitate the orderly transition of the administration of schools upon dissolution of a special school district and transfer to a county board of education. My personal views about this legislation are irrelevant to my position as a district judge, should I be fortunate enough to be confirmed.

**Nomination of Mark Norris to the
United States District Court for the
Western District of Tennessee
Questions for the Record Submitted
November 8, 2017**

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?

I agree with Chief Justice Roberts that a judge does not write the rules and does not get to decide not to apply them simply because he or she disagrees with them. Rather, a judge must follow the law and precedents in all cases.

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

A judge should follow the law, including all relevant precedent, in all cases. When the law calls upon a judge to consider the practical consequences of a particular ruling, the judge should do so. For instance, when presented with a motion for a temporary restraining order or a preliminary injunction, a judge should consider whether a failure to issue such an order or injunction would result in “irreparable harm” to the movant.

- 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?

No. Generally, judges apply an objective, reasonable factfinder standard to determine whether or not there are genuine disputes regarding material facts. In doing so, the judge is not to apply his or her own opinion about the relative strength of the evidence.

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?

A judge should have empathy for the parties and attorneys who appear before him,

particularly given it may be the first or only experience that a party will have with the federal judicial system. But personal opinions or experiences never justify a departure from the law, including any relevant precedent.

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

Although everyone brings a variety of personal experiences to the bench, a judge must faithfully apply the law, including any precedent.

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

I do not think that one can fully understand what it is like to be a person that they are not, or appreciate the struggles and trials of someone who has faced disadvantages that they have not. A number of life experiences, including my campaign to combat hunger, my volunteer work at the Boys and Girls Club of Memphis, and my experiences with our local safety net hospital, have given me deep appreciation for the struggles many face. Nonetheless, the outcome in a case must not turn on whether or not the judge can empathize with a party, but on the law and the facts.

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?

It is not.

4. Given your long history of pushing anti-choice legislation in an effort to curtail access to abortion, how can you assure this committee that you will uphold Supreme Court precedent protecting a woman's right to choose?

Please see my answer to Questions 3(a) and 3(b) from Senator Feinstein.

5. While in the Tennessee State Senate, you voted in favor of a voter ID bill and dismissed concerns regarding racial disenfranchisement that would result from the bill.
a. What evidence did you rely on to come to that position?

Please see my answer to Question 8(a) from Senator Feinstein.

- b. Do you still believe that voter ID laws do not result in the disenfranchisement of racial minorities?

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges. I would note that the laws that I have

supported in the past have been upheld by the courts.

- c. How can you assure this committee that as a federal judge you would protect the voting rights of all Americans regardless of race?

If I am confirmed, I would be duty bound to apply all federal protections for the voting rights of Americans, consistent with the precedents established by the United States Supreme Court and the Sixth Circuit. I would discharge this duty faithfully and to the best of my ability.

6. Do you believe that the public's confidence in a fair and impartial judiciary is crucial to our legal system? Given your repeated efforts to diminish the civil rights of LGBTQ people, how can you assure members of the LGBTQ community and other vulnerable groups that you are committed to rendering decisions impartially and without bias or prejudice?

Please see my answer to Question 2(a) from Senator Feinstein.

7. In 2011, you supported S.B. 49, dubbed the "Don't Say Gay Bill." The bill, which passed the State Senate, sought to prohibit teachers from providing any information about homosexuality to public school students.

- a. Please explain your reasons for supporting the "Don't Say Gay Bill."

In my role as a legislator representing constituents, I supported this bill, which was intended to codify existing practice that sex education would not begin until 9th grade. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and faithfully follow to the best of my ability all precedents of the United States Supreme Court and the Sixth Circuit.

- b. Are you aware that laws like the "Don't Say Gay Bill" have been found to discourage school personnel from intervening to stop bullying and harassment, deter teachers from providing basic information, and limit students' ability to form and organize LGBTQ groups? Did you take these concerns into account when supporting the bill?

This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

- c. How was your position on that bill consistent with your understanding of the First Amendment?

It would not be appropriate for me to express any views on the subject because a similar issue might come before me as a district judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf.* *also* Canon 1, Commentary ("The Code is designed to provide guidance to judges

and nominees for judicial office.”). If I am confirmed, I would faithfully and to the best of my abilities follow the precedents of the United States Supreme Court and the Sixth Circuit.

8. You tried to intervene in a same-sex divorce proceeding involving the custody rights of Erica and Sabrina Witt. The Witts were legally married in Washington, D.C. in 2014. Sabrina gave birth to their daughter through artificial insemination. Under Tennessee law, which has been on the books since 1977, in cases of artificial insemination, only “husbands” of the birth mother have parenting rights. Erica Witt argued, however, that under *Obergefell*, the Tennessee statute should be interpreted to include female spouses as well as “husbands.” Thus, the legal protections that state law provides to husbands must also be available to wives, regardless of the statute’s gendered language. Even the Republican state attorney general Slatery, in a memorandum of law, made clear that *Obergefell* applied and “must be construed so as to apply to a child born as a result of artificial insemination during a same-sex marriage.” Nevertheless, in September 2016, you and 52 Republican legislators filed a motion to intervene in the Witts’ divorce and child custody proceedings. The trial judge wrote that “the court finds that the current request to intervene constitutes an attempt to bypass the separation of powers provided by the Tennessee Constitution,” and the court granted custody rights to the non-birth mother.

- a. Please explain your reasons for seeking to intervene in this case, particularly when the state attorney general had made clear that *Obergefell* applied and “must be construed so as to apply to a child born as a result of artificial insemination during a same-sex marriage.”

Please see my answer to Question 3 from Senator Durbin.

- b. As a judge you may be called up to opine on the limitation of the government’s ability to infringe upon individual rights. Your attempt to intervene as a legislator in a family custodial matter suggests that you have little regard for individual rights. Discuss.

Please see my answer to Question 3 from Senator Durbin.

- c. The majority of the Supreme Court in *Obergefell v. Hodges* was concerned that “[w]ithout the recognition, stability, and predictability marriage offers, [same-sex couples’] children suffer the stigma of knowing their families are somehow lesser.” Did you consider the impact that your intervention would have on the rights and well-being of children of same-sex couples?

Please see my answer to Question 3 from Senator Durbin.

**Nomination of Mark Saalfield Norris, to be United States District Judge for
the Western District of Tennessee
Questions for the Record
Submitted November 8,
2017**

QUESTIONS FROM SENATOR COONS

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

I would faithfully follow the factors outlined by the binding precedents of the United States Supreme Court and the Sixth Circuit in determining whether a right is fundamental and protected under the Fourteenth Amendment. My decision in a particular case would be determined by precedent, law, the particular facts, and arguments presented.

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

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

- f. What other factors would you consider?

Please see my response to Question 1 above.

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

"Without equating gender classifications, for all purposes, to classifications based on race or national origin," the Supreme Court has held that gender classifications are subject to scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

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

As a district court judge, I would be bound by the rulings of the Supreme Court and Sixth Circuit in this area, regardless of arguments made to the contrary.

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

As a district court judge, I would follow *United States v. Virginia* and any other precedent of the Supreme Court or the Sixth Circuit.

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

This question encompasses cases and controversies that might come before me if I were confirmed as a district court judge. Were the question to arise, I would consider the arguments of the parties, study the briefs, and rule in accordance with Supreme Court and Sixth Circuit precedent.

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

Please see my answer to Question 2(c) above.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

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

right to use contraceptives?

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects a woman's right to use contraceptives.

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

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects a woman's right to obtain an abortion.

**Questions for the Record for Mark Norris
Submitted by Senator Richard Blumenthal
November 6, 2017**

1. In 2009, you cosponsored a resolution proposing to amend the Tennessee Constitution by adding language that would severely restrict women’s reproductive rights. In remarks regarding a similar resolution in 2001, you said an amendment to the state constitution to restrict reproductive rights “enables our citizens to vote on the meaning of their Constitution rather than a handful of Supreme Court Justices making it up as they go.”

a. Do you believe there is a constitutional right to privacy?

The Supreme Court has repeatedly held that there is a constitutional right to privacy.

b. Do you believe that the well-established line of case law finding a constitutional right to privacy is just “Justices making it up as they go”?

That comment did not refer to the United States Supreme Court, or to its line of case law finding a constitutional right to privacy. To the contrary, the quotation referred to Tennessee Justices under the Tennessee Constitution.

c. If confirmed, will you uphold the well-established constitutional right to privacy that protects, among other things, a woman’s right to have an abortion?

If I am fortunate enough to be confirmed, I would to the best of my ability faithfully apply *Roe v. Wade*, and all other precedents of the United States Supreme Court and the Sixth Circuit governing a woman’s right to have an abortion.

2. In 2011, after Nashville enacted an ordinance prohibiting city contractors from discriminating on the basis of sexual orientation or gender identity, you supported legislation (the “Equal Access to Intrastate Commerce Act”) that prohibited cities from protecting gay and lesbian Tennesseans from discrimination.

a. Why did you support this legislation?

In my role as a legislator representing constituents, I supported this legislation, which was intended to balance the right of local governments and businesses to adopt anti-discrimination policies with the proper level of state oversight. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and faithfully apply to the best of my ability the precedents of the United States Supreme Court and the Sixth Circuit in this regard.

In 2016, you supported legislation that would allow mental health counselors to discriminate against LGBTQ clients—what the American Counseling Association dubbed the “Hate Bill 1840” (S.B. 156). The American Counseling Association’s CEO said that “of all of the state legislation I have seen passed in my 30 years with ACA, [this] new Tennessee law ... is by far the worst.”

b. Why did you support this legislation?

In my role as a legislator representing constituents, I supported this legislation, which was intended to protect the religious liberty of professional counselors. If I am fortunate enough to be confirmed, I would set aside both my own preferences and those of my former constituents and faithfully follow to the best of my ability all precedents of the United States Supreme Court and the Sixth Circuit.

In 2011, you supported a bill dubbed the “Don’t Say Gay Bill” (S.B. 49). This bill, which passed the Tennessee Senate, sought to prohibit teachers from providing any information about LGBT issues to public school students.

c. Why did you support this legislation?

Please see my answer to Question 7(a) from Senator Whitehouse.

You also opposed the Obama Administration’s 2016 Title IX guidance regarding the rights of transgender students, and encouraged Tennessee to sue the Obama Administration. In a separate statement, you declared your commitment to “mak[ing] sure that nothing will be done to give this ‘guidance’ any effect.”

d. Why did you oppose this guidance?

In my role as a legislator representing constituents, I opposed this guidance because of concerns that it represented an improper attempt to rewrite Title IX without Congressional approval.

3. After the Supreme Court’s 2015 decision in *Obergefell v. Hodges* recognized marriage equality as the law of the land, you supported a resolution of the Tennessee General Assembly “express[ing] its disagreement with the constitutional analysis in *Obergefell v. Hodges* and the judicial imposition of a marriage license law that is contrary to the express will of this body and the vote of the people of Tennessee.” According to the bill’s sponsor, Republican Senator John Stevens, one aim of the bill was to “compel courts to side with the late Supreme Court Justice Antonin Scalia and his dissent.”

a. Do you disagree with the majority’s opinion in *Obergefell*?

It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other

than the relevant law and facts. If I am confirmed, I would faithfully and to the best of my abilities follow *Obergefell*, and all other precedent established by the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit regarding the public display of the Ten Commandments.

- b. As a general matter, how should federal courts treat a dissenting opinion? Do you think courts should follow Justice Scalia's dissent in *Obergefell*?**

The majority opinion in *Obergefell* represents the binding precedent of the Supreme Court. As such, I will faithfully apply that decision.

- c. Marriage equality is now unequivocally the law of the land. Will you commit to upholding the Supreme Court's decision in *Obergefell* and recognizing the right of same-sex couples to marry?**

Please see my answer to Questions 10(a) and 10(b) from Senator Feinstein, and my answer to Question 3(a) above.