Nomination of Peter Joseph Phipps to the U.S. Court of Appeals for the Third Circuit
Questions for the Record
June 12, 2019

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 lower courts to depart from Supreme Court precedent?

   It is never appropriate for an inferior court to depart from Supreme Court 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?

   Circuit court judges are under a duty to observe and apply binding Supreme Court precedent. While it is generally improper for a circuit court judge to question Supreme Court precedent, there may be instances where respectfully identifying an issue well-positioned for Supreme Court review could be beneficial.

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

   A circuit court typically can overturn its own precedent only through an en banc hearing, which requires consent of a majority of the active circuit judges who are not disqualified from the case. *See* Fed. R. App. P. 35(a); 3d Cir. L.A.R. 35.3 (2011). Such en banc review "is not favored." Fed. R. App. P. 35(a); *see also* 3d Cir. L.A.R. 35.4 (explaining that "en banc hearing or rehearing of appeals is not favored"). Ordinarily en banc review "will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions or (2) the proceeding involves a question of exception importance." Fed. R. App. P. 35(a). When sitting en banc, the Third Circuit is not bound by precedent "in the same way that a panel would be bound," but the en banc panel is still constrained "to the degree counselled by principles of stare decisis." *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 813 (3d Cir. 1991).

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

   The Supreme Court has made clear that "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Adhering to prior precedent, while not an "inexorable command," constitutes "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808, 827

(1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as "super-stare decisis." One text book on the law of judicial precedent, co-authored by Justice 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"? "superprecedent"?

   As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Roe v. Wade*.

   b. Is it settled law?

   Yes, *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Roe v. Wade*.

3. 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?**

   Yes, *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit 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?

   I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Heller*. As far as commenting on Justice Stevens's

dissenting opinion, as an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

The Supreme Court in *Heller* recognized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In *Heller*, the Supreme Court specifically stated 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 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?

Heller does not expressly overrule or abrogate any prior Supreme Court precedent. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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?

In *Citizens United*, the Supreme Court identified over twenty prior instances in which it had "recognized that the First Amendment protection extends to corporations." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). In the context of the specific issue in *Citizens United*, limits on corporate expenditures for electioneering communications, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 365. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

Please see my response to Question 5.a.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2012), the Supreme Court addressed whether the protections afforded by the Religious Freedom Restoration Act applied to corporations, but the issue of the applicability of the Free Exercise Clause to corporations was not resolved in that case. Because there may be litigation implicating this unanswered question, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

6. In 2016, Senator Toomey withheld a blue slip for Rebecca Haywood, who had been nominated to the Third Circuit, citing concerns about Haywood's level of experience. At the time of her nomination, Haywood had served in the U.S. Attorney's Office for the Western District of Pennsylvania for 17 years; had clerked for Judge Bloch of the Western District for three years on two different occasions; and had previously served as an associate at Jones Day. Then-Chairman Grassley respected Senator Toomey's blue slip and Haywood's nomination did not go forward.

Judge Vanaskie — whose seat you have been nominated to fill — spent over 16 years on the Middle District of Pennsylvania before his elevation to the Third Circuit.

a. Why do you think your eight months as a district court judge qualify you to sit on the Third Circuit?

I believe my qualifications for the Third Court are enhanced by my eight months of service on the district court, but my qualifications extend well beyond that. On the district court, I have presided over more than a hundred hearings and ruled on several hundred motions. Due to the volume of cases that were transferred to me, I have had the opportunity to adjudicate issues at all stages of litigation, across a broad spectrum of subject matter, in a wide range of procedural postures – from temporary restraining orders, to motions to dismiss, to discovery disputes, to summary judgment, and to trial. Those experiences have provided me with additional insight into the creation of the record for potential appeal in each of those cases.

Consistent with my judicial experience, the American Bar Association has rated me as well-qualified to serve on the Third Circuit. In addition, my prior experiences have prepared me well for the Third Circuit: from my legal education at Stanford Law School, to my clerkship for Chief Judge R. Guy Cole, Jr. of the U.S. Court of Appeals for the Sixth Circuit, to my work as a litigator in private practice, to my five years teaching administrative law at Duquesne University School of Law as an adjunct law professor, to my fifteen years of experience as a career public servant and litigation attorney in the Federal Programs Branch of the Civil Division of the U.S. Department of Justice, during which I was entrusted by three different administrations of both

political parties with some of the most high-profile, complex, and sensitive litigation involving the United States.

b. At the time of you initial discussions with the White House and Department of Justice about your nomination to the Western District, did anyone discuss with you the possibility of elevating you to the Third Circuit? If so, who and what was the nature of that discussion?

I understand that I previously received some consideration for a prior vacancy on the Third Circuit.

7. While serving as an attorney in the Justice Department, you were counsel of record on the federal government opposition to a motion for a temporary restraining order and preliminary injunction filed by the ACLU in the case *American Civil Liberties Union v. Wright*. In defending the Trump Administration's policies denying reproductive health care to unaccompanied minors — and claiming they did not constitute an undue burden on a woman's right to choose — you wrote: "Given the constitutionally legitimate interest that the Federal Defendants have in promoting childbirth, in refusing to facilitate an abortion, and in not providing incentives for pregnant minors to illegally cross the border to obtain elective abortions while in federal custody, as well as the irreversible nature of abortion, both the balance of hardships and the public interest favor denial of plaintiff's motion."

The judge in the case ultimately denied the ACLU's motion, but did so based on lack of venue and the fact that the deadline to amend pleadings had passed.

Why did you make an argument about undue burden rather than focusing exclusively on questions of venue and the deadline to amend pleadings?

The referenced case, *ACLU of Northern California v. Azar*, involved an Establishment Clause challenge to a competitively-awarded grant to a faith-based organization during the Obama administration. As a career attorney at the Department of Justice, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies. The issue of access to abortion was tangential to the Establishment Clause challenge, as made clear in the Court's summary judgment opinion upholding the constitutionality of the Obama-administration grant: "Discovery has clarified that this case is not about the government or any religious organization denying access to abortion or contraception. There is no evidence in the record that any unaccompanied minor or trafficking victim who wanted an abortion or contraception during the time period relevant to this case was unable to obtain them." *ACLU of N. Cal. v. Azar*, 2018 WL 4945321, at *1 (N.D. Cal. Oct. 11, 2018).

The October 2017 brief referenced in Question 7 was in response to an attempt to bring an unrelated plaintiff with an unrelated claim into the ongoing Establishment Clause challenge near the close of discovery and to obtain a preliminary injunction requiring the government to facilitate the plaintiff's access to an abortion within a week. In seeking a preliminary

injunction, plaintiff cited to the undue burden standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Accordingly, the referenced brief addressed the aspects of the undue burden test cited by plaintiff.

8. In Questions for the Record (QFRs) submitted to you by Senator Booker in relation to your nomination to the Western District, Senator Booker asked whether you believed there is implicit racial bias in the criminal justice system. You responded: "I have not studied the issue in depth, but the conclusion that members of the criminal justice system have acted with implicit social cognition on the basis of race would not surprise me." You also stated during your hearing that you were familiar with "a little bit" of the scholarship on implicit bias.

    a. Please identify the specific article(s) or other forms of scholarship on implicit racial bias with which you are familiar.

    I have not studied the issue in depth. When my wife was in graduate school, she alerted me to literature on implicit social cognition. After I was asked about this topic by Senator Hirono at my nomination hearing on April 25, 2018, I wanted to learn more about it, and shortly afterwards, I reviewed four articles related to the topic: Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, PSYCHOLOGICAL REVIEW, Vol. 102, No. 1, 4-27 (1995); B. Keith Payne & Bertram Gawronski, *A History of Implicit Social Cognition: Where Is It Coming From? Where Is It Now? Where Is It Going?* to appear in B. Gawronski & B.K. Payne (Eds.), HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS; Brian A. Nosek, Carlee Beth Hawkins & Rebecca S. Frazier, *Implicit social cognition: from measures to mechanisms*, TRENDS IN COGNITIVE SCIENCES, Vol. 15, No. 4 (Apr. 2011); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, SOCIAL ISSUES AND POLICY REVIEW, Vol. 6, No. 1 (2012).

    b. Please explain the difference between "implicit racial bias" and "implicit social cognition on the basis of race."

    I am not sure that there is a difference. My familiarity with the topic, including the articles I have more recently read, use the term "implicit social cognition." In responding to a question about implicit racial bias from Senator Hirono at my nomination hearing on April 25, 2018, I wanted to make sure that we had a common understanding; from Senator Hirono's clarification, I believe that we did.

9. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is difference than judicial selection in past years…."

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law?" If so, by whom, what was asked, and what was your response?

I was not asked about my "views on administrative law" in connection with my nomination. As a career attorney at the Federal Programs Branch of the Civil Division of the Department of Justice from January 2003 until October 2018, I discussed case-related issues of administrative law with colleagues and clients.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

As a career attorney at the Federal Programs Branch of the Civil Division of the Department of Justice from January 2003 until October 2018, I discussed case-related issues of administrative law with colleagues and clients. Similarly, for several years as an adjunct professor at Duquesne University School of Law, I have taught a three-credit survey course in administrative law. I cannot recall every conversation that I have had on any issue related to administrative law, nor do I know the affiliations of everyone with whom I ever have spoken about administrative law, but to my recollection, no one affiliated with either of those organizations asked me about my "views on administrative law" in connection with my nomination.

c. What are your "views on administrative law"?

In teaching and in practicing in this area, I have come to appreciate – consistent with many federal statutes – those aspects of administrative law that promote political accountability, transparency, and other democracy-enhancing features. As a judge, I would observe and apply all binding Supreme Court and Third Circuit precedent, including administrative law precedent.

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

The Supreme Court has made clear that if a statute is ambiguous, as statutes can be, *see, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015) (examining whether the term "tangible object" as used in the Sarbanes-Oxley Act includes undersized red groupers caught by fishermen in the Gulf of Mexico), then it is permissible for a court to look to legislative history to understand the meaning of the ambiguous term, as both the plurality and the dissent did in *Yates*. *See id.* at 1084 (plurality op.) (Ginsburg, J.) (citing to legislative history); *id.* at 1093 (Kagan, J., dissenting) ("And legislative history, for those who care about it, puts extra icing on a cake already frosted.").

11. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received these questions on Thursday, June 13, 2019. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, June 17, 2019. Each answer herein is my own.

Written Questions for Peter Joseph Phipps
Submitted by Senator Patrick Leahy
June 12, 2019

1. You were sworn in as a district court judge late last year, and you began discussing this Third Circuit vacancy with the White House just three months later.

   (a) What have you learned during your seven months on the bench that would help you as a Third Circuit judge?

   I believe my qualifications for the Third Court are enhanced by my eight months of service on the district court, but my qualifications extend well beyond that. On the district court, I have presided over more than a hundred hearings and ruled on several hundred motions. Due to the volume of cases that were transferred to me, I have had the opportunity to adjudicate issues at all stages of litigation, across a broad spectrum of subject matter, in a wide range of procedural postures – from temporary restraining orders, to motions to dismiss, to discovery disputes, to summary judgment, and to trial. Those experiences have provided me with additional insight into the creation of the record for potential appeal in each of those cases.

   Consistent with my judicial experience, the American Bar Association has rated me as well-qualified to serve on the Third Circuit. In addition, my prior experiences have prepared me well for the Third Circuit: from my legal education at Stanford Law School, to my clerkship for Chief Judge R. Guy Cole, Jr. of the U.S. Court of Appeals for the Sixth Circuit, to my work as a litigator in private practice, to my five years teaching administrative law at Duquesne University School of Law as an adjunct law professor, to my fifteen years of experience as a career public servant and litigation attorney in the Federal Programs Branch of the Civil Division of the U.S. Department of Justice, during which I was entrusted by three different administrations of both political parties with some of the most high-profile, complex, and sensitive litigation involving the United States.

2. While at the Justice Department, you defended the Air Force in a constitutional challenge to the "Don't Ask, Don't Tell" statute and regulations in place at the time. Since then, "Don't Ask, Don't Tell" has been rescinded, the Supreme Court has recognized a constitutional right to same-sex marriage, and numerous circuits have found sexual orientation and gender identity to be protected under federal anti-discrimination laws.

   (a) If confirmed to the Third Circuit, will you apply federal law equally to LGBTQ individuals?

   My commitment as a judge is to apply the law impartially to the cases and controversies before me, to afford everyone in court dignity and respect, and to treat everyone equally under the law, including LGBTQ individuals.

The referenced case, *Witt v. United States Air Force*, involved a challenge to a now-repealed federal statute, 10 U.S.C. § 654, that established the Don't Ask, Don't Tell policy. That statute was passed by Congress and signed into law by President Clinton in 1993. Afterwards, the Don't Ask, Don't Tell policy was implemented by Democratic and Republican administrations, until Congress passed and President Obama signed legislation repealing 10 U.S.C. § 654 in 2011.

As a career attorney at the Department of Justice, I had no role in the creation of the Don't Ask, Don't Tell statute and policy. In my role as a career attorney, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies.

The decision to defend the constitutionality of the statute and policy at trial was made by President Obama's Attorney General Eric Holder in consultation with Solicitor General Elena Kagan and the Department of Defense. Attorney General Holder stated in an April 24, 2009 letter to the Senate Legal Counsel, which referenced correspondence regarding the case from the General Counsel for the Department of Defense (Hon. Jeh Johnson) to the Solicitor General (Hon. Elena Kagan), that "the appropriate course" was to "to defend the constitutionality of 10 U.S.C. 654 on remand in the district court." Copy available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/04-24-2009.pdf. Following the trial, my duties included negotiating and drafting a settlement agreement with the plaintiff.

3. Also during your time at DOJ, you defended an HHS regulation allowing faith-based organizations to refuse to provide emergency contraception to unaccompanied minors entering the country and victims of foreign human trafficking, even though otherwise required by provisions of the grant funding.

(a) Do you believe that faith-based organizations should be able to refuse to provide legal medical care – in this case emergency contraception – to unaccompanied minors and victims of human trafficking, some of whom may have been raped during their journeys?

The referenced case, *ACLU of Northern California v. Azar*, involved an Establishment Clause challenge to a competitively-awarded grant to a faith-based organization during the Obama administration. As a career attorney at the Department of Justice, I worked on this case in conjunction with several other attorneys at the Department of Justice, including supervisors and higher-level officials, as well as with officers and employees at the client agencies. The issue of access to emergency contraception and abortion was tangential to the Establishment Clause

challenge, as made clear in the Court's summary judgment opinion upholding the constitutionality of the Obama-administration grant: "Discovery has clarified that this case is not about the government or any religious organization denying access to abortion or contraception. There is no evidence in the record that any unaccompanied minor or trafficking victim who wanted an abortion or contraception during the time period relevant to this case was unable to obtain them." *ACLU of N. Cal. v. Azar*, 2018 WL 4945321, at *1 (N.D. Cal. Oct. 11, 2018). Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

(b) If you believe faith-based organizations should be able to exercise "conscience rights," do you also believe that faith-based organizations should be able to refuse care to LGBTQ individuals?

Please see my response to Question 3(a).

4. Chief Justice Roberts wrote in *King v. Burwell* that

> "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'"

(a) Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

As an inferior court judge, my first and foremost obligation is to binding precedent on the meaning of any statutory term. Beyond that, I believe that looking to the text and structure of a statute is a salutary method of analysis, as the Supreme Court has repeatedly recognized.

5. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

The independence of the federal judiciary is established in Article III of the Constitution. Consistent with the Free Speech and the Free Press Clauses of the First Amendment, judges may from time to time be subject

to subtle and not-so-subtle criticism, but that does not erode the independence of the federal judiciary.

(b) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

Please see my response to Question 5(a).

6. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and will not be questioned*." (Emphasis added.)

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

In *Webster v. Doe*, 486 U.S. 592 (1988), the Supreme Court held that due to national security concerns, the plaintiff's case under the Administrative Procedure Act could not proceed, but the Supreme Court permitted the plaintiff's constitutional claims to proceed, explaining that "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Id.* at 603 (quotations omitted).

7. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders.

(a) If this president, any future president, or any other executive branch official refuses to comply with a court order, how should the courts respond?

Separation-of-powers principles rely in part on comity and respect among the three co-equal branches of government. Accordingly, each branch should exhibit respect and deference to each other. If a party does not comply with a court order, the opposing party may seek injunctive relief or other remedies from the court to enforce that order.

8. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

The Constitution states that Congress has the power to declare war as well as the power of the purse to make or deny appropriations. As observed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

The Supreme Court has acted to enjoin Executive Branch actions, even during time of war, because no one is above the law. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent in this area.

(c) Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

Please see my answer to Question 8(b).

9. **How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?**

On occasion, a conflict arises in court as to the Executive Branch's expertise in national security. *See, e.g., Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). If such an issue arises, as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

10. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(a) Do you agree with that view? Does the Constitution permit discrimination against women?

The Supreme Court has applied the Equal Protection Clause to classifications that discriminate against women. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

11. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

No.

12. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

    Article I, section 9, clause 8 provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State."

13. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

    (a) When is it appropriate for a court to substitute its own factual findings for those made by Congress or the lower courts?

    As a general rule, appellate courts do not engage in fact-finding; rather they evaluate the record on appeal. Federal Rule of Appellate Procedure 10(a) addresses the composition of the record on appeal. Under that rule, "[t]he following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk. See also Fed. R. App. P. 32(b) (providing requirements for the appendix). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent.

14. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

    Each of those amendments contains an enforcement clause, *see, e.g.*, U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2. Those enforcement clauses provide Congress the ability to enforce the amendment by appropriate legislation.

15. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Lawrene v. Texas*.

16. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

The Supreme Court has summarized the importance of adhering to precedent in its observation that "*Stare decisis* – in English, the idea that today's Court should stand by yesterday's decisions, is 'a foundation stone of the rule of law,'" and that "[r]especting *stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). Adhering to prior precedent, while not an "inexorable command," constitutes "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent.

17. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

I would apply conflict rules and ethical standards to assess whether a recusal is required or would be beneficial to the integrity of the judiciary. For instance, I would recuse myself from any case in which I have participated as an attorney. In addition, the Western District of Pennsylvania has a pre-screening process to avoid case assignments with a judicial conflict. I have identified five entities for pre-screening, which include my wife's employer and institutions with which I have a financial account. As a sitting judge, I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

18. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

(a) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Footnote 4 of *Carolene Products* is one of the most significant footnotes in constitutional law due to its role in the development of tiers of constitutional scrutiny. Specifically, the footnote contemplated more exacting judicial scrutiny in certain spheres, such as the right to vote, while the opinion itself employed rationale basis review for economic legislation. For context, the full sentence quoted above from footnote 4 states, "It is unnecessary to consider now whether legislation which restricts those political process which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *United States v. Carolene Prods.Co.*, 304 U.S. 144, 152 n.4 (1938).

19. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

(a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

Yes, it can be.

20. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

As a sitting judge, it is not appropriate for me to comment or opine publicly on this speculative and hypothetical scenario about a President's ability to self-pardon. *See* Canons 2 and 5, Code of Conduct for United States Judges.

21. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The Constitution confers to Congress certain enumerated powers, including the two identified in this question. The Supreme Court has addressed the scope of those powers on a number of occasions. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995) .

22. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the plaintiff's request for a searching inquiry into the justifications for Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, because such an inquiry would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S. C.t at 2409. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent in this area.

23. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion?**

I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court, in articulating the undue burden standard, quoted two passages from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): (i) "a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent, including *Whole Woman's Health*. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

24. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

    (a) Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?

    The Supreme Court developed the modern doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Third Circuit precedent on qualified immunity.

25. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted "seismic shifts in digital technology," such as the "exhaustive chronicle of location information casually collected by wireless carriers today."

(a) **In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), recognized that "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). In a similar vein, Congress has enacted the Electronic Communications Privacy Act, which imposes several statutory restrictions above and beyond those required by the Fourth Amendment on searches involving certain types of electronic communications. *See* 18 U.S.C. § 2518. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

26. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

(a) With the understanding that you cannot comment on pending cases, are there situations in which you believe a president can lawfully allocate funds for a purpose previously rejected by Congress?

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court explained that "a fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements. . . .'" *Id.* at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen 307, 319 (1975)). Because there may be litigation implicating this question, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge

should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

27. **Can you discuss the importance of judges being free from political influence or the appearance thereof?**

Judicial independence is incredibly important, and this has been long and continuously recognized: from Federalist No. 78, which observed that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution," to Canon 1 of the Code of Conduct for United States Judges, which provides that "[a]n independent and honorable judiciary is indispensable to justice in our society."