Nomination of Elizabeth Branch to the
U.S. Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted December 20, 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?

   It is never appropriate for lower courts to depart from binding Supreme Court precedent.

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

   In the Eleventh Circuit, a panel of circuit judges may not overrule a precedent of a previous panel. *Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir. 1998). To overrule a decision rendered by a prior panel, the Eleventh Circuit must hear a case en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

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

   It would be inappropriate for me, as a nominee to a lower court, to comment on when it might be appropriate for the Supreme Court to 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?

   Yes, and judges are bound by precedent from the Supreme Court and the judge's Circuit in interpreting the Constitution.

   b. How do you decide when the Constitution's "original meaning" should be controlling?

   If confirmed, I would decide a case involving the meaning of a provision of the Constitution like I would decide all other cases—I would carefully consider the arguments of the parties and apply all applicable laws and precedents to the facts of the

case.

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that the Fourteenth Amendment "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." I would follow *Obergefell* as I would follow all other binding precedent of the Supreme Court.

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*?

In *Loving v. Virginia*, 87 S.Ct. 1817, 1823-24 (1967), the Supreme Court held that the Fourteenth Amendment prohibited states from restricting the right to marry based on race. I would follow *Loving* as I would all other binding precedent of the Supreme Court.

3. 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"?

Roe v. Wade is binding precedent of the Supreme Court and I would follow it, as I would follow all precedent of the Supreme Court, regardless of whether someone may characterize it as "super-stare decisis" or "superprecedent."

b. Is it settled law?

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

4. 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 precedent of the Supreme Court and I would follow it, as I would follow all precedent of the Supreme Court, regardless of whether someone may characterize it as "settled law."

5. 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 majority opinion in *Heller* is binding precedent of the Supreme Court and I would follow it, as I would follow all precedent of the Supreme Court. Under the canons of judicial ethics, it would be inappropriate for me to offer my personal opinion on a Supreme Court case.

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

   In *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), the Supreme Court noted that

   > [l]ike most rights, the right secured by the Second Amendment is not unlimited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

   Heller is binding precedent of the Supreme Court and I would follow it, as I would follow all precedent of the Supreme Court.

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

   Please see my response above to question 5(a).

6. In May 2017, you gave a Law Day speech to the Hall County Bar Association in which you criticized the substantive due process doctrine, asserting that the "plain meaning" of the Fourteenth Amendment's due process clause requires only that the government

provide procedural protections before it can deprive individuals of life, liberty, or property.

a. Is it your view that the Due Process Clause of the Fourteenth Amendment provides no substantive protections?

The Supreme Court has made it clear that the Due Process Clause of the Fourteenth Amendment provides substantive protections. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). All of these cases are binding precedent and I would follow them, as I would follow all precedent of the Supreme Court.

b. In that same speech, you suggested that you agreed with Justice Thomas argument that the Privileges or Immunities Clause is the only provision of the Fourteenth Amendment that protects substantive rights. Please elaborate on that theory.

In that speech, I simply noted what Justice Thomas had written about the Privileges or Immunities Clause. As noted in my response above to question 6(a), the Supreme Court has made it clear in *Loving*, *Planned Parenthood*, *Glucksberg*, and *Obergefell*, that the Due Process Clause of the Fourteenth Amendment provides substantive protections. All of these cases are binding precedent and I would follow them, as I would follow all precedent of the Supreme Court.

c. In your view, which substantive rights does the Privileges or Immunities Clause protect? Is the scope of that protection broader or narrower than the scope of rights protected under the Due Process Clause?

See my response above to question 6(b).

d. Many Supreme Court precedents are based on substantive due process—including *Roe v. Wade*, but also *Pierce v. Society of Sisters, Moore v. City of East Cleveland,* and others. Are there any Supreme Court precedents based on substantive due process that you would have difficulty applying if confirmed as a circuit court judge?

No.

7. In that same May 2017 Law Day speech, you said, "My judicial philosophy is that I am an originalist and a textualist. When I interpret a provision—be it constitutional,

statutory, or even a[] contractual provision—I am bound by the words in front of me and I look to the words meant when they were drafted."

a. When you're attempting to determine what the words of the Constitution or a statute meant when they were drafted, what role does precedent play?

If confirmed, I will follow all precedent of the Supreme Court and the Eleventh Circuit in all cases, including those involving the provisions of the Constitution.

b. When a provision's original meaning conflicts with precedent, which prevails?

If confirmed, I will follow all precedent of the Supreme Court and the Eleventh Circuit in all cases, including those involving the provisions of the Constitution.

8. In October 2013, you gave a speech called "The Rule of Law and the Court of Appeals' Role in Our Constitutional System of Government." In your notes for that speech, you cited two books: *Coercing Virtue: The Worldwide Rule of Judges*, by Robert Bork, and *Men Black: How the Supreme Court is Destroying America*, by Mark Levin.

a. Why did you choose to cite those two books?

When I was drafting the talking points for my speech, I made note of those two books because they are entirely devoted to criticizing judicial activism, a term I had just defined. I have no recollection as to whether I actually mentioned the two books to the audience.

b. In *Coercing Virture*, Judge Bork writes, "In reading the opinions of many judges, it is apparent that they view their mission as preserving civilization from a barbarian majority motivated by bigotry, racism, sexism, xenophobia, irrational sexual morality, and the like. . . . Hence, courts everywhere displace traditional moralities with cultural socialism." Do you agree with that statement?

In my October 2013 speech, I did not quote any provision of *Coercing Virtue* to the audience. I am not aware to which judges the author is referring. Further, under the canons of judicial ethics, it would be inappropriate for me to offer my personal opinion on cases.

c. In *Men in Black*, Levin contends that modern court decisions on social issues, including on abortion and gay rights, have created a "de facto judicial tyranny" and an economy "lurching toward socialism." Do you agree with that assessment?

In my October 2013 speech, I did not quote any provision of Men in Black to the

audience. Under the canons of judicial ethics, it would be inappropriate for me to offer my personal opinion on cases.

9. Last year, in a case called *Gary v. State*, you wrote an opinion reversing a defendant's conviction for using his cellphone camera to record a video under a woman's skirt at a grocery store. According to your opinion, this activity was not prohibited under the relevant Georgia statute because it did not constitute recording an individual "in a private place and out of public view." **Could you please explain your reasoning in that case?**

In *Gary v. State*, 338 Ga. App. 403 (2016), *cert. denied*, 2017 Ga. LEXIS 265 (Ga. April 17, 2017), the majority opinion held:

….We do not disagree with either of these propositions [that Gary's conduct was patently offensive and that a woman walking and shopping in a public place has a reasonable expectation of privacy in the area of her body concealed by her clothing]. Nor do we doubt that a woman whose body is surreptitiously photographed beneath her clothing has suffered an invasion of privacy of some kind. . . . Rather, the only issue presented by this appeal is whether the defendant's conduct constitutes a *criminal* invasion of privacy in violation of O.C.G.A. § 16-11-62(2) (emphasis in original).

….the statutory provision at issue makes it illegal to 'observe, photograph, or record the activities of another which occur in any private place and out of public view.'

…..The use of the phrase "which occur in" demonstrates that the term "private place" refers to the location of the person being observed or filmed—i.e., the statute refers to a person being observed or filmed while he or she is "*in* any private place." (emphasis in original). O.C.G.A. § 16-11-62(2), therefore, criminalizes certain conduct as to an individual who is in a specific physical location—i.e., a place which is out of public view and in which the individual could reasonably expect to be free from intrusion or surveillance.

….In closing, we note that it is regrettable that no law currently exists which criminalizes Gary's reprehensible behavior. Unfortunately, there is a gap in Georgia's criminal statutory scheme, in that our law does not reach all of the disturbing conduct that has been made possible by ever-advancing technology (footnote omitted). The remedy for this problem, however, lies with the General Assembly, not with this Court. Both our constitutional system of government and the law of this State prohibit the judicial branch from amending a statute by interpreting its unambiguous provisions thereof (citation omitted). We are therefore constrained to reverse Gary's conviction.

10. From 2005 to 2008, you served in the Office of Information and Regulatory Affairs in the Office of Management and Budget.

    a. **What did you learn from that experience that might be relevant to the work**

of a federal judge?

During my tenure at OIRA, I learned about the analysis agencies perform when drafting regulations, how agencies interact with the public and with OIRA, and OIRA's process for reviewing regulations.

b. Please comment on the role of agency expertise in the regulatory process.

Under the canons of judicial ethics, it would be inappropriate for me to comment on any matters that could involve pending and future litigation.

c. When it is appropriate for courts to take agency expertise into account in reviewing agency actions?

If confirmed, I would follow all precedent of the Supreme Court and the Eleventh Circuit when analyzing cases involving agency actions.

d. If confirmed as a judge on the U.S. Court of Appeals for the Eleventh Circuit, would you have any problem applying *Chevron USA v. Natural Resources Defense Council*?

No.

e. As a judge on the Tenth Circuit, Justice Gorsuch wrote a separate opinion opining that *Chevron* ought to be overturned. **When do you believe it is appropriate for federal circuit court judges to question Supreme Court precedent, or suggest that Supreme Court precedents ought to be overturned?**

Judges are free to offer thoughts or suggestions to other courts or even other branches of government and often do, typically in a concurrence or dissent. However, judges must follow binding precedent.

11. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

I understood that, in response to all questions of the SJQ, I was to disclose all information requested truthfully and fully to the best of my ability.

b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did not need to disclose certain material, including material "published only on the Internet," as required by Question 12(a) of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

I have disclosed all information requested by the SJQ truthfully and fully to the best of my ability. I did not fail to disclose information "published only on the internet."

c. Have you ever maintained a public blog or public social media account, including on Facebook or Twitter? If so, during what time period? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

I have never maintained a public blog or public social media account. I do have private Facebook and LinkedIn accounts which are protected by privacy

controls and available only to friends.

d. Have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

I have not posted commentary on legal, political, or social issues on public websites either under my own name or a pseudonym that I have not disclosed to the Committee.

e. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

Once I was notified that the President intended to nominate me, the only changes I made on social media were to strengthen the already-existing privacy controls on my private Facebook and LinkedIn accounts.

12. You indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 2001 and on its Board of Advisors since 2012. You also served on its executive board from 2009 to 2012. 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 did not author this language and I am not aware of what the Federalist Society meant by this statement.

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

I did not author this language and I am not aware of what the Federalist Society meant by this statement.

c. As a member of the Federalist Society, explain what "traditional values" you understood the organization placed a premium on.

I did not author this language and I am not aware of what the Federalist Society meant by this statement.

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

I received the questions on December 20, 2017. I reviewed the questions, performed research, and personally drafted answers. I shared my draft responses with the Office of Legal Policy at the Department of Justice and, after receiving feedback, made edits that I deemed appropriate. Finally, I authorized the submission of these responses.

Written Questions for Elizabeth L. Branch
Submitted by Senator Patrick Leahy
December 20, 2017

1. **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?'"**

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?

I agree with Chief Justice Roberts that rules of statutory construction require judges to read statutes in the context of their overall place in the statutory scheme and not in isolation. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132-33 (2000). If confirmed, I would fully and faithfully follow all binding precedents of the Supreme Court and Eleventh Circuit concerning the rules of statutory interpretation, including *King v. Burwell*.

2. 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?

Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter.

(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?**

Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter. As a general matter, however, I believe in our constitutional system, the separation of powers, and an independent judiciary.

3. 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.)

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

Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter or on an issue that could be the subject of litigation. As a general matter, if confirmed, I would decide cases involving issues of national security like I would decide all other cases—I would carefully consider the arguments of the parties and fully and faithfully apply all applicable laws and precedents to the facts of the case.

4. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter or on an issue that is the subject of ongoing litigation. As a general matter, if confirmed, I would decide all cases involving the First Amendment like I would decide all other cases—I would carefully consider the arguments of the parties and fully and faithfully apply all applicable laws and precedents to the facts of the case.

5. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

    Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter or on an issue that could be the subject of litigation. As a general matter, our Constitution creates three co-equal branches of government and each branch should respect the powers conferred to the other branches. If confirmed, I would decide all cases involving this issue like I would decide all other cases—I would carefully consider the arguments of the parties and fully and faithfully apply all applicable laws and precedents to the facts of the case.

6. 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."

(e) **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?**

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."

Hamdi is binding precedent of the Supreme Court and, if confirmed, I would fully and faithfully apply it and all other binding precedent. As to *Hamdan*, the Supreme Court explained that Congress may exercise its war powers in the context of military commissions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in the proper exercise of its own war powers, placed on his powers." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

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

Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter or on an issue that could be the subject of litigation.

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

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

I am not familiar with that interview or comment and, therefore, cannot opine on what Justice Scalia may have meant by it. Nonetheless, the Supreme Court has held that laws discriminating on the basis of sex are subject to intermediate scrutiny under the Equal Protection Clause. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed, I would fully and faithfully apply all binding precedent.

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

I am not familiar with that comment and, therefore, cannot opine on what Justice Scalia may have meant by it. As a general matter, if confirmed, I would decide all cases involving the Voting Rights Act like I would decide all other cases—I would carefully consider the arguments of the parties and fully and faithfully apply all applicable laws and precedents to the facts of the case.

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

Under the canons of judicial ethics, it is inappropriate for me to comment on an issue that is the subject of ongoing litigation. However, the section of the Constitution to which you are referring provides as follows: "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 of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, §9, cl. 8.

10. 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."

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

    Under the canons of judicial ethics, it would be inappropriate for me to opine as to how the Supreme Court should handle factual findings made by Congress. I would fully and faithfully apply *Shelby County* as I would all other binding precedent.

11. **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"?**

Under the canons of judicial ethics, it would be inappropriate for me to comment on a matter that could be the subject of future litigation. However, the express language of each of those amendments grants Congress the power to enforce its provisions "by appropriate legislation." U.S. Const. amend. XIII, § 2; U.S. Constit. amend. XIV, § 5; U.S Constit. amend. XV, § 2. If confirmed, I would fully and faithfully apply all binding precedent on cases involving racial discrimination.

12. 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."

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

To the extent that this question seeks to have me to opine as to a matter that might be the subject of future litigation, it would be inappropriate for me to do so under the canons of judicial ethics. However, to the extent this questions is limited to *Lawrence*, I will fully and faithfully apply it and all other binding precedent.

13. In the confirmation hearing for Justice Gorsuch earlier this year, 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.

(j) 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?

All lower court judges are absolutely bound by the decisions of the U.S. Supreme Court, regardless of whether the question is one of statutory construction or constitutional interpretation. Further, if confirmed, I would be required to follow all binding precedent of the Eleventh Circuit.

14. 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.

(k) 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.

At present, I am not aware of any cases in which I would need to recuse. However, if confirmed, I will evaluate all possible conflicts on a case-by-case basis pursuant to the Code of Conduct for United States Judges; the Ethics Reform Act of 1989, 28 U.S.C. § 455; and all other relevant recusal rules and guidelines.

15. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. 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."

(l) 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?

This responsibility of the Court is best embodied in the oath that judges take. As a judge on the Court of Appeals of Georgia, I took an oath to "administer justice without respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all of the duties incumbent on me…." If confirmed to the Eleventh Circuit, I would take a similar oath. *See* 28 U.S.C. § 453.

16. 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 and politically motivated hiring and firing at the Justice Department during the Bush administration. 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 Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

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

Under the canons of judicial ethics, it is inappropriate for me to comment on a political matter or on an issue that could be the subject of litigation.

17. **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?**

Article I, Section 8, Clause 3 of the Constitution grants Congress the power to "regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes." Section 5 of the Fourteenth Amendment grants Congress the power to "enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. If faced with a case involving the scope of Congressional power, I will fully and faithfully apply the Constitution and all binding precedent of the Supreme Court and the Eleventh Circuit.

Senator Dick Durbin
Written Questions for Elizabeth L. Branch
December 20, 2017

For questions with subparts, please answer each subpart separately.

Questions for Elizabeth Branch

1. In March of this year, you wrote the majority opinion in *Georgia Department of Transportation v. King*. This case involved a driver, Ms. King, who was injured in a car accident with a state employee and who sued the state for negligence. Under state law, the plaintiff in a tort case against the state had to notify the state of "the amount of loss claimed" before filing suit. In this case, Ms. King filed the notice and said she intended to "claim the full amount of damages allowed by law." Georgia law caps damages in tort claims against the state at $1 million.

   The lower court held that Ms. King's filing was sufficient to put the state on notice that she would be seeking the maximum $1 million in damages. But your opinion reversed, holding that she failed to give adequate notice because she did not list a specific dollar amount.

   a. **Do you think the state was not aware that the full amount of damages allowed by law in a tort suit was $1 million?**

   In *Georgia Department of Transportation v. King*, 341 Ga. App. 102 (2017), *cert. denied*, 2017 Ga. LEXIS 738 (Ga. August 28, 2017), the majority opinion made two points responsive to this question.

   First, under the Georgia Tort Claims Act, the claimant is required to provide the State with written notice of the claim before filing suit, including "[t]he amount of the loss claimed." O.C.G.A. § 50-21-26(a)(5). *King*, 341 Ga. App. at 104. "It is well-established that omitting only the 'amount of the loss claimed' from an ante-litem notice is a failure to 'strictly comply with the notice requirements of the GTCA" and therefore fatal to the plaintiff's claim." *Id.*

   Second, the GTCA's cap on liability "has nothing to do with the amount of the claim; rather it is a limitation on the amount that can be recovered. . . . Moreover, the jury will hear information about the total amount of the plaintiff's claims without ever hearing about the limitation on recovery. . . . Accordingly, the cap provides no limitation on the amount the plaintiff can claim in the lawsuit. . . . Thus, the reference to the GTCA's cap on recovery provides no information whatsoever about the amount that King may claim in the suit." *Id.* at 106.

   b. **If the state was reasonably aware, then why wasn't Ms. King's filing sufficient in terms of notice? As the dissent noted in this case, the Supreme Court of Georgia has cautioned that "strict compliance does not require a hyper-technical construction that would not measurably advance the purpose of the ante litem notice provisions."**

See my response above to question 1(a).

c. **Did the dissent have a point that requiring Ms. King to say "$1 million" instead of "the full amount allowed by law" is a hyper-technical construction that does not advance the purpose of providing the state with notice but that does impact Ms. King's ability to get relief for her injuries?**

See my response above to question 1(a).

2. In 2016 you authored a 6-3 majority opinion in *Gary v. State*, a case involving a defendant who took cell phone video recordings underneath the skirt of a woman who was shopping in a grocery store. The defendant was convicted of violating an invasion of privacy statute that made it illegal for "any person, through the use of any device, without the consent of all persons involved, to observe, photograph, or record the activities of another which occur in any private place and out of public view."

   Your opinion reversed the defendant's conviction by construing the words "private place" to mean that the photographing must occur in a non-public setting, rather than having "private place" refer to the fact that the defendant was photographing a private part of the victim's body. Your opinion called for the state legislature to amend the statute because you thought the plain text of the statute precluded convicting a defendant who took photos up a woman's skirt while in a public supermarket.

   The dissenting judges argued that the plain meaning of the word "place" can refer to a part of a person's body according to multiple dictionaries. The dissent said:

> Regardless of what dictionary definition is used, the plain meaning of the word "place" is susceptible to many varied meanings. To read the statute as applying to only one, and one chosen by the judiciary to the exclusion of all others, is troubling. This is particularly true when the definitions are not mutually exclusive, and the statute has no limiting language.

   a. **What is your response to the dissent's argument?**

Please see my response to Senator Feinstein's Question 9.

   b. **Why couldn't a photo taken of a person's private parts of her body constitute a private "place," given multiple dictionary definitions that defined the term that way?**

Please see my response to Senator Feinstein's Question 9.

   c. **What happened to this defendant after your court reversed his conviction?**

I am not aware of what happened to this defendant after our court reversed his conviction.

d. **Is it possible for a textualist judge to try to achieve a particular outcome by choosing a particular dictionary definition over others or emphasizing some words in the text over others?**

I am not aware of such a situation.

3. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

   The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's nominees, including Joan Larsen, David Stras, and others.

   a. **Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

   I am not aware of any such donations being made in support of my nomination. And under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could involve future litigation.

   b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

   See my response above to question 3(a). Further, if the issue arose, I would carefully consider 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws and rules regarding recusals.

   c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

   See my response above to question 3(a).

4.

   a. **Is waterboarding torture?**

   I have not studied the issue but I understand that Congress created legislation addressing waterboarding. Under the judicial canons of ethics, however, it would be inappropriate for me to comment on any issue that could involve future litigation.

   b. **Is waterboarding cruel, inhuman and degrading treatment?**

See my response above to question 4(a).

c. **Is waterboarding illegal under U.S. law?**

See my response above to question 4(a).

5. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on "political questions"?**

Under the canons of judicial ethics, it is inappropriate for me to comment on a political issue.

6. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could involve future litigation.

7. In your questionnaire you list yourself as having been a member of the Federalist Society since 2001.

   a. **Why did you join?**

   I first learned about the Federalist Society after talking with a number of my friends who were members. I joined because I was interested in a legal organization that encouraged debate on current issues. I was particularly impressed with the speakers at the monthly luncheons and the panelists at the annual convention.

   b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

   Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues.

   c. **Please list each year that you attended the Federalist Society's annual convention.**

   To the best of my recollection, I attended all or part of the Federal Society's Annual Lawyers Convention during the following years: 2001, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2011, 2012, 2016, 2017.

   d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke

with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I did attend Attorney General Sessions' speech at this year's convention. While I recall that he made the joke, I cannot recall my outward reaction to it. As a sitting judge, I am mindful that I need to minimize any public reaction to political issues but I cannot recall what I did in this instance.

8.

a. **Can a president pardon himself?**

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could involve future litigation.

b. **What answer does an originalist view of the Constitution provide to this question?**

See my response above to question 8(a).

c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

Under the canons of judicial ethics, it would be inappropriate for me to comment on political issues or on any issue that could involve future litigation.

9. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

The appropriate role of the judge is best summarized in the oath we take. As a judge on the Court of Appeals of Georgia, I took an oath to "administer justice without respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all of the duties incumbent on me…." If confirmed to the Eleventh Circuit, I would take a similar oath. See 28 U.S.C. § 453.

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

Obergefell is binding precedent of the Supreme Court and I would follow it as I would follow all other binding precedent of the Supreme Court.

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

See my response above to question 9(a).

Nomination of Elizabeth L. Branch to the
United States Court of Appeals
For the Eleventh Circuit
Questions for the Record
Submitted December 20, 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?

    To the extent that Justice Roberts meant that judges should apply the law to the facts of each case and not impose their own personal preferences, I agree with the quotation.

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

    In each case, the judge should apply the law to the facts of the case. If the issues on appeal include consideration of practical consequences, the judge should address them.

    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?

    Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The U.S. Supreme Court "has instructed that 'the substantive law will identify which facts are material' and that the trial court judge, ruling on a summary judgment motion, must evaluate the evidence presented by the substantive evidentiary burden." Brown v. Crawford, 906 F.2d 667, 669 (11th Cir. 1990) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Accordingly, the judge makes an objective determination as to whether disputes of material fact exist based on the underlying substantive law. At the summary judgment stage, the judge does not weigh 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 federal judge takes an oath to "administer justice without respect to persons, and do equal right to the poor and the rich." 28 U.S.C. § 453. Accordingly, in each case, the

judge must apply the law to the facts; a judge's personal opinions and emotions must not lead the judge to favor one party over another. Judges are certainly human and experience a wide range of emotions, including empathy for individuals who are suffering. However, the judge must remain mindful of his or her oath and duty to "faithfully and impartially discharge and perform all the duties incumbent upon [him/her] . . . under the Constitution and laws of the United States." Id.

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

See my response above to question 2(a).

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?

No.

Nomination of Elizabeth L. Branch, to be United States Circuit Judge for the Eleventh Circuit
Questions for the Record
Submitted December 20, 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 apply the analytical framework as provided in the most applicable decision of the U.S. Supreme Court, which has ruled on this issue in a number of contexts over the decades. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

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

Yes.

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?

Yes. In *Glucksberg*, 521 U.S. at 720-721, the Supreme Court noted that "[o]ur established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' (citations omitted). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." And *Glucksberg* directs that such analysis begins "by examining our Nation's history, legal traditions, and practices."

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

Yes, as an Eleventh Circuit judge, I would be bound by the precedent of the U.S. Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit. If the issue was not settled by either of these courts, I would consider precedent from other circuits for its persuasive value.

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

Yes. The U.S. Supreme Court has explained that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66-67 (1996).

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*).

Casey and *Lawrence* are binding precedent of the U.S. Supreme Court, so I would apply them fully and faithfully, as I would do with all other binding precedent.

f. What other factors would you consider?

I would consider any other factors that are relevant under applicable U.S. Supreme Court precedent and Eleventh Circuit precedent.

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

The U.S. Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to discrimination on the basis of gender and race. *See, e.g., U.S. v. Virginia*, 518 U.S. 515 (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 judge, I would apply all binding U.S. Supreme Court precedent on gender discrimination.

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?

I am not aware of why this litigation was not instituted until the 1990s.

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

In *Obergefell*, 135 S.Ct. at 2607, the U.S. Supreme Court held that the Fourteenth Amendment "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."

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

As this issue is the subject of pending litigation, it would be inappropriate for me as a judge to offer an opinion on this topic.

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

use contraceptives?

The Supreme Court has held that there is a constitutional right to privacy that protects a women's right to use contraceptives. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

a. 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 held that there is such a right. *See, e.g., Planned Parenthood of Southeastern Penn. v. Casey*, 502 U.S. 833 (1992).

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has held that there is such a right. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003).

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses above to questions 3, 3(a), and 3(b).

4. You have stated that you "struggle with" the "application and predictability" of substantive due process, which protects critical fundamental rights. If you are confirmed, how will you assure litigants that your approach and application of substantive due process law will predictably follow all binding precedent?

As a judge on the Court of Appeals of Georgia for the past five years, I have followed all binding precedent. If confirmed to the Eleventh Circuit, I will do the same.

5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

    a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

    If confirmed to the Eleventh Circuit, I would fully and faithfully apply binding precedent of the U.S. Supreme Court and the Eleventh Circuit. If applicable precedent mandates the consideration of evidence that "sheds light on our changing understanding of society," I would follow such precedent.

    b. What is the role of sociology, scientific evidence, and data in judicial analysis?

    Rule 702 of the Federal Rules of Evidence provides that an expert may testify "[i]f the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue." The Supreme Court has held that the rule "'establishes a standard of evidentiary reliability'" that the judge must determine. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 592 (1993)).

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

    a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you

consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

While this issue is the subject of scholarly debate, as a judge on the Eleventh Circuit, I would be bound by *Brown*.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism,* National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited December 19, 2017).

Justice Thomas, in his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742, 854 (2010), responded to this criticism when he stated that "[t]he mere fact that the [Privileges or Immunities] Clause [of the Fourteenth Amendment] does not expressly list the rights it protects does not render it incapable of principled judicial application. The Constitution contains many provisions that require an examination of more than just constitutional text to determine whether a particular act is within Congress' power or is otherwise prohibited."

7. You have suggested that the Supreme Court was "legislating their own policy preferences" when the Court struck down laws banning interracial marriage, the use of contraception, and intimate consensual same-sex relationships, and you have expressed some appreciation for the dissenting opinions in these cases. Which specific cases do you believe are examples of the Court legislating their own policy preferences?

In my May 12, 2017 Law Day speech to the Hall County Bar Association on the Fourteenth Amendment (a topic selected by the American Bar Association), I quoted Justice Rehnquist's majority opinion in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), wherein he cautioned the other justices to "exercise the utmost care whenever we are asked to break new ground in this field, lest liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." I then raised the following question: "by getting away from the plain language of the 14th Amendment, has the Supreme Court been legislating their own policy preferences? I leave that question for each of you to evaluate and decide." I did not offer my personal opinion during that speech because it would have been inappropriate for me to do so as a judge on the Court of Appeals of Georgia. And it would be inappropriate for me to do so as a nominee for the Eleventh Circuit.

8. In a 2016 case, *Prophitt v. State*, 784 S.E.2d 103 (Ga. Ct. App. 2016), you overturned a criminal conviction for child molestation. The defendant had spied on a child in the shower, but, in your view, the defendant was not "in the presence of or with" the child, as required under the statute. The defendant was mere feet from the victim. Why did you read this statute narrowly when the word "presence" can include someone nearby, regardless of whether the victim is aware of him?

   In *Prophitt v. State*, 336 Ga. App. 262 (2016), *cert. denied*, 2016 Ga. LEXIS 633 (Ga. Oct. 3, 2016), the criminal defendant was charged with violating O.C.G.A. § 16-6-4(a)(1) which provides: "A person commits the offense of child molestation when [he] [d]oes any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arose or satisfy the sexual desires of either the child or [himself]." As noted in the unanimous decision of the Court of Appeals, "[i]n a series of cases, this Court has made clear that the presence element of child molestation is satisfied where the accused and the victim were in close physical proximity (such as in the same room or on the same piece of furniture) and the defendant was aware of the child's presence at the time he committed the immoral or indecent act at issue." *Id.* at 264 (citations omitted). The majority then explained, "Here, the evidence showed that although there may have been a distance of only seven to eight feet from the shower to the area under the house where Prophitt had situated himself, the relatively short distance did not place Prophitt in immediate physical proximity to [the victim]. Instead, there was a significant physical barrier between the two in the form of the bathroom floor. Thus, to be in [the victim's] immediate physical presence, it would have been necessary for Prophitt to crawl out from underneath the house, enter through the back door, walk down the hallway, and open the bathroom door." *Id.* at 268. The majority also noted that "given the size and location of the hole [in the bathroom floor], it would have been physically impossible for [the victim] to see Prophitt while she was showering" and that "the evidence showed that [the victim] was not aware either that Prophitt was observing her or that he was engaging in an indecent act while doing so." *Id.*

Questions for the Record for Elizabeth L. Branch

Senator Mazie K. Hirono

1. In *Laird v. Tatum*, 409 U.S. 824 (1972), then-Justice Rehnquist stated the following:

> "Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.
>
> "It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

In the above statements, Chief Justice Rehnquist acknowledges that the notions and experiences that judges have developed over the course of their lives influence their interpretation of the Constitution.

a. Do you agree with Chief Justice Rehnquist's observations?

While judges and justices may have personal opinions about various issues, including constitutional ones, they must nonetheless apply binding precedent.

b. If judicial nominees have set forth legal inclinations and interpretations in their work, do you believe that this naturally has to have a bearing on what they would do as a judge, and how they would apply the law?

See my response above to question 1(a).

c. What does Justice Rehnquist's observation suggest about reassurances from judicial nominees that they will simply apply precedent, particularly in areas where many have strong convictions, or in circumstances where the facts of a case don't line up precisely with a precedent and a judge has discretion in what precedent to apply and how it would apply?

As a judge on the Court of Appeals of Georgia for the past five years, I have followed all binding precedent. If confirmed to the Eleventh Circuit, I will do the same.

2. At the hearing, you discussed a speech you gave recently, in May 2017. As noted at the hearing, in your speech, you questioned whether the recognition of substantive due process rights is merely the Supreme Court "legislating their own policy preferences" and pointed to cases like *Roe v. Wade* and *Loving v. Virginia*. You also explained that you were an originalist and textualist. Pointing to Justice Thomas's argument that substantive due process "distorts the constitutional text," you noted your agreement with Justice Thomas that the text of the Due Process Clause of the Constitution only guarantees procedural rights.

a. When you described yourself as an originalist and textualist, does that include the view that substantive due process rights should not be recognized because such

rights are not explicitly mentioned in the Constitution?

In my May 12, 2017 Law Day speech to the Hall County Bar Association on the Fourteenth Amendment (a topic selected by the American Bar Association), I quoted Justice Rehnquist in his majority opinion in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), wherein he cautioned the other justices to "exercise the utmost care whenever we are asked to break new ground in this field, lest liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." I then raised the following question: "by getting away from the plain language of the 14th Amendment, has the Supreme Court been legislating their own policy preferences? I leave that question for each of you to evaluate and decide." I did not offer my personal opinion during that speech because it would have been inappropriate for me to do so as a judge on the Court of Appeals of Georgia. And it would be inappropriate for me to do so as a nominee for the Eleventh Circuit.

Further, the U.S. Supreme Court has ruled that substantive due process protects fundamental rights in a number of contexts over the decades. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). I will fully and faithfully apply all binding precedent of the U.S. Supreme Court and the Eleventh Circuit.

b. Based on your self-identification as an originalist and textualist, in your view, were *Roe v. Wade* and *Loving v. Virginia* wrongly decided?

Both *Roe v. Wade* and *Loving v. Virginia* are binding precedent of the Supreme Court and I will fully and faithfully apply them as well as all other binding precedent.

c. As an originalist and textualist, do you think *Obergefell v. Hodges*, 576 U.S. (2015), which recognized the right of same-sex couples to marry, was wrongly decided?

Obergefell v. Hodges is binding precedent of the Supreme Court and I will fully and faithfully apply it.

d. What are other examples of cases that, in your view, demonstrate that the Supreme Court was "legislating their own policy preferences"?

See my response above to question 2(a).

3. In *Prophitt v. State*, you reversed a child molestation conviction because the defendant was not "in the presence of" the child, as Georgia law required. The defendant had instructed his ten-year-old daughter's friend to take a shower facing the door so he could watch through a hole in the floor and engage in sexual conduct. Under your strict, textual interpretation of the statute, it appears that a defendant who watched numerous naked children and engaged in sexual conduct could not be stopped under this law so long as, during the offensive act itself, the children remained unaware and the defendant was at least a few feet away.

a. By strictly interpreting the text of a statute, do you believe there is a danger of reaching absurd results?

There was no absurd result in that case. Please see my response to Senator Coons'

Question 8.

b. As a textualist and originalist, do you believe that you are bound by the text of statute, no matter how absurd the result?

The Supreme Court has long held, "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also Rector v. Holy Trinity Church*, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."). If confirmed, I would faithfully apply Supreme Court and Eleventh Circuit precedent.

c. If not, how do you determine whether a result has reached an absurd level and what statutory interpretation tools do you use avoid it?

To determine whether a result is absurd, I would faithfully apply the precedent of the Supreme Court and the Eleventh Circuit.