

**Nomination of William Shaw Stickman IV to the United States District Court for the
Western District of Pennsylvania
Questions for the Record
June 12, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

Never. A lower court is absolutely bound to fully and faithfully apply the precedent of the Supreme Court. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

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?

No. A district court judge is not in the position to question precedent of the Supreme Court. Further, as a general matter, a district court judge does not author dissenting or concurring opinions.

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

A district court does not create precedent. However, as a principle of the rule-of-law district court judge should render similar decisions when faced with similar facts. If a district court judge decides that it a change of position (rather than precedent) is warranted, the district judge should write a detailed opinion explaining the jurisprudential basis for departing from prior practice.

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

The Supreme Court itself has identified factors that it will consider in determining whether to overturn its own precedent. *See Janus v. Am. Fed'n of State, City and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018). As a nominee to a District Court, I am not in the position to opine as to when it is “appropriate” for the Supreme Court to exercise its discretion to depart from its own precedent.

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”?

For a district court, all Supreme Court precedent is superprecedent in that it is binding on all district courts. If confirmed, I would fully and faithfully apply *Roe* and its progeny.

b. Is it settled law?

Please see my response to Question 2.a. above.

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. If confirmed, I will faithfully apply *Obergefell*.

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

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

As a District Court nominee, it is not appropriate for me to express agreement or disagreement with either the majority or dissenting opinion in decisions of the Supreme Court. *Heller* is precedent. If confirmed I would faithfully apply it.

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

The Supreme Court stated, “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).

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

I have not studied pre-*Heller* jurisprudence regarding the Second Amendment and am not, therefore, in a position to offer an opinion in response to this Question.

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

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

Citizens United is precedent of the Supreme Court. If confirmed as a District Court Judge, I would faithfully apply *Citizens United* and all other precedent.

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

As a district court nominee, it would be inappropriate for me to comment on policy matters in light of Canon 5 of the Code of Conduct for United States Judges. It would also be inappropriate for me to comment on a matter that could come before me, if confirmed.

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

In *Burwell v. Hobby Lobby*, 134 S. Ct 2751 (2014), the Supreme Court held that corporations may assert claims under the statutory Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.* The Court did not, however, determine whether a corporation may assert a claim under the free exercise clause of the First Amendment.

6. In 2004, you wrote a letter to the editor of the *Pittsburgh Post-Gazette* in which you described the “abortion industry” as “grotesque.” You wrote: “[S]ince *Roe vs. Wade* more than 39 million babies have been killed by abortion.” Your letter also stated that *Roe v. Wade* had led to “the intentional deaths of many millions of babies.” (PITTSBURGH POST-GAZETTE, Oct. 29, 2004)

a. Given your strong personal beliefs, will you commit to recusing yourself from any case where *Roe v. Wade* is implicated if you are confirmed?

If confirmed, I would fully and faithfully apply the provisions of *Roe v. Wade*, *Planned Parenthood v. Casey*, and their progeny. I would review any request for recusal, in any case and for whatever reason, pursuant to the provisions of 28 U.S.C. §455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances..

b. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving *Roe v. Wade*.

Please see my response to Question 6.a above.

7. In 2003 – while the Supreme Court was considering *Lawrence v. Texas* – you wrote a letter to the editor of the *Pittsburgh Post-Gazette* in which you defended then-Senator Rick Santorum for equating homosexual intercourse to incest. (PITTSBURGH POST-GAZETTE, Apr. 30, 2003) Santorum had said: “If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you

have the right to incest, you have the right to adultery. You have the right to anything.” (Chris Mondics, *Santorum Remarks Outrage Gay Groups*, PITTSBURGH POST-GAZETTE, Apr. 22, 2003)

In your letter to the editor, you wrote:

“The leftist sharks are circling around Sen. Rick Santorum for his opinions on the legal argument against the Texas sodomy law. . . . Even if the senator did equate homosexual intercourse with adultery, bigamy and incest, isn’t that his prerogative? Are we and the leaders whom we elect no longer allowed to disagree with the activities of certain groups?”

a. Why did you write a letter to the editor defending then-Senator Santorum for equating homosexuality with adultery, bigamy, and incest?

I wrote this letter to the editor as a student over sixteen-years ago and do not stand by the comments in it. My letter was an inarticulate attempt to weigh in on the topic of free speech and open discussion. It is not a defense of Senator Santorum’s comments. I did not then – and do not now – agree with Senator Santorum’s comments.

b. Given your strong personal beliefs, will you commit to recusing yourself from any case where LGBT rights are implicated if you are confirmed?

I would review any request for recusal, in any case and for whatever reason, pursuant to the provisions of 28 U.S.C. §455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances..

c. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving LGBT rights.

My letter was an inarticulate attempt to weigh in on the topic of free speech and open discussion. I did not then – and do not now – agree with Senator Santorum’s comments. Looking back upon it from the distance of time and with the maturity I have developed through my professional experiences as a law clerk and practicing attorney, and personal experiences as a husband, father, and community member, I am embarrassed by my letter, especially the strident and insensitive tone. If confirmed, every litigant in my courtroom can be assured that I will treat every person involved in every case fairly and with dignity and respect. That is what I do in my professional life and personal life, where I have worked closely with people of diverse backgrounds and experiences, including members of the LGBTQ community. As a lower court judge, I would also be bound by and faithfully apply Supreme Court and Third Circuit precedent regarding LGBTQ issues. In addition, I would faithfully adhere to the judicial oath, whereby I would promise to “administer justice without respect to persons.”

8. In 2015, the Pittsburgh City Council passed an ordinance requiring employers to provide paid sick leave. On your Questionnaire, you noted that you are the lead counsel – representing a collection of business interests – in a case challenging this ordinance. The case is currently pending before the Pennsylvania Supreme Court. In one of your submissions to the trial court, you argued that requiring paid sick leave would wreak “havoc” on employers and “result in the loss of jobs and businesses.” (*Pennsylvania Restaurant and Lodging Association et al. v. City of*

Pittsburgh, Response to Defendants’ Motion for Judgment on the Pleadings and Supporting Briefs, Nov. 19, 2015) The United States is the only developed nation in the world that doesn’t guarantee paid family leave – whether to care for a new baby, a sick family member, or an employee’s own health. I have co-sponsored legislation to change that. (The Family Act, S.463)

a. What study or studies did you rely on for the proposition that providing workers with paid sick leave would wreak “havoc” on employers and “result in the loss of jobs and businesses”?

This case remains pending in the Pennsylvania Supreme Court. I am limited, therefore, in my ability to discuss the matter in detail. Subject to this limitation, my clients’ position did not question whether paid sick leave is a good idea from a policy perspective. Indeed, the record of the case shows that several of my clients had already offered paid sick leave benefits to their employees before the City of Pittsburgh passed the ordinance. The issue in the case is whether the City had the authority under the Pennsylvania Home Rule Charter and Optional Plan of Government Law, 53 Pa.C.S. §2962(f), to enact the ordinance or whether regulation of employers and business is reserved to the state legislature.

It is my client’s position that Section 2962(f) reserves to the state legislature (rather than individual municipalities) the authority to promulgate employment regulations (including paid sick leave) because the Commonwealth of Pennsylvania is comprised of 2560 municipalities. My clients argued that it would be difficult for a business considering moving into the Commonwealth to comply with 2560 separate regimens of employment regulations.

b. If you cannot cite a specific study, why did you make that argument in court?

Please see my response to Question 8.a. above.

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

I do not have any specific “views on administrative law.” If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and the Third Circuit regarding administrative law.

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

If the plain language of a statute is ambiguous or otherwise unclear, the statute’s legislative history is one of the tools that can be used to aid in the interpretation of the statute.

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

No.

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

I received these questions on the evening of June 12, 2019. I reviewed the questions, undertook necessary research and drafted responses, which I forwarded for advice and comment to the Department of Justice’s Office of Legal Policy on June 14, 2019. The responses to these questions are my own.

Written Questions for William Shaw Stickman IV
Submitted by Senator Patrick Leahy
June 13, 2019

1. In 2003 you wrote a letter to the editor of the *Pittsburgh Post-Gazette* defending comments of then-Senator Santorum, who had expressed his support for the sodomy law in *Lawrence v. Texas*. The opinion by Justice Kennedy in *Lawrence* is considered one of the great civil rights landmarks in Supreme Court history.

(a). Do you believe that private and consensual sexual activity should be protected by substantive due process under the 14th Amendment? Do you also believe, as Justice Kennedy stated in *Lawrence*, that the Constitution protects personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing, regardless of whether you agree with the specific choices being made?

The Supreme Court has recognized that the Fourteenth Amendment protects personal decisions relating to marriage, *Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); procreation and contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), family relationships and child rearing, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). If confirmed, I will faithfully apply this and all precedent of the Supreme Court and the Third Circuit.

2. In 2001 you wrote a letter to the editor of the *Pittsburgh Post-Gazette* and criticized a county councilman for drawing what you called a “blatantly partisan redistricting plan.” Nearly a decade later, however, you represented the Pennsylvania Legislative Reapportionment Commission in its efforts to defend a gerrymandered map that was eventually struck down by the state Supreme Court.

(a). Do you believe that gerrymandering with a solely partisan motive is lawful? If so, on what basis?

The question of whether and to what extent partisan considerations and other issues relating to gerrymandering will render a redistricting or reapportionment unlawful is currently being litigated before federal and state courts. As such, it would not be appropriate for me to comment pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in

the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’”

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

Yes. The Supreme Court has made clear that the context within a statutory scheme of a specific statutory term is an important consideration in interpreting the meaning of the provision at issue.

4. 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?

An independent judiciary is a bulwark for the rule of law and a pillar of our democracy. I wrote a law review article on the importance of judicial independence and highlighted the devotion Chief Justice Ralph Cappy of the Pennsylvania Supreme Court (for whom I clerked) to this principle. *An Independent Judiciary: The Role of Chief Justice Cappy*, 47 Duq. L. Rev. 547 (2009).

(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?

That is not a practice that I have engaged in or would engage in. As an attorney, there have been occasions where I have disagreed with the determination of a judge or a court. I have never, however, criticized the legitimacy of the court or judge.

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

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

While the President has broad authority over national security decisions pursuant to Article II of the Constitution, the Supreme Court has explained that that power is not unfettered and is not beyond review. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

6. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

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

Courts have procedures in place to address situations where *any* litigant or third party fails or refuses to comply with an order of the court. For example, Rule 37 of the Federal Rules of Civil Procedure empowers a federal district court to impose sanctions on a litigant or third party which refuses to comply with a subpoena or other court order.

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

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

Yes.

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

The Supreme Court demonstrated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that even in a time of war, the President’s authority is not unfettered and is at its lowest ebb when it runs contrary to a law passed by Congress. I would faithfully apply Supreme Court precedents and any relevant constitutional or statutory provisions.

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

Please see my response to Question 7.b. above.

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

The Supreme Court has explored the contours of judicial review in the context of national security matters in multiple cases, including *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

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

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

I am not familiar with the late Justice Scalia’s remarks in the 2011 interview cited in this question. However, in *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibits discrimination against women.

10. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”

I am not familiar with the remarks of the late Justice Scalia cited in this question. I do not agree with the characterization of the Voting Rights Act which is quoted in this question. The Supreme Court has recognized that the Voting Rights Act has helped to remedy the disenfranchisement of African Americans and that its accomplishments are “undeniable.” *Northwest Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193 (2009).

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

Article I, §9 of the United States Constitution states: “And no Person holding any Office of Profit or Trust under them, shall, without the consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”

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

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

As a general principle, appellate courts review the record which was created in proceedings before the trial court, which is best equipped to make factual findings. In doing so, the Court’s review is circumscribed by the appropriate standard and scope of review. The Supreme Court’s decision in *Shelby County v. Holder*, is binding precedent, which I would faithfully apply.

13. 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”?

I have not engaged in detailed study of the scholarship surrounding the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments. Without question, the enactment of the Thirteenth, Fourteenth and Fifteenth Amendments, following the Civil War, marked an important point in our nation’s constitutional and cultural history. Each of these Amendments specifically confers upon Congress the authority “to enforce this Article by appropriate legislation.”

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

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

The Supreme Court’s decision in *Lawrence v. Texas* is binding precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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

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

If confirmed as a district court judge, I would be bound to fully and faithfully apply the precedent of both the Supreme Court and the Third Circuit. A district court judge’s commitment to the principle of *stare decisis* must be absolute. A district court judge lacks any authority to depart from precedent of a higher court. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016).

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

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

I will base my decision on whether I should recuse on the factors set forth at 28 U.S.C. §455(b)(1)-(5). By way of specific example, if confirmed, I will recuse in any litigation where I have ever played a role. For a period of time, I anticipate recusing in cases where my current firm represents a party. I will recuse in any case where I have a financial interest.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of

undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

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

Courts play an essential role in our system by providing a forum for the examination and adjudication of claims by litigants that their constitutional rights have been violated and affording a remedy if a violation is determined.

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

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

Yes.

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

I have not studied this issue. If confirmed and faced with a case raising this issue, I would carefully examine all statutory authority and all applicable precedent of the Supreme Court and the Third Circuit.

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

The Supreme Court has written extensively on the scope of congressional authority under the commerce clause. As a brief summary of the general contours of that authority: (1) Congress may regulate the use and channels of interstate commerce; (2) Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) Congress may regulate activities which have a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995); *see also Wickard v. Filburn*, 317 U.S. 111 (1942); *NFIB v. Sebelius*, 567 U.S. 519 (2012).

The Supreme Court has explored the scope of Section 5 of the Fourteenth Amendment in *Katzenbach v. Morgan*, 384 U.S. 641 (1966); and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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

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

This Question relates to matters that are currently pending in the federal courts. As such, I am unable to respond pursuant to Canon 3(A)(6).

22. **How would you describe the meaning and extent of the “undue burden” standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The “undue burden” standard has been defined by the Supreme Court. In *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), the Court explained the contours of the standard: (i) “a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends,” *Whole Woman’s Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,” *Whole Woman’s Health*, 136 S. Ct. at 2309. If confirmed as a district court judge, I will faithfully apply the “undue burden” standard as articulated by the Supreme Court and the Third Circuit.

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

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

The Supreme Court has held that “qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). If I am confirmed, I will faithfully apply all binding Supreme Court and Third Circuit precedent, including *Pearson*.

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

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

The Supreme Court’s decision in *Carpenter* recognized that the evolving jurisprudence on the application of the Fourth Amendment to emerging forms of electronic technology. If confirmed, I would fully and faithfully apply the decision in *Carpenter* and employ its analysis in examining similar cases. Because the balance between electronic data collection and the protections of the Fourth Amendment are still being explored by our courts, I am not able to render an opinion on the specific hypothetical.

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

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

This Question relates to matters that are currently pending in the federal courts. As such, I am unable to respond pursuant to Canon 3(A)(6).

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

Yes. Canon 5 of the Code of Conduct for United States Judges provides that “A judge should refrain from political activity” and sets for specific prohibitions regarding political involvement by judges. Moreover, the principle of an independent judiciary requires that judges remain free from political influence so that they can render decisions based on the law without regard to any extrinsic, such as political, considerations.

**Nomination of Peter William Stickman
to the United States District Court for the Western District of Pennsylvania
Questions for the Record
Submitted June 12, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Recent reporting in the Washington Post (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts,” May 21, 2019) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Yes.

b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

I have not studied this issue in depth. Further, to the extent that this question concerns a political matter relating to the process of nominating and confirming judges, I cannot comment further pursuant to Canon 5 of the Code of Conduct of United States Judges.

c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my response to Question 1.b above.

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

No. I am not a member of the Federalist Society and do not know of Mr. Leo.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

Other than reading the Washington Post story cited in this Question, I am unfamiliar with Mr. Leo and do not know his beliefs. If confirmed as a district court judge, my only agenda will be to faithfully follow the provision of the judicial oath, to decide cases pursuant to established statutory law and precedent, and to do so in a diligent and timely manner.

2. On April 3rd, 2003, you wrote a Letter to the Editor of the *Pittsburg Post-Gazette* entitled “Free to Disagree” in which you defended the statements of former Senator Rick Santorum (R-PA) regarding the Texas sodomy laws struck down by the Supreme Court’s holding in *Lawrence v. Texas*. Mr. Santorum’s statements were as follows:

If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.

You wrote that Mr. Santorum’s words had been “misconstrued by gay rights groups, power-hungry Democrats and the media in an obvious attempt to create a public outcry against him.”

a. In what way do you believe Senator Santorum’s words were “misconstrued”?

My letter was an inarticulate attempt to weigh in on the topic of free speech and open discussion. Now, after more than sixteen years, I do not specifically recall how I believed that the former Senator’s remarks were “misconstrued.”

b. Do you agree with Senator Santorum that the Supreme Court’s recognition of a constitutional right to same-sex intimate relations logically extends to create a right to bigamy, polygamy, incest, or adultery? Why or why not?

No. The remarks find no support in the law.

3. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I think that the Chief Justice’s metaphor is generally accurate. A baseball umpire makes calls based on rules that are already established by a separate authority. Likewise, a judge, and especially a District Judge, makes determinations based on “rules” established by Congress, state legislatures (in diversity jurisdiction cases) and by the precedent of higher courts. Neither a baseball umpire nor a District Judge make the rules.

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

As a general matter, judges should render decisions in a case based on the law and the law alone. However, there are occasions where the substantive or procedural rules require a court to consider the practical outcome of a determination, such as proceedings on preliminary injunctive relief under Fed. R. Civ. Pro. 65.

4. 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 trial judge to make a subjective determination?

Under the caselaw examining and explaining Fed. R. Civ. Pro. 56, a determination of whether a case presents a “genuine issue of material fact” is left to the determination of the District Judge. That

determination must be guided by the objective factors set forth by the Supreme Court in examining Rule 56.

5. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

a. What role, if any, should empathy play in a judge's decision-making process?

A judge' substantive decisions should be based on the law and the law alone. However, empathy can play a role in the work of a judge. For example, a judge's empathy may warrant the grant of a continuance or may take the needs of counsel, parties and witnesses into account when scheduling matters. Further, a judge may empathize with the discomfort of parties, witnesses and jurors in the litigation process and may take reasonable steps to alleviate this discomfort in the course of court proceedings.

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

While a judge's decisions should be based only on the law, a judge does bring his or her personal experience and education to work in his or her role. As explained in response to Question 5.a., a judge's experiences can lead him or her to understand and have empathy for those who the judge encounters in the course of his or her duties.

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

Every person is different and carries different life experiences with himself or herself. I do not have the specific experiences enumerated in this question (young teenage mom, poor, African-American, gay, disabled or old). However, I do come from a background which mirrors many people in the communities of the Western District of Pennsylvania. I am from a blue-collar family in an economically diverse city neighborhood. I was the first person in my family to graduate from college. I am still in close contact with the neighborhood and community where I grew up and where my parents, extended family and many friends still reside. In my professional and personal life, I have encountered people of diverse backgrounds and perspectives. For instance, as an attorney, I represented the parents of a U.S. Army Green Beret soldier in a wrongful death action against a military contractor after he was electrocuted by a short-circuited water pump installed and maintained by the contractor. Through these experiences and the perspective that I have gained through these experiences, I have a real-life understanding of the challenges encountered by many residents of the Western District of Pennsylvania. I have brought this perspective with me throughout my career and would, if confirmed, bring them with me to the bench.

6. 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.

7. The Seventh Amendment ensures the right to a jury “in suits at common law.”

a. What role does the jury play in our constitutional system?

Trial by jury has been a fundamental part of the Anglo-American legal system since the earliest days of the Common Law. As early as the fifteenth century, the jurist John Fortescue described the trial by jury as “the best and most certain way of finding out the truth.” Fortescue, *In Praise of the Laws of England*, Chap. XX, The Legal Classics Library (1984). In criminal cases, trial by jury is a fundamental right guaranteed by the Sixth Amendment and incorporated to the states through the Fourteenth Amendment. See, *Williams v. Florida* (399 U.S. 78 (1970)). Although not incorporated to the states, in the federal system, the Seventh Amendment guarantees a trial by jury to litigants in civil cases.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

This is an issue that is currently being litigated in the courts. As such, it is not appropriate for me to render an opinion pursuant to Canon 3(A)(6) of the Code of Conduct of U.S. Judges.

c. Should an individual’s Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question 7.b. above.

8. What do you believe is the proper role of an appellate court with respect to fact-finding?

As a District Court nominee, I have not studied this issue in depth. However, in my practice I have had substantial experience in practicing in appellate courts. It is my understanding that it is generally inappropriate for appellate courts to engage in fact-finding. Rather, an appellate court’s scope of review is generally limited to the record before it. Records on appeal are created in proceedings before trial courts, which are best equipped for the fact-finding necessary to create a record in a case.

9. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Please see my response to Question 8 above.

10. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

If the plain language of a statute is ambiguous or otherwise unclear, the statute’s legislative history, including congressional fact finding, is one of the tools that can be used to aid in the interpretation of the statute.

11. The Federal Judiciary’s Committee on the Codes of Conduct recently issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion, will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

In considering whether to attend or participate in educational seminars or other events, I will carefully consider Advisory Opinion #116 as well as any other laws, rules, and practices governing attendance and participation at such events.

ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to Question 11.b.i. above.

iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to Question 11.b.i. above.

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 11.b.i. above.

v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Please see my response to Question 11.b.i. above.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 11.b.i. above.

**Nomination of William Shaw Stickman IV, to be United States District Court Judge
for the Western District of Pennsylvania
Questions for the Record
Submitted June 12, 2019**

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 look to the factors identified and employed by the Supreme Court and the Third Circuit when examining whether a right is fundamental and protected by the Fourteenth Amendment.

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, as explained in *Washington v. Glucksberg*, 521 U.S. 702 (1997), whether a right is deeply rooted in this nation's history and tradition is an important consideration in determining whether a right is fundamental. Courts may employ a variety of sources to determine whether a right is deeply rooted in history and tradition, including but not limited to historical records, statutes and legal texts.

In confirmed as a District Court judge, I would fully and faithfully apply the analysis set forth in *Glucksberg*.

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

Yes. As a District Court judge, I would be bound by the precedent of both the Supreme Court and the Third Circuit. I would look to the precedent of those Courts at the beginning of my analysis.

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

Yes. The Supreme Court has held that lower courts are required to apply not only the specific result of a binding precedent, but also the rationale underlying the result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996). Thus, the determination of

the Supreme Court or the Third Circuit regarding a similar right would be an important consideration.

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*).

Planned Parenthood v. Casey and *Lawrence v. Texas* are binding precedent of the Supreme Court. If confirmed as a District Court judge, I would apply both fully and faithfully.

f. What other factors would you consider?

If confirmed as a District Court judge, I would consider each of the factors discussed above. As a lower court judge, I would give special focus to examining the precedent of the Supreme Court and the Third Circuit.

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

The Supreme Court has held that the equal protection clause of the Fourteenth Amendment applies to gender as well as race. *United States 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?

The United States Supreme Court has held that the equal protection clause applies to gender. If confirmed as a District Court judge, it is the Court’s determination that would be the touchstone of my analysis. I would faithfully apply the Court’s precedent.

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 have not studied this issue and am, therefore, unable to offer an opinion as to why the Court had not addressed this issue earlier than the decision in *United States v. Virginia*.

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

In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the United States Supreme Court held that the Fourteenth Amendment guarantees to gay and lesbian couples the same right to marry as heterosexual couples.

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

This issue is currently the subject of litigation pending in federal and state courts. I am not permitted, therefore, to offer an opinion on issue pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

Yes. The Supreme Court specifically recognized such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully follow this precedent and all Supreme Court precedent.

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

Yes. The Supreme Court recognized such a right in several cases including *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully follow this precedent and all Supreme Court precedent.

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?

Yes. The Supreme Court recognized the right of privacy that protect intimate relations between two consenting adults in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully follow this precedent and all Supreme Court precedent.

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.

All of the cases cited above are precedent of the United States Supreme Court. If confirmed, I will faithfully apply each.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher 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 as a District Court judge, I would look to precedent of the Supreme Court and the Third Circuit as to circumstances where it is appropriate to consider our changing understanding of society. In addition, where such consideration is warranted, I would be guided by the applicable Federal Rules of Evidence regarding the introduction of evidence into the record, including lay and expert evidence, on the issue at bar.

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

A court may permit the introduction of such evidence where it assists the trier of fact and complies with the requirements of F.R.E. 702 and the requirement of reliability as set forth in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), and its progeny.

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

If confirmed, I would faithfully follow *Obergefell* and all Supreme Court precedent.

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

As a District Court judge, I would fully and faithfully apply all precedent of the Supreme Court.

6. 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.

- a. 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?

I have not studied whether *Brown* is consistent with originalism. Whether or not consistent with the principles of originalism, *Brown* is precedent of the Supreme Court. As such, if confirmed, I would fully and faithfully apply *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-papers/democratic-constitutionalism> (last visited June 7, 2019).

As a District Court judge, it would be my obligation to apply the precedent of the Supreme Court and the Third Circuit, notwithstanding whether that precedent falls neatly within the parameters of any philosophy of interpretation.

c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

As a District Court judge, the most important considerations in interpreting a constitutional provision would be the constitutional text and the interpretation of the Supreme Court and Third Circuit. To the extent that the issue is not resolved, other considerations, such as discerning the original public meaning may be helpful in interpreting the provision at issue.

d. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my Response to Question 6.c. above.

e. What sources would you employ to discern the contours of a constitutional provision?

If confirmed, when faced with the need to discern the contours of a constitutional provision, I would first examine the language of the constitutional text. Next, as a District Court judge, I would look to precedent of the Supreme Court and the Third Circuit. If the constitutional text and precedent of higher courts does not fully address the issue, I would consider other factors, such as the interpretations rendered by other Circuit and District courts, sources showing the original public meaning, and other factors as presented by the focused advocacy of the litigants and any amici.

Questions for the Record for William Stickman
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.
 - b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No.

2. You wrote in a Letter to the Editor in a local newspaper in October 2004 that accidental deaths of Iraqi civilians were “in service of a good cause, whereas abortions involve the intentional deaths of many millions of babies.” You have gone on to say that since *Roe v. Wade* more than 39 million babies have been killed by abortion.
 - a. Given the inflammatory language you are on the record using, accusing women who have abortions of being killers, how could a litigant in a case before you that involved abortion rights ever believe they were getting a fair hearing from you?

If confirmed, every litigant in my courtroom can be assured that I will treat every person involved in every case fairly and with dignity and respect. That is what I do in my professional life and personal life, where I have worked closely with men and women of diverse backgrounds and experiences. If confirmed as a district judge, I would be committed by oath to faithfully apply – and I would faithfully apply – all precedent of the Supreme Court and Third Circuit concerning abortion, including *Roe*, *Casey* and their progeny.
 - b. Would you agree to recuse yourself from all cases involving abortion?

I would review any request for recusal, in any case and for whatever reason, pursuant to the provisions of 28 U.S.C. §455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances..

3. In 2002, you defended then Senator, Rick Santorum’s comment about the case of *Lawrence v. Texas* that “if the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.” You went on to say that “the leftist sharks are circling around Sen. Rick Santorum for his opinions.”

a. Considering your derisive comments, how could a same-sex couple, or an LGBTQ person that comes before your court have any assurance that you could fairly adjudicate their claim?

My letter was an inarticulate attempt to weigh in on the topic of free speech and open discussion. I did not then – and do not now – agree with Senator Santorum’s comments. Looking back upon it from the distance of time and with the maturity I have developed through my professional experiences as a law clerk and practicing attorney, and personal experiences as a husband, father, and community member, I am embarrassed by my letter, especially the strident and insensitive tone. If confirmed, every litigant in my courtroom can be assured that I will treat every person involved in every case fairly and with dignity and respect. That is what I do in my professional life and personal life, where I have worked closely with people of diverse backgrounds and experiences, including members of the LGBTQ community. As a lower court judge, I would also be bound by and faithfully apply Supreme Court and Third Circuit precedent regarding LGBTQ issues. In addition, I would faithfully adhere to the judicial oath, whereby I would promise to “administer justice without respect to persons.”

b. Given your incendiary remarks, would you agree to recuse yourself on matters concerning the rights of LGBTQ people?

I would review any request for recusal, in any case and for whatever reason, pursuant to the provisions of 28 U.S.C. §455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

c. Do you still stand by your defense of Mr. Santorum’s comment?

I wrote this letter to the editor as a student over sixteen-years ago and do not stand by the comments in it. My letter was an inarticulate attempt to weigh in on the topic of free speech and open discussion. It is not a defense of Senator Santorum’s comments. I did not then – and do not now – agree with Senator Santorum’s comments.

d. Would you characterize those of us still concerned with your defense of this comment as “leftist sharks”?

No. I would not use that language today. Looking back upon it from the distance of time and the maturity I have developed through my professional experiences as a law clerk and practicing attorney and personal experiences as a husband, father, and community member, I regret the strident and insensitive tone.

Nomination of William Shaw Stickman, IV
United States District Court for the Western District of Pennsylvania
Questions for the Record
Submitted June 12, 2019

QUESTIONS FROM SENATOR BOOKER

1. In 2003, then-Senator Rick Santorum said, “If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”¹ He received substantial criticism for that statement. You wrote a letter to the editor of the *Pittsburgh Post-Gazette* defending Senator Santorum.² You wrote: “Even if the senator did equate homosexual intercourse with adultery, bigamy and incest, isn’t that his prerogative? Are we and the leaders whom we elect no longer allowed to disagree with the activities of certain groups?”³ You went on to say, “apparently, we’ve reached a point where the freedom of speech is only the right to agree with select groups. Dissenters be damned – and resign.”⁴

a. Do you stand by the comments in that letter to the editor?

I did not then – and do not now – agree with Senator Santorum’s comments.

b. At the time of writing the letter to the editor, did you agree with then-Senator Santorum’s comments?

See my response to Question 1.a.

c. Please explain why, if you’re confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case regarding LGBT issues based on your letter to the editor?

My letter was an inarticulate attempt to weigh in on the topic of free speech and open discussion. I did not then – and do not now – agree with Senator Santorum’s comments. Looking back upon it from the distance of time and with the maturity I have developed through my professional experiences as a law clerk and practicing attorney, and personal experiences as a husband, father, and community member, I am embarrassed by my letter, especially the strident and insensitive tone. If confirmed, every litigant in my courtroom can be assured that I will treat every person involved in every case fairly and with dignity and respect. That is what I do in my professional life and personal life, where I have

¹ Chris Mondics, *Santorum Remarks Outrage Gay Groups*, PITTSBURGH POST-GAZETTE (re-printed from Philadelphia Inquirer) (Apr. 22, 2003).

² Stickman letter to the Editor, *Free to Disagree*, PITTSBURGH POST-GAZETTE (Ap. 30, 2003) (SJQ Attachment 12(a) at p. 358).

³ *Id.*

⁴ *Id.*

worked closely with people of diverse backgrounds and experiences, including members of the LGBTQ community. As a lower court judge, I would also be bound by and faithfully apply Supreme Court and Third Circuit precedent regarding LGBTQ issues. In addition, I would faithfully adhere to the judicial oath, whereby I would promise to “administer justice without respect to persons.”

2. The American Bar Association says that “all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public.”⁵ In your Questionnaire you said, “I have not participated in any formal pro-bono program.”⁶

a. Do you agree that “all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public”?

Yes.

b. Why do you not participate in a formal pro-bono program?

Unlike large law firms, my firm does not have a formal pro-bono program. Nevertheless, I believe in giving back to the legal community by volunteering my time. Throughout my practice, I have done so in various ways. I served without compensation for six years on the Pennsylvania Civil Procedural Rules Committee, including one year as chair. In that time, I never missed either a meeting or a subcommittee meeting. This service required a significant investment of time. Although not a specific client retention, I believe that this service was for the good of the public as it helped to facilitate the fair and orderly administration of justice in Pennsylvania’s legal system.

In addition, for the last several years I have lectured without compensation at the University of Pittsburgh School of Law on approximately six occasions each year. I have served, without compensation, as a presenter for the young lawyers division of the local bar association. I have also invested a substantial amount of time in preparing written materials and lectures for continuing legal education programs without compensation. In addition to lecturing, I have taken the time to mentor law students and young lawyers.

Outside of the law, I have been an active volunteer in my community through multiple charitable organizations. I have tried to lend a helping hand to those in need, especially the elderly and those in hospitals.

c. How many hours each year do you dedicate to pro bono legal representation? If you do not provide pro bono legal representation, please explain why you do not provide such representation.

Please see my response to Question 2.b. above.

⁵ AMERICAN BAR ASSOCIATION, *A Guide Explanation to Pro Bono Services* (July 26, 2018) https://www.americanbar.org/groups/legal_education/resources/pro_bono/.

⁶ SJQ at p. 29.

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.⁷ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁸ 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.⁹ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁰

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

I believe that racial bias, implicit or otherwise, presents serious concerns for our criminal justice system.

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

Yes.

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

As a member of Leadership Pittsburgh, I recently attended a class focused on the criminal justice system and corrections. The program included an overview of bias in our justice system and, in addition, the disproportionate representation of people of color in our jails and prisons.

d. 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.¹¹ Why do you think that is the case?

I have not studied this specific report and am not equipped to opine on this issue.

e. 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

⁷ 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>.

⁸ *Id.*

⁹ 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>.

¹⁰ *Id.*

¹¹ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

mandatory minimum sentences.¹² Why do you think that is the case?

I have not studied this specific study and am not equipped to opine on this issue.

f. 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?

Every judge has an affirmative obligation to fulfil the requirements of the judicial oath, which requires him or her “to administer justice without respect to persons, and do equal right to the poor and to the rich.” A fundamental part of this obligation is that a judge treat every person equally.

4. 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.¹³ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁴

a. Do you believe there is a direct link between increases in a state’s incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this document or this issue and am not equipped to opine on this issue.

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 document or this issue and am not equipped to opine on this issue.

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

Yes.

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

I generally do not use labels since they can have different meanings for different people. I am aware that some people understand originalism to refer to a manner of constitutional interpretation that attempts to discover and apply the original public meaning of the constitutional text in question. If confirmed as a district court judge, I would be bound by the precedent of both the

¹² Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹³ 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>.

¹⁴ *Id.*

United States Supreme Court and the Third Circuit, both of which have on occasion examined certain constitutional issues through the prism of originalism. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) both the majority and the dissenting opinion used originalism in their examination of the issues before the Supreme Court.

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

I generally do not use labels since they can have different meanings for different people. I am aware that some people understand textualism to refer to a method of statutory interpretation which looks to the language of a statute as the primary indication of the statute's meaning.

8. 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 indicated that if the statutory language at issue is ambiguous, legislative history is a tool that can be employed to determine the meaning of the text.

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?

I would consider all relevant arguments advanced by litigants.

9. 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?

Yes. If confirmed, all persons in my courtroom will be treated with fairness, dignity and respect.

10. Do you believe that *Brown v. Board of Education*¹⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As a general matter, I believe it is inappropriate for a nominee to federal judicial office to opine as to whether Supreme Court decisions were correctly decided unless a nominee has previously offered public commentary on the decision at issue. However, *Brown v. Board of Education*, because of its singular and unique importance in American jurisprudence and because I do not believe that the holding of *Brown* is likely to come before me if I am confirmed, is different. *Brown* was correctly decided. The Supreme Court's unanimous decision appropriately ended the terrible doctrine of separate but equal. If I am confirmed, I will faithfully follow and apply *Brown*

¹⁵ 347 U.S. 483 (1954).

and all Supreme Court and Third Circuit controlling precedent.

11. Do you believe that *Plessy v. Ferguson*¹⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. As the Supreme Court held in *Brown v. Board of Education*, *Plessy v. Ferguson* was not correctly decided.

12. 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?

No.

13. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”¹⁷ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

I cannot foresee a situation where a judge’s race or ethnicity would ever be the basis for recusal or disqualification.

14. 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.”¹⁸ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has stated that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

¹⁶ 163 U.S. 537 (1896).

¹⁷ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁸ 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 June 12, 2019
For the Nomination of

William Stickman, IV, to the U.S. District Court for the Western District of Pennsylvania

1. 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?

I would follow the process set forth by the Supreme Court and the Third Circuit. In *United State v. Gunter*, 462 F.3d 237 (3d. Cir. 2006), the Court set forth a three-part process for a district court to employ in imposing a sentence:

- (1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before *Booker*;
- (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force; and,
- (3) Finally they must exercise their discretion by considering the relevant §3553(a) factors in setting the sentence they impose regardless of whether it varies from the sentence calculated under the Guidelines.

I would also take into account factors such as the indictment, pre-sentence investigation report, sentencing memoranda and any statements by the defendant and victim(s).

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

I would apply the law of the Supreme Court and Third Circuit, as set forth at Question 1.a. In addition, I would carefully study resources regarding sentencing published by the U.S. Sentencing Commission and examine statistics regarding sentences of the Western District of Pennsylvania and other districts.

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

Federal Sentencing Guidelines provide guidance as to the circumstances when a departure from the ranges set forth in the Guidelines is appropriate. *See* Federal Sentencing Guidelines, Chapter 5. If confirmed, I would follow the direction of the Sentencing Guidelines regarding departures and the guidance of the Supreme Court and the Third Circuit.

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 have not studied issues regarding mandatory minimum sentences and am not, therefore, equipped to render an opinion on this issue. In addition, as a judicial nominee, I believe that providing such an opinion would be inappropriate because this issue involves the consideration of matters of policy. If confirmed, I will fully and faithfully comply with all applicable statutes and precedent.

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

Please see my response to Question 1.d.i.

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

Please see my response to Question 1.d.i.

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 efforts to address the injustice, including:**

1. Describing the injustice in your opinions?

As a judicial nominee, I do not believe that it is appropriate to commit to taking any specific course of action in rendering a decision or imposing a sentence, other than to apply the law as set forth by Congress and applicable precedent. In addition, I believe that principles of separation of powers require a judge to be careful to avoid taking a position on the wisdom or other policy considerations underlying a statute, which is left to the authority Congress.

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>

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

Please see my response to Question 1.d.iv.1.

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

Please see my response to Question 1.d.iv.1.

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?**

If confirmed, I would consider all options permitted by statute and set forth in the sentencing guidelines, including alternatives to incarceration.

2. 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. I am aware, for example, of the disproportionate number of people of color who are serving time in our nation’s prisons and jails.

3. 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?**

If confirmed, I will make hiring decisions on a case-by-case basis. In doing so, I will be sensitive to the interest of diversity and welcome opportunities to hire and promote women and minority candidates.