Nomination of Ada E. Brown to the United States District Court for the Northern District of Texas
Questions for the Record
May 7, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

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

   A district court judge is required to fully, faithfully, and fairly apply Supreme Court precedent. It is never proper for a district court judge to question Supreme Court precedent.

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

   A district court should set aside its own decision when it conflicts with the precedent of the Supreme Court or of the court of appeals where the district is located. The Federal Rules of Civil Procedure provide standards for a district court to set aside its prior rulings in a specific case. *See* Fed. R. Civ. P. 59 (e), 60.

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

   As a district court judge nominee, it would be inappropriate for me to opine on whether and when it would be appropriate for the Supreme Court to overturn its own precedent. The Supreme Court itself determines when that is appropriate. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating that only the Supreme Court has "the prerogative of overruling its own decisions.").

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

Precedent, Thomas West, p. 802 (2016))

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

All Supreme Court precedent is binding law on a district court judge and entitled to controlling precedential weight and dispositive stare decisis effect. That includes *Roe v. Wade*. If confirmed to serve as a district court judge, I would faithfully follow all Supreme Court precedent.

b. Is it settled law?

Yes. All Supreme Court precedent, including *Roe v. Wade*, is settled law that must be followed by all district court judges.

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

   Yes. All Supreme Court precedent, including *Obergefell v. Hodges*, is settled law that must be followed by all district court judges. If confirmed to serve as a district court judge, I would faithfully follow all Supreme Court precedent.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

   As a district court judge nominee, it would be inappropriate for me to provide personal opinions about particular Supreme Court decisions or dissents from those decisions. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would faithfully follow all Supreme Court precedent.

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

   In *Heller*, the Supreme Court found that "the right secured by the Second Amendment is not unlimited" adding, "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." *District of Columbia v. Heller*, 554 U.S. 570, 626–

27 (2008). As a district court judge nominee, it would be inappropriate for me to comment on gun regulations that are currently the subject of pending or impending litigation and political debate, therefore Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges make it inappropriate for me to comment further.

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

The Supreme Court majority in *Heller* held that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). If I am confirmed as a district court judge, I would be bound by *Heller* and all Supreme Court precedent, which I will faithfully follow.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The Supreme Court "has recognized that First Amendment protection extends to corporations." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). In *Citizens United*, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 365. If I am confirmed as a district court judge, I would be bound by *Citizens United* and all Supreme Court precedent, which I will faithfully follow. The scope of corporations' First Amendment rights is the subject of pending or impending litigation and political debate, therefore Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges make it inappropriate for me to comment further.

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

If I am confirmed as a district court judge, I would be bound by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) and all Supreme Court precedent, which I will faithfully follow. The scope of corporations' First Amendment rights is the subject of pending or impending litigation and political debate, therefore Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges make it inappropriate for me to comment further.

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

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 691 (2014) that owners of a closely held corporation did not forfeit all Religious

Freedom Restoration Act protection "when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships." The Supreme Court also noted the limits of its holding. *See id*. at 692–93. Any extent to which the *Hobby Lobby* case protects corporations' religious freedom rights is currently the subject of pending or impending litigation and political debate, therefore Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges make it inappropriate for me to comment further. If I am confirmed as a district court judge, I would be bound by *Hobby Lobby* and all Supreme Court precedent, which I will faithfully follow.

6. In 2016, the Supreme Court reaffirmed in *Fisher v. University of Texas at Austin* that states have a compelling interest in promoting student-body diversity at colleges and universities that justifies the consideration of race in college admissions.

   Do you agree that states have a compelling interest in promoting student-body diversity at colleges and universities that justifies the consideration of race in college admissions?

   Yes. The Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) determined that student-body diversity is a compelling state interest that can justify the consideration of race in college admissions. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. If I am confirmed as a district court judge, I would be bound by *Grutter* and all Supreme Court precedent, which I will faithfully follow.

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

      No.

   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"?

The question is broad. My general understanding of administrative law is that it is guided by the Administrative Procedure Act as well as other rules including Supreme Court and U.S. Circuit Court precedent. If I am confirmed as a district court judge I will faithfully follow all Supreme Court and Fifth Circuit Court of Appeals precedent, including those applicable to administrative law.

8. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2018. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law 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." It says 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. Could you 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 write this statement and thus cannot elaborate on what its author meant.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

I did not write this statement and thus cannot elaborate on what its author meant.

c. What "traditional values" does the Federalist society seek to place a premium on?

I did not write this statement and thus cannot elaborate on what its author meant.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

No.

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

It is a well-settled rule of statutory construction that legislative history may be considered if

the language of the statute is ambiguous. *See e.g*. *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995); *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005). If confirmed as a district court judge, I will faithfully follow all Supreme Court and Fifth Circuit precedent on this issue.

10. 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 any outside groups — about loyalty to President Trump? If so, please elaborate.

    No. If confirmed to be a district court judge, my loyalty will be to follow the law, faithfully, fully and fairly. During the American Bar Association's investigation of my experience, which resulted in a unanimous rating of Well Qualified, they interviewed my coworkers, including other judges with whom I have practiced, and attorneys from across the spectrum—defense, prosecution, civil—who have practiced before me and are familiar with my work. All spoke to my fairness in dealing with all parties in every proceeding in which I have been involved and my commitment to following the law in each and every case before me.

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

    I received the questions on Tuesday March 7, 2019. I personally drafted the responses and shared those draft responses with the Department of Justice, Office of Legal Policy, which offered suggestions and comments. I revised my responses, as I thought appropriate, in light of those comments. My answers to each question are my own.

Nomination of Ada E. Brown
United States District Court for the Northern District of Texas Questions for the Record
Submitted May 7, 2019

QUESTIONS FROM SENATOR BOOKER

1. In 2011, the Dallas Morning News published a letter to the editor you wrote that said, "There seems to be a public preoccupation with whether, after being sentenced to death, the criminal has 'changed' and if they are 'sorry' about having committed capital murder. Remorse may have its place in sentencing a cat burglar, but is it relevant in deciding whether someone should have their death sentence commuted?"[1]

    a. What compelled you to write this letter to the editor?

    I wrote this letter to the editor when I was a lawyer in private practice. It was in response to previous letters to the editor calling for the commutation of an inmate's death sentence due to the inmate's claimed remorse for his crime.

    b. It appears that you supported capital punishment at the time of writing that letter to the editor. Is that correct?

    Capital punishment, under certain circumstances, is the law in Texas. As a former prosecutor, and now a state court judge, I follow that law. I am aware that capital punishment is a sensitive political issue that is likely to be the source of pending or impending litigation in my court if I am confirmed to a district court bench. Therefore it would be inappropriate for me to give my personal opinions about capital punishment under Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges.

2. In 2005, the Dallas Morning News interviewed you and quoted you as saying that you have "black relatives who distrust the state too much to be fair jurors."[2]

    a. If confirmed, what would you do to improve trust in our criminal justice system among minorities?

    During the American Bar Association's investigation of my experience, which resulted in a unanimous rating of Well Qualified, they interviewed my coworkers, including other judges with whom I have practiced, and attorneys from across the spectrum—defense, prosecution, civil—who have practiced before me and are familiar with my work. All spoke to my fairness in dealing with all parties in every proceeding in which I have been involved. If I am confirmed as a district court judge, I will do my utmost to ensure that all parties of all races and backgrounds receive fair rulings and fair trials in my court. I will also do my utmost to see that the juries selected in my court reflect the communities from which they are selected. I will also study my potential sentences against sentences given by other district court

[1] Ada Brown, Letters to the Editor, The Dallas Morning News (July 22, 2011) (SJQ Attachments at pp. 20).
[2] Steve McGonigle, "A process of juror elimination Dallas prosecutors say they don't discriminate, but analysis shows they are more likely to reject black jurors," The Dallas Morning News (August 21, 2005) (SJQ Attachments at pp. 160).

judges in my district for similar crimes to ensure that the sentences are as consistent and fair as possible.

3. According to a Brookings Institution 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.[3] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[4] 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.[5] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[6]

   I was heartened to read that you have previously written about the ways that implicit bias plays out in our criminal justice system.

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

      Yes.

   b. 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.

      Yes. I have read many articles and reports on the issue of racial bias over the years and have taken numerous continuing legal education and judicial training seminars on the topic of implicit bias. Articles such as *Implicit Bias in the Judiciary*, https://users.nber.org/~dlchen/papers/Implicit_Bias_in_the_Judiciary.pdf., have been informative. I have also read about how implicit bias affects judicial decisions and jury decisions. *See* Hon. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1 (2010); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Anna Roberts, (*Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012). I have also taken Harvard's Implicit Bias test to research my own implicit bias.

   c. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[7] Why do you think that is the case?

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[3] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[4] *Id.*
[5] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[6] *Id.*
[7] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

I am not sufficiently familiar with the research to know all of the factors that might cause such a racial disparity.

d. According to an academic study, black men are 75 percent more likely than similarly situated white men are to be charged with federal offenses that carry harsh mandatory minimum sentences.[8] Why do you think that is the case?

I am not sufficiently familiar with the research to know all of the factors that might cause such a racial disparity.

e. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

The first step is for a judge to be mindful that implicit bias exists so she can be aware of it and correct for it. If I were confirmed as a district court judge, I would do many things to ensure that implicit bias has no place in my courtroom. One way to help ensure that implicit bias does not play a role in the trial is to allow the lawyers additional time for voir dire so the lawyers can make their strikes based on meaningful interactions with the jurors rather than based on stereotypes and assumptions. Another important way I would deter implicit bias is by strictly enforcing *Batson v. Kentucky*, 476 U.S. 79 (1986), in my courtroom so that diverse juries are seated to hear cases. Racism and implicit bias will have no place in my courtroom.

4. In an interview you gave in 2017, you said, "We need a better approach for dealing with homeless people who are mentally ill and who are arrested repeatedly for low-level, non-violent crimes."[9] I agree. Establishing alternatives to imprisonment is an essential part of reforming our criminal justice system to be more humane and just.

    a. As a district court judge, how will you implement a "better approach?"

    If confirmed to be a district court judge, I would put great thought into the sentences I hand down. The punishment should fit the crime, and the sentence imposed should be sufficient, but not greater than necessary, to comply with the purposes of the advisory Federal Sentencing Guidelines set forth by Congress in 18 U.S.C. § 3553 (a). When appropriate, I would consider the specific circumstances that can justify a departure from the advisory guidelines range as set out in Chapter 5, Part K of the advisory Sentencing Guidelines.

5. You have characterized affirmative action as "preferential treatment" that "tell[s] intelligent black folks [and society] that they don't have to run as fast as everyone else to win."[10] But affirmative action is instead designed to create space and equal opportunity for people of color to enter institutions that have systemically excluded them.

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[8] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

[9] Attorney at Law Magazine, An Interview with Justice Ada Brown (Feb. 17, 2017) (SJQ at pp. 126-127).

[10] Ada Brown, "The negatives of affirmative action," The Dallas Morning News (Apr. 21, 2012) (SJQ Attachments at p. 9).

a. Do you believe that the Supreme Court's landmark decisions upholding race-conscious admissions programs—such as *Regents of the University of California v. Bakke*[11] and *Grutter v. Bollinger*[12]—were correctly decided?

The article that I authored and to which you refer, focused on whether the children of African-American doctors, lawyers and college presidents should have relied on affirmative action programs to the extent that they lowered their own expectations, and were satisfied with obtaining lower graduate school entrance exam scores than our Anglo counterparts. This article also addressed my experiences as an African-American woman who has encountered the inevitable affirmative action stigma that is attached to all successful minorities, whether or not we were actually the recipients of affirmative action programs.

As a district court judge nominee, it is not appropriate for me to offer views on whether a particular Supreme Court case was correctly decided according to Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges. As Justice Elena Kagan stated during her hearing before the Senate Judiciary Committee in 2010, "I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases." *See Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 64 (2010). If confirmed as a district court judge, I will faithfully follow all Supreme Court precedent, including *Bakke*, *Grutter* and *Bollinger*.

b. Do you believe that *Bakke*, *Grutter*, and *Fisher v. University of Texas*[13] were correctly decided?

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

c. If confirmed, would you faithfully uphold both the letter and the spirit of these precedents?

If confirmed as a district court judge, I would faithfully apply both the letter and the spirit of all Supreme Court precedent, including the *Bakke*, *Grutter* and *Fisher* opinions.

d. Do you believe that having a diverse student body is a compelling government interest?

Yes. The Supreme Court has so held in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

6. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[14] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[15]

a. Do you believe there is a direct link between increases in a state's incarcerated

[11] 438 U.S. 265 (1978).
[12] 539 U.S. 306 (2003).
[13] 136 S. Ct. 2198 (2016).

[14] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[15] *Id.*

population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue and thus cannot give an opinion on it.

b. Do you believe there is a direct link between decreases in 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.

I have not studied this issue and thus cannot give an opinion on it.

7. At the hearing, you expressed support for demographic diversity on the judicial branch and in jury composition. You said that you would be sure to enforce *Batson v. Kentucky*[16] to ensure that prosecutors do not use peremptory challenges to dismiss jurors based on their race.

a. What will such enforcement look like?

If peremptory challenges to potential jurors by a prosecutor, or a defense attorney, seem to follow a racial pattern or a litigant appears to be striking potential jurors based on gender or national origin, opposing counsel can raise a *Batson* objection. Making a prima facie case is not onerous and need only raise an inference of discriminatory purpose. *Johnson v. Cal.*, 545 U.S. 162, 169 (2005). I would then hold a hearing on the grounds for use of the peremptory strikes. The lawyer being challenged would have the opportunity to give a protected-class-neutral reason for the use of her peremptory strike. Mere denial of a discriminatory purpose is insufficient. *Purkett v Elem*, 514 U.S. 765, 768–69 (1995). I would then look to see if the justification for the strike had been applied consistently in the entire jury panel. *Miller-El v. Dretke*, 545 U.S. 231 (2005) (overturning conviction where prosecutor's explanation for striking African-American juror was not applied to white jurors). Next, I would evaluate whether the moving party proved purposeful discrimination by a preponderance of the evidence, considering the totality of the circumstances. *Batson* hearings often require credibility determinations. If I determined that the reason being offered for the peremptory strike was pretextual, I would either seat the potential juror on the jury or dismiss the existing jury panel and begin jury selection again with a new pool of potential jurors. The Supreme Court extended *Batson* to apply to gender in *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) and extended *Batson* to apply to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). I would faithfully apply *Batson* and its progeny to all criminal and civil trials. Racial, gender and national origin discrimination will have no place in my courtroom.

b. In what other ways will you promote diversity in your chambers?

I will seek to hire and retain diverse talent to work in my chambers.

8. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

The Supreme Court has looked to the original public meaning and considered it relevant when performing constitutional interpretation. *See, e.g., District of Colombia v. Heller*, 554 U.S. 570 (2008). If confirmed as a district court judge, I will faithfully follow whatever approach the Supreme

[16] 476 U.S. 79, 89 (1986).

Court dictates in constitutional interpretation.

9. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

   Justice Elena Kagan said in a recent speech that "we're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, (Nov. 25, 2015). The Supreme Court has repeatedly stated that statutory interpretation begins with the text and that when the text is clear, the inquiry ends. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If confirmed as a district court judge, I will faithfully follow the precedents of the Supreme Court, including its approach to statutory interpretation.

10. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

    a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

       The Supreme Court has said that it may be appropriate to consider legislative history when the text of a statute is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct 1744, 1756 (2017); *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). If I am confirmed as a district court judge, I will faithfully follow all Supreme Court precedent and its approach to statutory interpretation, including the use of legislative history.

    b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

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

11. Would you honor the request of a plaintiff, defendant, or witness in your courtroom, who is transgender, to be referred in accordance with their gender identity?

    If I am confirmed as a district court judge, I commit to treating each and every person who appears before me, whether as a litigant, lawyer, or witness, with the utmost dignity and respect.

12. Do you believe that *Brown v. Board of Education*[17] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    The *Brown* case corrected an egregious wrong and is a landmark case. Because of *Brown*, I attended an excellent racially integrated public school whereas my father was forced to attend an inadequate "separate-but-equal" segregated school, where books and school supplies consisted of the cast-offs from the white school. As a district court judge nominee, it

[17] 347 U.S. 483 (1954).

is not appropriate, however, for me to offer views on whether a particular Supreme Court case was correctly decided, according to Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges. As Justice Elena Kagan stated during her hearing before the Senate Judiciary Committee in 2010, "I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases." *See Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 64 (2010).

13. Do you believe that *Plessy v. Ferguson*[18] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Plessy upheld racial segregation, which is immoral. The Supreme Court made clear that *Plessy* was incorrectly decided when it issued its opinion in *Brown*.

14. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    It is my firm personal belief that it is inappropriate to opine on the correctness of decisions rendered by the Supreme Court which could, by any stretch of the imagination, factor into cases that could appear before me in court. It is for that reason alone that I fully embrace and invoke Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges.

15. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[19] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    Yes. The Supreme Court has so held. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."). Because this issue deals with a matter of pending or impending litigation, it would be inappropriate for me to comment further, according to Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges.

[18] 163 U.S. 537 (1896).

[19] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted May 7, 2019
For the Nomination of

Ada E. Brown, to the U.S. District Court for the Northern District of Texas

1. In July 2011, you submitted a letter to the editor of the *Dallas Morning News*, in which you wrote that "[i]n my opinion, actual innocence is the only thing that should disturb a jury's verdict in a capital case."

    a. **Do you believe that procedural errors at trial are legitimate grounds to vacate or reverse a death sentence? If not, why not?**

    Yes. The Supreme Court has so ruled. *See Foster v. Chatman*, 136 S. Ct. 1737 (2016) (reversing death penalty conviction because two African-American jurors were struck from the jury in violation of Defendant's rights under *Batson v. Kentucky*.).

2. In April 2012, you wrote an op-ed in the *Dallas Morning News* titled "The Negatives of Affirmative Action." In that article, you wrote that "[p]referential treatment turned some of us into the walking wounded . . . . When you tell intelligent black folks that they don't have to run as fast as everyone else to win, some will come to believe that they can't compete without a head start."

    a. **Do you believe that all forms of affirmative action serve to "tell intelligent black folks that they don't have to run as fast as everyone else to win"?**

    No. The article that I authored and to which you refer, focused on whether the children of African-American doctors, lawyers and college presidents should have relied on affirmative action programs to the extent that they lowered their own expectations, and were satisfied with obtaining lower graduate school entrance exam scores than our Anglo counterparts. This article also addressed my experiences as an African-American woman who has encountered the inevitable affirmative action stigma that is attached to all successful minorities, whether or not we were actually the recipients of affirmative action programs.

    b. **As a practical matter, do you believe that educational institutions are likely to achieve meaningful racial diversity without recognizing and taking account of race?**

    I have not studied this matter and cannot opine as to whether educational institutions are likely to achieve meaningful racial diversity without recognizing and taking account of race. I would faithfully follow such Supreme Court precedent as *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding state had compelling interest in obtaining a diverse student body). I would also faithfully follow *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (holding

University's use of race as a consideration in the admissions process did not violate the Equal Protection Clause of the Fourteenth Amendment).

c. **Does the U.S. Constitution allow an educational institution to consider race if it implements a race-neutral alternative, and thereafter experiences a reduction in minority enrollment?**

I have not studied this issue and cannot opine as to if the Constitution allows an educational institution to consider race if it implements a race-neutral alternative, and thereafter experiences a reduction in minority enrollment. I would faithfully follow such Supreme Court precedent as *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016).

3. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

a. **What is the process you would follow before you sentenced a defendant?**

If I am confirmed as a district court judge, I will give careful consideration in all sentencing proceedings to ensure that the sentence imposed is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing as set forth by Congress in 18 U.S.C. § 3553(a). I will consult the indictment, the governing statutes, applicable precedent from the Supreme Court and the Fifth Circuit, the presentence report from the probation department, the advisory Sentencing Guidelines and other factors set forth in 18 U.S.C. § 3553(a), the arguments and objections of the parties, and the statements of the defendant, victim and any witnesses. I will also consider the sentences given by other district court judges in my district to ensure that my sentence is consistent with other sentences given to defendants in similar circumstances. I fully appreciate the gravity of the sentencing process and the care it requires. I will fully, faithfully and fairly follow the law and my judicial oath in carrying out this serious responsibility.

b. **As a judge, how do you plan to determine what constitutes a fair and proportional sentence?**

I would follow the procedures set forth above in my response to Question 3(a). During the American Bar Association's investigation of my experience, which resulted in a unanimous rating of Well Qualified, they interviewed my coworkers, including other judges with whom I have practiced, and attorneys from across the spectrum—defense, prosecution, civil—who have practiced before me and are familiar with my work. All spoke to my fairness in dealing with all parties in every proceeding in which I have been involved, including my sentences handed down as a criminal court judge. I understand the importance and gravity of the sentencing process and would be very careful to assess fair and proportional

sentences to each and every defendant before me.

c. **When is it appropriate to depart from the Sentencing Guidelines?**

The advisory Sentencing Guidelines policy statements identify circumstances and considerations that may justify a departure from the advisory Sentencing Guidelines. Chapter 5, Part K of the Sentencing Guidelines lists specific circumstances that can justify a departure from the advisory Sentencing Guidelines range. Under Supreme Court precedent, the factors listed in 18 U.S.C. § 3553(a) may also call for varying from the advisory Sentencing Guidelines range. Additionally, the Supreme Court and Fifth Circuit have provided guidance to district courts as to when departure from the advisory Sentencing Guidelines may be appropriate.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

i. **Do you agree with Judge Reeves?**

I am not familiar with Judge Reeves's work, but I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a district court judge nominee, it would be inappropriate for me to opine further. *See* Code of Conduct for United States Judges, Canons 2, 3(a)(6), and 5.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my response to Question 3(d)(i) above.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my response to Question 3(d)(i) above.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive**

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

efforts to address the injustice, including:

1. **Describing the injustice in your opinions?**

   I am not familiar with Judge Gleeson's opinions. However, I am aware that mandatory minimum sentences are the subject of much debate and commentary. I am also aware that judges have faced criticism for using judicial opinions to publicize their disagreement with a particular law. If confirmed as a district court judge, I will evaluate each case individually and consider the law and my ethical obligations, consistent with my duty to apply the law pursuant to the Constitution, as well as Supreme Court and Fifth Circuit precedent**.**

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   The authority to make charging decisions lies exclusively in the Executive Branch under our Constitution. I believe that it is important for judges to respect the separation of powers under the Constitution. However, I would not hesitate to reach out to prosecutors if I were concerned about ethical improprieties or professional misconduct. I would address these issues consistent with judicial ethics.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   Clemency is a power left to the Executive Branch. If confirmed as a district court judge, I would be bound to respect the separation of powers under our Constitution.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

   Yes.

4. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

      Yes.

b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes. Unfortunately racial bias still plays a role in our criminal justice system in 2019. This issue has been documented by studies done by Sonja Starr in her article *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*.[3] It has been researched by the Executive Director of the Sentencing Project in his article *Addressing Racial Disparities in Incarceration*.[4] It has also been studied by Cassia Spohn, the Chair of Criminal Justice at the Department of Criminal Justice at the University of Nebraska at Omaha in her article *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*.[5] Statistics also show that race can make a difference in sentencing.[6]

5. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes.

[3] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, U. MICH. L. & ECON., EMPIRICAL LEGAL STUDIES CENTER PAPER NO. 12-002 (2012).
[4] Marc Mauer, *Addressing Racial Disparities in Incarceration*, THE PRISON JOURNAL, vol. 91, no. 3 supp., Sept. 2011, p. 87S.
[5] Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIMINAL JUSTICE 427 (2000), available at http://www.justicestudies.com/pubs/livelink3-1.pdf.
[6] U.S. SENTENCING COMMISSION, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (Dec. 2012), available at https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing.