

**Nomination of Michael Scudder to the
U.S. Court of Appeals for the Seventh Circuit
Questions for the Record
Submitted March 28, 2017**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

Decisions of the Supreme Court of the United States are binding on all lower federal courts. It is never appropriate for a lower federal court to depart from Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

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

The Seventh Circuit may overturn its own precedent by adhering to the procedures in the Court’s Circuit Rule 40(e) or by sitting en banc. *See* Cir. R. 40(e) (“A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”); *Mojica v. Gannett Co.*, 7 F.3d 552, 557 (7th Cir. 1993) (“When sitting *en banc*, the full court has the power to change general rules stated in previous cases.”). Revisiting a prior decision through an en banc hearing is “not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity in the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a).

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

As a nominee to a lower federal court, it would be inappropriate for me to comment on the circumstances under which the Supreme Court should overturn its own precedent.

2. Many conservative judges and legal scholars believe that the Constitution should be interpreted consistent with its “original meaning”—in other words, the meaning it had at the time it was enacted.

a. With respect to constitutional interpretation, do you believe judges should rely on the “original meaning” of the constitution?

If fortunate enough to be confirmed to the Seventh Circuit, on matters of constitutional interpretation, I would look to and follow the guidance and direction provided by all applicable precedent of the Supreme Court and Seventh Circuit.

b. How do you decide when the Constitution’s “original meaning” should be controlling?

Please see my response above to question 2(a).

c. Does the “original meaning” of the Constitution justify a constitutional right to same-sex marriage?

In its 2015 decision in *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment protects the right of same-sex marriage. If fortunate enough to be confirmed to the Seventh Circuit, I would fully and faithfully follow *Obergefell*.

d. Does the “original meaning” of the Constitution explain the right to marry persons of a different race recognized by the Court in *Loving v. Virginia*?

As with all precedent of the Supreme Court, I would fully and faithfully follow the Court’s holding in *Loving v. Virginia*.

3. At your hearing, you testified that modern-day originalists would ask in interpreting the Equal Protection or Due Process clauses of the Fourteenth Amendment, “what is the value or the principle that’s embodied by the words ‘equal protection,’ ‘due process of law.’”

a. As a legal matter, how should one develop an interpretation of values and principles of these terms?

I do not recall being asked questions or testifying at my hearing on these matters. I would approach interpretations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment by carefully reviewing all applicable Supreme Court and Seventh Circuit precedent, as well as pertinent decisions from other courts, to discern the applicable legal framework and

standards to decide or guide the resolution of a question presented in an appeal.

b. What are the values or principles embodied in “equal protection” and “due process of law”?

Please see my response above to question 3(a).

c. How do those values or principles apply to groups that the Framers of the amendment likely did not have in mind, such as women? Or LGBT individuals?

Please see my response above to question 3(a).

4. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A textbook on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is “super-stare decisis”? “superprecedent”?

Accepting the definitions provided in the question, I agree that the Supreme Court’s decision in *Roe v. Wade* qualifies as “super-stare decisis” and “superprecedent” because, as the question observes, the decision has survived numerous challenges since 1973.

b. Is it settled law?

Roe v. Wade is binding Supreme Court precedent, and I would fully and faithfully follow it if fortunate enough to be confirmed to the Seventh Circuit.

5. 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?**

Obergefell v. Hodges is binding Supreme Court precedent, and I would fully and faithfully follow it if fortunate enough to be confirmed to the Seventh Circuit.

6. 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?

The Supreme Court's decision in *District of Columbia v. Heller* is binding precedent, and I would fully and faithfully follow it if fortunate enough to be confirmed to the Seventh Circuit. As a judicial nominee, it would not be appropriate to offer any personal view on any Supreme Court opinion, including any dissenting opinion of a particular Justice.

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

In *Heller*, the Court explained that the "right secured by the Second Amendment is not unlimited" and, although "not undertak[ing] an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008).

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

The majority and dissenting opinions in *Heller* discussed and debated the scope and applicability of the Court's prior decisions interpreting the Second Amendment, including *United States v. Miller*, 307 U.S. 174 (1939). Compare *Heller*, 554 U.S. at 621-25 (majority opinion's discussion of *Miller*), with *id.* at 676-79 (Stevens, J., dissenting) (principal dissenting opinion's discussion of *Miller*). Beyond observing this aspect of the opinions in *Heller*, please see my response above to question 6(a).

7. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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 different 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?

As stated in response to question 26 in the Committee’s Questionnaire for Judicial Nominees, and respecting the expectation confidentiality of my interview with White House and Department of Justice officials, at no point in the judicial selection process did anyone ask me a question seeking any form of assurance concerning my views on an issue of administrative law.

- 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?**

No.

- c. What are your “views on administrative law”?**

Federal administrative law is a vast body of law, governed and guided in part by the Administrative Procedure Act and legal doctrines and other principles embodied in precedent of the Supreme Court and reflected in decisions of lower federal courts. If fortunate enough to be confirmed to the Seventh Circuit, I will fully and faithfully follow all applicable precedent in these (and all other) areas.

8. Since 2014, you have represented the University of North Carolina in a case defending the University’s use of race as one of many factors under consideration in its admissions process.

- a. Please explain your role in this case.**

My law firm, Skadden, Arps, Slate, Meagher, & Flom LLP, is co-counsel with the North Carolina Office of the Attorney General defending the University of North Carolina at Chapel Hill and related defendants in the matter of *Students for Fair Admissions, Inc. v. Univ. of North Carolina*, No. 1:14-cv-00954-LCB-JLW, a case filed in November 2014 and currently pending in the United States District Court for the Middle District of North Carolina. I have served as the lead attorney on the Skadden Arps team.

- b. How did you become involved in this case?**

The University of North Carolina at Chapel Hill retained Skadden Arps as defense counsel at the outset of the litigation, and the University then asked me to lead the defense team within my firm.

9. On your Senate Questionnaire, you list membership in the St. John the Cross Parish. In 2011, the parish bulletin notes: “Michael Scudder, Jr. - is helping to establish a residential crisis pregnancy center.” (Bulletin, St. John of the Cross Parish (May 1,

2011), <https://johnofthecross-wpengine.netdna-ssl.com/wp-content/uploads/2011/06/may-1.pdf> at 5.)

a. What is a “residential crisis pregnancy center”?

The May 2011 references in the St. John of the Cross Parish bulletin to my “helping to establish a residential crisis pregnancy center, expanding legal services to veterans at St. Leo’s, coordinating the spring social hosted by his law firm, and sponsors the Tuesday night Supper downtown” relate to my service as a member of the Board of Directors of Catholic Charities of the Archdiocese of Chicago. As to the specific reference to “helping to establish a residential crisis pregnancy center,” I was asked by Catholic Charities to serve on a small ad hoc group to assist with a potential partnership arrangement between two organizations, one (unaffiliated with Catholic Charities) that provided residential housing to pregnant women and another (affiliated with Catholic Charities) that provided counseling services to those same individuals. I recall my involvement lasting only approximately a few months and do not know whether the partnership was ever formed or whether a new residential crisis pregnancy center was ever opened.

b. Did you work with the parish “to establish a residential crisis pregnancy center”? If so, please describe your involvement in the effort.

No. Please see my response above to question 9(a).

c. Was such a center ultimately established? If yes, please identify the center and any involvement you currently have with the center.

I do not know. Please see my response above to question 9(a).

10. In your Senate Questionnaire, you indicate that, while working in the White House Counsel’s Office during the George W. Bush Administration, your “primary responsibilities included representing the Department of Justice in efforts to implement various intelligence and information sharing reforms instituted following the attacks of September 11, 2001.” When you worked at the White House Counsel’s Office and then the National Security Council, you indicate your “work focused primarily on national security matters,” as well as “terrorism, intelligence, defense, foreign policy, and related matters.”

When Judge Brett Kavanaugh came before this Committee in 2006, he disclosed the categories of issues he had worked on in the White House Counsel’s Office, as did Judge Greg Katsas last year. **Please indicate whether you worked on the following issues, and if so, detail your role and the nature of your work:**

Unless otherwise noted below, I do not recall working on the issues listed below during my service in 2006 in the Office of the Deputy Attorney General or while Associate

Counsel to the President from January 2007 to August 2007. In August 2007, I began serving as Senior Associate Counsel to the President and General Counsel of the National Security Council. To the best of my knowledge, and unless otherwise noted below, each of the issues listed below relate to decisions made before August 2007, and thus I did not provide advice in connection with original decision making on the issues. By August 2007, however, aspects of the issues listed below had received and were continuing to receive attention, including through oversight by committees of Congress, media reporting, litigation, and otherwise. My service to the National Security Council between August 2007 and January 2009 required me to have varying levels of familiarity with and situational awareness of the inquiries, media reporting, and other related activities occurring during that time period, and any advice I provided would have occurred in that context.

a. Government surveillance of Americans under the President’s Surveillance Program or the Terrorist Surveillance Program.

Please see my introductory response above to question 10. In the general area of electronic surveillance for foreign intelligence purposes, I recall providing advice related to Congress’s enactment of amendments to the Foreign Intelligence Surveillance Act (FISA) through the Protect America Act of 2007 and the FISA Amendments Act of 2008.

b. The implementation or defense of the Military Commissions Act of 2006.

Please see my introductory response above to question 10. I recall having general understandings of the status of matters involving military commissions during my service in the White House from 2007 to January 2009, but do not recall providing advice relating to any specific aspect of the implementation of the Military Commissions Act of 2006. I had no role in defending the statute in any particular case or otherwise.

c. More generally, issues related to habeas corpus rights of Guantanamo Bay detainees.

Please see my introductory response above to question 10. Throughout my service in the White House between 2007 and January 2009, efforts were underway to close the U.S. detention facility at Guantanamo Bay, and I recall providing advice in connection with those efforts. I also recall attending a moot court at the Department of Justice prior to the Solicitor General’s December 2007 oral argument in *Boumediene v. Bush*, as well as providing advice about the ruling following the Supreme Court’s decision in June 2008.

d. Issues related to the legality of “enhanced interrogation” or torture, including the permissibility of specific techniques.

Please see my introductory response above to question 10. I do not recall advising on these issues.

e. Issues related to the judicial review of claims of torture or conditions of confinement filed by Guantanamo Bay detainees.

Please see my introductory response above to question 10. I do not recall advising on these issues.

f. Issues related to the detention of American citizens as enemy combatants, including, but not limited to, the Jose Padilla case.

Please see my introductory response above to question 10. I do not recall advising on these issues.

g. Any aspect of the *Boumediene v. Bush* case.

Please see my introductory response above to question 10 and to question 10(c).

11. In 2006, while you were at the Justice Department, Attorney General Alberto Gonzales fired nine U.S. Attorneys for allegedly political reasons. According to *The Seattle Times*, your name appeared as a recipient of emails related to the firing of John McKay, who was the U.S. Attorney for the Western District of Washington. (David Bowermaster, *E-mails show feds unhappy with McKay over letter*, THE SEATTLE TIMES (Mar. 20, 2007)).

a. Please describe any involvement you had in the decisions that led to the firing of any of the nine U.S. Attorneys, including Mr. McKay.

As I testified during my hearing, I had no involvement in any decision to terminate any U.S. Attorney during my work at the Department of Justice in 2006.

b. At the time, did you see any evidence that the termination of any of the U.S. Attorneys was motivated by political reasons?

No. I am also aware that the 2006 termination of nine U.S. Attorney's was the subject of investigations by a special counsel appointed by the Attorney General, the Department of Justice Office of Inspector General, and perhaps others. I do not know the particular findings of those investigations.

In 2007, you became an Associate Counsel in the White House Counsel's Office and helped lead the Office's inquiry into this U.S. Attorney firings.

c. At the time, did you consider that your role in leading the inquiry into the

firing may present a conflict of interest, considering you had held a political position in the Office of the Deputy Attorney General at the time of the firings? If so, what did you do to address the potential conflict? If not, please explain why your role did not present any potential for a conflict of interest.

No. I did not consider the work I performed in 2007 with other members of the White House Counsel's Office to constitute a conflict of interest. As stated above in response to question 11(a), I had no involvement in any decision to terminate any U.S. Attorney during my work at the Department of Justice in 2006.

d. At your hearing, you testified that, while you were at the White House Counsel's Office, you drafted a memo setting forth a chronology of the U.S. Attorney firings. When the Justice Department's Office of Inspector General later investigated the U.S. Attorney firings, both the White House Counsel's Office and the Office of Legal Counsel refused to give a full, unredacted version of this chronology memo to the Inspector General. Did you have any role in the Administration's refusal to disclose your complete memo to the Inspector General's Office? If so, please explain that role and the position you took.

No.

12. 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.

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

I received the above questions on March 28, 2017, and immediately began preparing responses. I then shared draft responses with members of the Department of Justice Office of Legal Policy, received comments, and then finalized my answers. Each of the answers provided above (and in response to questions from other members of the Committee) is my own, and I have authorized the Office of Legal Policy to submit these answers to the Committee.

Senate Judiciary Committee
“Nominations”
Questions for the Record
March 21, 2018
Senator Amy Klobuchar

Questions for Michael Scudder and Amy St. Eve, Nominees to the United States Court of Appeals for the Seventh Circuit

- If you are confirmed, you will be hearing cases as part of a panel of judges. In your view, is there value to finding common ground – even if it is slightly narrower in scope – to get to a unanimous opinion on appellate courts?

Yes.

- You both previously served as Assistant United States Attorneys. What did you learn from this experience, and how will it shape your perspective as a federal judge?

Serving as an Assistant United States Attorney in the Southern District of New York was a great privilege and honor. Well beyond acquiring trial skills and experiencing how criminal law is and should be practiced, I witnessed firsthand that prosecutors regularly make decisions of extraordinary consequence for others. My experience in New York City taught me the importance of making those decisions after a careful, deliberate, and balanced review of the facts and law. I also learned broad and lasting lessons about the importance of treating everyone—victims and defendants, opposing counsel, and judges and court personnel—with the utmost fairness, dignity, and respect.

Since entering private practice in 2009, I have served as defense counsel, including on numerous occasions on a pro bono basis, in multiple criminal cases. This work has allowed me to appear opposite Assistant United States Attorneys and to see cases from the perspective of individuals accused of crime. These experiences have not only underscored my views on the importance of an unyielding commitment to fairness and open-mindedness, but also heightened my awareness of the enormous and consequential responsibility that comes with the government’s authority to enforce criminal law.

**Nomination of Michael Y. Scudder to the
United States Circuit Court for the Seventh Circuit
Questions for the Record
Submitted March 28, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

- a. Do you believe there is implicit racial bias in our criminal justice system?

I believe racial bias exists in America and remains a very real and important challenge for our country and many individuals and institutions. Issues of racial discrimination regularly arise in litigation, including in criminal cases. I believe my background, including my extensive pro bono work for many underrepresented minorities in criminal matters as well as my demonstrated commitment to issues of diversity and inclusion within and outside my law firm, will serve me well in evaluating such issues within the context of particular cases if I am fortunate enough to be confirmed to the Seventh Circuit.

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

While I have not studied implicit racial bias in depth, I am aware generally that the issue has received important attention in scholarly studies and broader public

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

reporting. I have attended a general training session within my law firm on issues of implicit bias, including implicit racial bias.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶
 - a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I am generally aware from following issues of criminal justice that others have concluded that many factors contribute (to different degrees and in different ways) to fluctuations in crime rates. I have not studied the issue, however, and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

Please see my answer above to question 2(a).

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*