Nomination of Eric David Miller to the U.S. Court of Appeals for the Ninth Circuit
Questions for the Record
October 31, 2018

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 a lower court to depart from Supreme Court precedent. Even if a Supreme Court precedent appears to have been called into question by subsequent cases, a lower court must "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

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

   In rare cases, it may be appropriate for a circuit court judge to identify inconsistencies or confusion created by the Supreme Court's precedents, or to call the Supreme Court's attention to issues that may warrant its review. In such cases, as in any other, the circuit court judge remains bound to apply existing Supreme Court precedent.

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

   In the Ninth Circuit, a panel is bound to follow the decisions of prior panels and may depart from circuit precedent only if an intervening Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The court may reconsider circuit precedent when sitting en banc, but en banc review is appropriate only in the narrow circumstances identified in Federal Rule of Appellate Procedure 35.

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

   This question has been the subject of considerable debate within the Supreme Court. Ultimately, the decision to overturn Supreme Court precedent is for the Supreme Court alone, and a lower court judge is strictly bound to follow Supreme Court 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"?

Roe has indeed survived multiple attempts to overrule it and thus appears to satisfy the definition of a "super-precedent" set out above. From the point of view of a lower-court judge, however, the distinction between "super-precedent" and other forms of precedent is immaterial. *Roe*, like all Supreme Court precedent, is strictly binding on the lower courts. If confirmed, I would faithfully apply it.

b. Is it settled law?

Yes.

3. 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?

Heller is a binding precedent of the Supreme Court, and if confirmed, I would faithfully apply it. It would be inappropriate for me to offer my personal opinions on criticisms of *Heller*—or any other Supreme Court decision—whether from a dissenting Justice or anyone else. *See Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64 (2010) ("I think that . . . it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.") (statement of Hon. Elena Kagan).

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

The Court in *Heller* stated that "the right secured by the Second Amendment is not unlimited," and that "nothing in our opinion should be taken to cast doubt on

longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying 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). The Court "also recognize[d] another important limitation on the right to keep and carry arms"—namely, "that the sort of weapons protected were those in common use at the time." *Id.* at 627 (internal quotation marks omitted).

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

The majority and the dissenting Justices disagreed on the correct interpretation of Supreme Court precedent. *Compare* 554 U.S. at 619-26, *with id.* at 672-79 (Stevens, J., dissenting). For the reasons explained in my answer to question 3(a) above, it would be inappropriate for me to opine on which Justices were correct.

4. 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?

Although I am generally familiar with the decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), I have not had occasion to study this precise question. In *Citizens United*, the Supreme Court stated that "First Amendment protection extends to corporations." *Id.* at 342. Determining whether, and in what contexts, First Amendment protection might vary depending on whether the speaker is an individual or a corporation would require a careful examination of *Citizens United* and other relevant Supreme Court and Ninth Circuit precedents.

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

I have not had occasion to study this question. If called upon to address it, I would carefully review all relevant Supreme Court and Ninth Circuit precedents.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that certain for-profit corporations may assert claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, but it did not have occasion to resolve whether such corporations may assert claims under the Free Exercise Clause of the First Amendment. If confronted with that question, I would carefully examine *Hobby Lobby* and all other relevant Supreme Court and

Ninth Circuit precedents.

5. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 1996. 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?

   As an initial matter, I note that I have not "been a member of the Federalist Society since 1996." Although I joined the Federalist Society in 1996 and have been a member at various times since then, I am not currently a member, and I have not been a member in most of the years between 1996 and the present.

   I did not write the quoted statement; I have never discussed it with anyone; and I do not know what the Federalist Society means by it. Since my graduation from law school in 1999, my experience with law schools has been limited to the University of Washington School of Law, where I have served as a part-time lecturer. In that role, I have not observed the University of Washington School of Law to be dominated by advocacy of "a centralized and uniform society."

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

   I did not write the quoted statement; I have never discussed it with anyone; and I do not know what the Federalist Society means by it.

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

   I did not write the quoted statement; I have never discussed it with anyone; and I do not know what the Federalist Society means by it.

6. In numerous cases, you have represented clients adverse to Indian tribes and tribal interests. **For each of the below matters, state (1) whether you handled the case on a *pro bono* basis, (2) who your clients were, (3) whether the clients were existing clients of your law firm before you took on the matter, (4) how you became involved in the matter, and**

(5) what your role in the matter was. Answer each of these questions separately for each matter listed below.

The question states that I have been involved in "numerous cases" on behalf of clients adverse to Indian tribes, but it is worth noting that the list below—which appears long in part because it includes the same case listed several times—represents a small fraction of the matters I have handled during my time in private practice, which itself has been significantly less than half of my legal career. With that proviso, my answers are set out below.

a. Friends of Amador County v. Jewel

This was not a pro bono representation. The firm's client was Friends of Amador County, a community organization in Amador County, California. The client retained the firm specifically to handle this matter, which involved filing a petition for a writ of certiorari in the Supreme Court. I was invited to assist by the lead partner on the matter. My role was to work with the lead partner in drafting a petition for a writ of certiorari and a reply brief in support of the petition; I filed that petition and brief as counsel of record.

b. New Mexico v. Department of the Interior

This was not a pro bono representation. The firm's client was the State of New Mexico, which was a client of the firm's before this matter began. I was invited to assist by the lead partner on the matter. My role was to be part of a team of attorneys who filed a complaint, preliminary-injunction papers, and summary-judgment papers in federal district court. I argued the preliminary-injunction motion. On appeal, I was part of a team of attorneys who filed a brief in the Tenth Circuit. I presented oral argument in the appeal.

c. Citizens Against Reservation Shopping v. Zinke

This was not a pro bono representation. The firm's clients were Citizens Against Reservation Shopping (a community organization in Washington State), Al Alexanderson and Greg and Susan Gilbert (homeowners in Cowlitz County, Washington), and Dragonslayer, Inc. and Michels Development, LLC (operators of card rooms). All of the clients were clients of the firm before I became involved in the matter, several for more than a decade. After administrative proceedings were completed, I was invited to assist by the lead partner on the matter. I provided input on the district court filings and was part of a team of attorneys who drafted the briefs on appeal. A different partner presented oral argument in the D.C. Circuit. I then was part of a team of attorneys who drafted a petition for a writ of certiorari and a reply brief in support of the petition; I filed that petition and brief as counsel of record.

d. Washington v. United States

This was not a pro bono representation. The firm's clients were a group of business,

home building, real estate, farming, and municipal organizations, mostly in the Pacific Northwest—specifically, the Association of Washington Business, the National Association of Home Builders, the Building Industry Association of Washington, the Montana Building Industry Association, the Oregon Home Builders Association, the Master Builders Association of King and Snohomish Counties, Washington Realtors, the Washington State Farm Bureau, the Idaho Farm Bureau Federation, the Montana Farm Bureau Federation, the Oregon Farm Bureau, and the Association of Washington Cities. The clients retained the firm specifically to handle this matter in the Supreme Court. I was approached by the clients to file amicus briefs, first in support of the certiorari petition filed by the State of Washington, and then in support of the State's position on the merits. (The Association of Washington Cities was involved only in the first of those briefs.) My role was to be part of a team of attorneys who prepared those briefs; I filed the briefs as counsel of record.

e. Upper Skagit Indian Tribe v. Lundgren

This was a pro bono representation. The firm's clients were Sharline and Ray Lundgren. The clients retained the firm specifically to handle this matter in the Supreme Court. I became involved after communications with co-counsel at a different firm. My role was to be part of a team of attorneys who filed a brief on the merits in the Supreme Court; I was not counsel of record. I presented oral argument in the Supreme Court. After the case was remanded to the Washington Supreme Court, I assisted with the proceedings on remand.

f. Lewis v. Clarke

This was a pro bono representation. The firm's clients were Brian and Michelle Lewis. The clients retained the firm specifically to handle this matter in the Supreme Court. I became involved after communications with co-counsel at a different firm. My role was to be part of a team of attorneys who filed a petition for a writ of certiorari, a reply brief in support of certiorari, a merits brief, and a reply brief on the merits in the Supreme Court; I filed the petition and those briefs as counsel of record. I presented oral argument in the Supreme Court. After the case was remanded to the Connecticut Supreme Court, I did not continue to participate.

g. La Cuna De Aztlan Sacred Sites Protection v. U.S. Department of Interior

This was not a pro bono representation. The firm's clients were BrightSource Energy, Inc., Solar Partners I, LLC, Solar Partners II, LLC, and Solar Partners VII, LLC. The clients were clients of the firm before I became involved in the matter. After litigation in the district court and the court of appeals were completed, I was invited to assist by the lead partner on the matter. My role was to work with the lead partner in drafting a brief in opposition to a petition for a writ of certiorari in the Supreme Court; I filed that brief as counsel of record.

h. Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell

This is the same case identified in question 6(c) above. The caption changed between the D.C. Circuit phase of the proceedings and the Supreme Court phase.

i. Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals Inc.

This is not a pro bono representation. The firm's client is Mylan Pharmaceuticals Inc., which was a client of the firm's for many years before the matter began. I was invited to assist by the lead partner on the matter. My role was to be part of a team of attorneys who filed briefs before the Patent Trial and Appeal Board and then before the Federal Circuit. I presented oral argument in the Federal Circuit. This litigation is ongoing, and I remain part of the team of attorneys working on it.

j. Citizens Against Reservation Shopping v. Zinke

This is the same case identified in question 6(c) above.

k. Robinson v. Jewell

This was not a pro bono representation. The firm's clients were Tejon Ranch Company and affiliated entities. The clients were clients of the firm before I became involved in the matter. After the case had been litigated in the district court, I was invited to assist by the lead partner on the matter. My role was to be part of a team of attorneys who drafted the briefs on appeal and to present oral argument in the Ninth Circuit.

l. Mashantucket Pequot Tribe v. Town of Ledyard

This was not a pro bono representation. The firm's client was the Town of Ledyard, Connecticut, which was a client of the firm's before I became involved in the matter. After the case had been litigated in the district court and fully briefed in the court of appeals, I was invited to assist by the lead partner on the matter. My role was to present oral argument in the Second Circuit.

m. Stand up for California! v. Department of Interior

This is not a pro bono representation. The firm's clients are Joe Teixeira, Patty Johnson, and Lynn Wheat (individuals who reside in Elk Grove, California), and Stand Up for California!, a nonprofit organization. The clients were clients of the firm before I become involved in the matter. After administrative proceedings had been completed and litigation was initiated in district court, I was invited to assist by the lead partner on the matter. My role was to be part of a team of attorneys who drafted summary-judgment papers. I presented oral argument on a summary-judgment motion in district court. Litigation remains ongoing, and the parties are currently conducting discovery. I have not been involved in discovery proceedings.

n. Public Utility District No. 1 of Klickitat County v. Department of Interior

This is not a pro bono representation. The firm's client is the Public Utility District No. 1 of Klickitat County, Washington, which has been a client of the firm's since before this matter began. I was invited to assist by the lead partner on the matter. My role was to be part of a team of attorneys who filed a complaint and an opposition to a motion to dismiss. After the complaint was dismissed, a notice of appeal was filed, but the appeal was dismissed before any briefs were filed. Administrative proceedings remain ongoing. I have provided occasional consultation on those proceedings but have not otherwise remained involved.

o. All other cases in which you represented clients adverse to a Tribe or Tribal interests.

To the best of my recollection, there have been only two other cases in which I have filed briefs or appeared in court on behalf of clients adverse to a Tribe or Tribal interests.

Young v. Fitzpatrick, 133 S. Ct. 2848 (2013). This was a pro bono representation. The firm's client was Chris Young, as personal representative of the estate of Jeffry Young. The client retained the firm specifically to handle this case in the Supreme Court. I became involved after communications with co-counsel at a different firm. By the time I became involved, the case had been fully litigated in state court; a petition for a writ of certiorari had been filed; and the Supreme Court had invited the Solicitor General to file a brief expressing the views of the United States. I assisted co-counsel in encouraging the Solicitor General to file a brief supporting the petition and then in filing a supplemental brief responding to the Solicitor General's brief. I was not counsel of record.

Citizens for a Better Way v. Brown, No. C075018, 2016 WL 5940923 (Cal. Ct. App. Oct. 13, 2016). This was not a pro bono representation. The firm's clients were Citizens for a Better Way, Stand Up for California!, and Grass Valley Neighbors (community organizations in California). The clients were clients of the firm before I became involved in the matter. After litigation had been initiated, I was invited to assist by the lead partner on the matter. My role was to be part of a team of attorneys who filed an opposition to a demurrer in a California trial court. I presented oral argument in opposition to the demurrer. Thereafter, I was part of a team of attorneys who filed briefs on appeal. I did not present oral argument in the appeal.

I have also provided consultation and advice in various other matters in which I did not file a brief or appear in court. None of those matters has involved a significant investment of my time.

7. You have represented clients on a *pro bono* basis in cases opposed to Tribal interests.

***a.* In general, what criteria do you use to decide whether to take on a *pro bono* case?**

Most of the pro bono cases in which I have participated have been cases for which another attorney was primarily responsible, and in which I participated because I was asked to assist. In selecting those pro bono matters for which I was the lead attorney, I have focused on finding ways to apply my experience litigating in the Supreme Court to benefit pro bono clients. Thus, the principal criterion I have applied is whether the matter would offer an opportunity to brief or argue a case in the Supreme Court.

b. Have you ever declined to become involved in a *pro bono* case that your firm was handling? Why?

No. I have been involved in nearly two dozen pro bono matters during my six years at Perkins Coie. In most of those cases, my involvement consisted of offering advice on an appellate brief or participating in a moot court to assist an attorney in preparing for oral argument. Scheduling constraints have sometimes required me to limit the extent of my involvement in a particular matter, but I do not recall ever having declined to participate altogether, and I have never done so because of any personal opinions about the position being advocated on behalf of the firm's client.

c. Have you ever represented a Tribal interest in a *pro bono* case?

No. Attorneys have an ethical obligation to avoid conflicts of interest, and lawyers associated with law firms must avoid imputed conflicts of interest. *See generally* Wash. R. Prof. Conduct 1.10. Because Perkins Coie has historically represented a variety of entities adverse to Indian tribes, imputed conflicts have generally precluded my representation of tribes on any basis, including pro bono. Although Perkins Coie has represented tribes in some matters, those have tended to be business transactions or other matters in areas of the law in which I lack expertise.

8. What is your understanding of the nature and scope of the United States' treaty obligations with Indian tribes?

The Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. That clause applies to treaties with Indian tribes. Such treaties must be interpreted "to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

9. What is the significance of a Tribe's status as federally recognized in the Federal Register?

Congress has directed the Secretary of the Interior to publish annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Federally Recognized Indian Tribe List Act of 1994, § 104(a), Pub. L. No. 103-454, 108 Stat. 4791. The Secretary has explained that the listed entities "are

acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such Tribes" and "are eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes." 83 Fed. Reg. 34,863 (July 23, 2018).

10. **What effect does a Tribe's status as federally recognized have on its right to sovereign immunity?**

    The Ninth Circuit has held that a federally recognized tribe is necessarily entitled to sovereign immunity. *See Native Vill. of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992). An entity that is not federally recognized may also be deemed a tribe entitled to immunity, provided that certain conditions are met. *Id.*

11. In 2003, as an appellate attorney in the Justice Department, you filed a brief defending the Department of Defense in *Britell v. United States*. At issue in this case was whether the Department of Defense was required to reimburse the spouse of a service member for the cost of an abortion for a non-viable fetus. The brief you filed argued that "Congress could rationally decide that the government should not be in the business of rendering judgments about which potential lives are worth living, and which are so devoid of value that the government should pay to terminate them."

    a. **What was your role in this case?**

       I worked on this case as a line attorney in the Appellate Staff of the Civil Division of the Department of Justice. Under the direction of more senior attorneys, I prepared an initial draft of the opening brief and the reply brief. The draft briefs were extensively revised by several more senior attorneys in the Department, including Deputy Assistant Attorney General Gregory Katsas. Mr. Katsas presented oral argument.

    b. **What role did you play in selecting which arguments would be included in the brief?**

       The responsibility to determine whether the United States should appeal an adverse district court decision is committed to the Solicitor General of the United States. *See* 28 C.F.R. § 0.20(b). In making that determination, the Solicitor General decides which issues are to be raised in the appeal. Beyond that observation, my professional obligation to safeguard the confidences of former clients prohibits me from disclosing the precise process by which the government formulated its position. *See* Wash. R. Prof. Conduct 1.9(c). I can say, however, that in a case of sufficient importance to attract the personal involvement of the Deputy Assistant Attorney General, the selection of arguments to be presented would not have been left to a junior line attorney.

12. In 2002, as an appellate attorney in the Justice Department, you filed an amicus brief in support of an Ohio law banning partial-birth abortions in *Women's Medical Professional*

Corp. v. Taft. Your brief referred to partial-birth abortions as "especially troubling."

a. What was your role in this case?

I worked on this case as a line attorney in the Appellate Staff of the Civil Division of the Department of Justice. Under the direction of more senior attorneys, I prepared an initial draft of the brief. The brief was then extensively revised by several more senior attorneys, including Deputy Assistant Attorney General Gregory Katsas. No attorney presented oral argument on behalf of the United States.

b. What role did you play in selecting which arguments would be included in the brief?

The responsibility to determine whether the United States should file an amicus brief in any case is committed to the Solicitor General of the United States. *See* 28 C.F.R. § 0.20(c). In making that determination, the Solicitor General decides which issues are to be presented in the brief. Beyond that observation, my professional obligation to safeguard the confidences of former clients prohibits me from disclosing the precise process by which the government formulated its position. *See* Wash. R. Prof. Conduct 1.9(c). I can say, however, that in a case of sufficient importance to attract the personal involvement of the Deputy Assistant Attorney General, the selection of arguments to be presented would not have been left to a junior line attorney.

13. In 2002, as an appellate attorney in the Justice Department, you filed a brief for the Attorney General in *Detroit Free Press v. Ashcroft*. This case concerned the federal government's attempt to close immigration hearings to the press and public in cases of "special interest" to the government's investigation of the September 11, 2001 attacks.

a. What was your role in this case?

I worked on this case as a line attorney in the Appellate Staff of the Civil Division of the Department of Justice. Under the direction of more senior attorneys, I prepared an initial draft of the opening brief and the reply brief. The briefs were extensively revised by several more senior attorneys in the Department, including Deputy Assistant Attorney General Gregory Katsas. Mr. Katsas presented oral argument.

b. What role did you play in selecting which arguments would be included in the brief?

The responsibility to determine whether the United States should appeal an adverse district court decision in any case is committed to the Solicitor General of the United States. *See* 28 C.F.R. § 0.20(b). In making that determination, the Solicitor General decides which issues are to be raised in the appeal. Beyond that observation, my professional obligation to safeguard the confidences of former clients prohibits me from disclosing the precise process by which the government formulated its position. *See* Wash. R. Prof. Conduct 1.9(c). I can say, however,

that in a case of sufficient importance to attract the personal involvement of the Deputy Assistant Attorney General, the selection of arguments to be presented would not have been left to a junior line attorney.

14. In 1999, you authored a law review article arguing that courts should, *sua sponte*, invoke a federal law that purported to overrule the Supreme Court's decision in *Miranda v. Arizona*. Your note argued that "[i]n federal cases presenting *Miranda* issues, courts should consider the applicability of Section 3501 *sua sponte*. To refrain from doing so is to refrain from deciding the case according to the law." The law at issue in your note was struck down by the Supreme Court in 2000.

In what circumstances is it appropriate for a judge to *sua sponte* raise and decide issues not presented by the parties?

A court always has an obligation to determine that it has subject-matter jurisdiction. Thus, if an issue affects subject-matter jurisdiction, a court is required to consider it even if it has not been raised by the parties. *See Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 278 (1977). Outside of that narrow context, however, a court has discretion to decide whether or not to raise an issue *sua sponte*. I believe that such discretion should be exercised very rarely—much more rarely than I suggested in the article I wrote as a law student in 1999. With the benefit of experience gained in many years of practice, I believe that the interests of justice are generally best served when courts confine themselves to resolving the issues and arguments advanced by the parties. That practice ensures that the parties will have notice and an opportunity to respond to the issues that the court may decide. It also maintains a clear distinction between the role of the lawyers (advocating a particular result, and raising issues they believe will help their clients achieve that result) and the role of the judges (neutrally applying the law in order to resolve the dispute presented by the parties).

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

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

    As noted in my response to question 26(a) on the Senate Judiciary Committee Questionnaire, I interviewed with officials from the White House and the Department of Justice more than a year ago, on September 21, 2017. I do not remember everything discussed in that interview. I do remember discussing the Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), which governs the standard of judicial deference to an administrative

agency's interpretation of the statutes it administers. I stated that *Chevron* is binding Supreme Court precedent and that, if nominated and confirmed, I would follow it in any case to which it applies.

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?

I cannot definitively account for every informal conversation I have had since 2016, let alone the group memberships of every person to whom I have spoken during this period. However, I do not recall any conversations responsive to this question.

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

Administrative law is a vast field that would be difficult to cogently summarize. If confirmed, I would faithfully apply all Supreme Court and Ninth Circuit precedent in the field.

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

The Supreme Court has stated that considering legislative history is appropriate "to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

17. 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.

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

Upon receiving the questions, I conducted research and reviewed my records and those of my law firm in order to gather the information necessary to respond. I then drafted answers to the questions. With respect to questions pertaining to matters I have litigated, I solicited comments from some of the attorneys with whom I worked on those matters. I also solicited comments from the Office of Legal Policy in the Department of Justice. I revised some of my answers in light of those comments. My answers are my own.

Senator Dick Durbin
Written Questions for Eric Miller and Bridget Bade
October 31, 2018

For questions with subparts, please answer each subpart separately.

Questions for Eric Miller

1. On August 21, the National Congress of American Indians and the Native American Rights Fund sent a letter to the Committee raising serious concerns about your nomination. The letter summarized 11 cases you have worked on in the last five years in which you have opposed the interests of Indian tribes. The letter said:

> Our concern is that he chose to build a law practice on mounting repeated challenges to tribal sovereignty, lands, religious freedom, and the core attribute of federal recognition of tribal existence. His advocacy has focused on undermining the rights of Indian tribes, often taking extreme positions and using pejorative language to denigrate tribal rights. Indeed, his law firm website touts his record, with over half of his private practice achievements coming at the expense of tribal governments. Given his strong preference for clients who oppose tribes, there are considerable questions about whether he would be fair in hearing cases regarding tribal rights.

Given your extensive record of advocacy against tribal rights and interests, will you commit that if you are confirmed you will recuse yourself from hearing cases involving tribal rights and interests?

The quoted statement notes that I have argued some cases in which my firm's clients opposed tribal interests, but it overlooks that I have also argued on behalf of the United States in support of tribal interests. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). It is also incorrect to suggest that I have "built a law practice" on opposing tribal interests. Most of my career has been spent in public service, and during the time I have spent in private practice, I have been a generalist appellate litigator, with a relatively small fraction of my time devoted to work involving Indian tribes. In all of the cases I have handled as an advocate in this and other areas of the law, I have zealously advanced the views of my clients, which have not necessarily been my own views. *See* Wash. R. Prof. Conduct 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

The positions I have advanced on behalf of my clients are not fairly characterized as "extreme." In private practice, I have presented oral argument in appellate courts in six cases involving Indian tribes. In five of those cases, my client's position prevailed in a unanimous decision. *See Lewis v. Clarke*, 137 S. Ct. 1285 (2017); *Saint Regis Mohawk Tribe v. Mylan Pharm., Inc.*, 896 F.3d 1322 (Fed. Cir. 2018); *New Mexico v. Department of the Interior*, 854

F.3d 1207 (10th Cir. 2017); *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). In the sixth, the Court remanded the case without reaching the merits of the argument I advanced on behalf of my client. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018).

As explained in more detail in my response to question 6 from Senator Hirono, I have not used "pejorative language" in reference to Indian tribes or anyone else. I believe it is important for all participants in litigation—parties, lawyers, and judges—to treat each other with civility and respect. I have done so throughout my career, and the bipartisan letters of support for my nomination from attorneys with whom I have worked reflect that record.

If I were to be confirmed, I would evaluate potential recusal questions by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any other applicable laws, rules, or practices. It would not be appropriate for me to commit in advance to a particular resolution of such questions.

2.

a. **Were you correct to say in your brief in the 2013 case *Walston v. Boeing Co.* "there is no evidence that exposure to asbestos is certain to cause injury"?**

Yes, and the Washington Supreme Court agreed. Specifically, the court stated: "As the experts in this case acknowledge, asbestos exposure is not *certain* to cause mesothelioma or any other disease." *Walston v. Boeing Co.*, 334 P.3d 519, 522 (Wash. 2014) (emphasis added). That does not mean, of course, that asbestos is safe or that it is appropriate for workers to be exposed to it. To the contrary, all parties in *Walston* agreed that, in the words of the Washington Supreme Court, any asbestos exposure "does cause a *risk* of disease." *Id.* The issue in the litigation was not whether workers should be exposed to asbestos—they obviously should not—nor was it whether workers who are injured as a result of such exposure should be compensated—they obviously should. The issue was whether such compensation should be provided through the workers' compensation system or through a tort action against the employer. The Washington Supreme Court had previously held that a tort action is available only when the employer "had actual knowledge that an injury was *certain* to occur and willfully disregarded that knowledge." *Birklid v. Boeing Co.*, 904 P.2d 278, 285 (Wash. 1995) (emphasis added). The court applied that principle in *Walston* to rule in favor of Boeing.

b. **Are you aware that, according to the Occupational Health and Safety Administration "[t]here is no 'safe' level of asbestos exposure for any type of asbestos fiber" (see https://www.osha.gov/SLTC/asbestos/), and that according to the National Institutes Of Health's National Cancer Institute, "the overall evidence suggests there is no safe level of asbestos exposure" (see https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet)? Both of these statements reference pre-2013 studies.**

Yes. One of the briefs we filed for Boeing cited a statement from the Occupational Safety and Health Administration making essentially that point. *See* Boeing's Response to Brief of Amicus Curiae United Steelworkers Local 12-369, at 7-8, *Walston v. Boeing Co.*, 334 P.3d 519 (Wash. 2014) (No. 88511-7).

3. **You say in your questionnaire that when you worked in the Office of Legal Counsel (OLC) from 2003-2004, you drafted formal opinion memoranda and provided informal legal advice. Please list all OLC memoranda that you worked on or upon which you provided legal advice during your tenure at OLC.**

I did not retain non-public documents or records when I left the Office of Legal Counsel. I therefore do not have a list of the matters on which I worked.

A significant portion of my time in the Office of Legal Counsel was devoted to drafting comments on pending legislation and to reviewing proposed executive orders for form and legality. Those projects generally did not result in opinion memoranda. I also spent significant time conducting legal research to assist the Assistant Attorney General or Deputy Assistant Attorneys General in the provision of informal legal advice.

Some of the memoranda that I recall working on have not been published, and it would be a violation of my ongoing professional obligations to a former client for me to publicly disclose them. *See* Wash. R. Prof. Conduct 1.9. In an effort to answer this question, I have reviewed the website of the Office of Legal Counsel to identify opinions that are now public and to which I may have contributed. Other than the memoranda identified in response to question 7 from Senator Booker, my review identified only one opinion: *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30 (2004).

4.

a. **Do you believe that judges should be "originalist" and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

A lower-court judge must always follow Supreme Court precedent. If the Supreme Court has spoken to a particular constitutional question, a judge should follow that precedent. If the Court has not spoken directly to the question, a judge should follow any more general guidance the Court has provided. In some contexts, the Court has looked to original public meaning in interpreting the Constitution. *See*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). In other contexts, it has not. *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005).

b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

> …no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

The interpretation of the Foreign Emoluments Clause is the subject of pending litigation. *See District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018). Canon 3(A)(6) of the Code of Conduct for United States Judges therefore prohibits me from opining on it.

5. You say in your questionnaire that you have been a member of the Federalist Society intermittently since 1996.

   a. **Why did you join the Federalist Society?**

      I joined the Federalist Society because I enjoyed the speakers and debates it hosted at my law school.

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

      As a judicial nominee, I am prohibited by Canon 5 of the Code of Conduct for United States Judges from commenting on the political aspects of the nomination process.

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

      I attended the annual convention only in 1999.

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

      I did not attend the speech.

6.

a. **Is waterboarding torture?**

Yes, waterboarding constitutes torture whenever it is intentionally used "to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1).

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

Congress has provided that no person in the custody or under the control of the United States government may be subjected to any interrogation technique not authorized in the Army Field Manual. *See* 42 U.S.C. § 2000dd-2(a)(2). Waterboarding is not authorized in the Army Field Manual.

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

Please see my answers to questions 6(a) and 6(b) above. In addition, I note that the Supreme Court has held that detainees must be treated consistently with Common Article 3 of the 1949 Geneva Conventions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2004). That provision prohibits any "outrages upon personal dignity, in particular humiliating and degrading treatment." Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316.

7. **Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

Canon 5 of the Code of Conduct for United States Judges prohibits me from commenting on matters of political controversy.

8. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

Judicial nominees should answer all questions truthfully and to the maximum extent permitted by the Code of Conduct for United States Judges and the rules of privilege.

9.

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

I have no knowledge of any such donations, nor am I aware that the Judicial Crisis Network has supported my nomination. The question whether such donations would be problematic is a matter of political controversy, and under Canon 5 of the Code of Conduct for United States Judges, I am prohibited from commenting on it.

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

If confirmed, I would apply the recusal requirements specified in 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and all pertinent advisory opinions. Beyond that, the disclosure or nondisclosure of any such donations constitutes a matter of ongoing public debate on which Canon 5 of the Code of Conduct for United States Judges prohibits me from opining.

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

Please see my responses to questions 9(a) and 9(b) above.

10.

a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not had occasion to study this question.

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

I have not had occasion to study this question.

Nomination of Eric D. Miller, to be
United States Circuit Judge for the Ninth Circuit
Submitted October 31, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. Various tribal rights advocacy groups have submitted letters in opposition to your nomination based on a perceived hostility toward Native American "tribal sovereignty, treaty rights, and federal trust responsibility." In various briefs and cert petitions, you have found against the stated interest of tribal parties.

a. How would you characterize your beliefs and legal views regarding tribal sovereignty, treaty rights, and federal trust responsibility in relation to the United States Constitution and federal law?

The question refers to a "perceived hostility" to Native American interests, but my record reveals no such hostility. I have argued some cases in which my firm's clients opposed tribal interests, but I have also argued in support of tribal interests. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). Most of my career has been spent in public service, and during the time I have spent in private practice, I have been a generalist appellate litigator, with a relatively small fraction of my time devoted to work involving Indian tribes. In all of the cases I have handled as an advocate in this and other areas of the law, I have zealously advanced the positions of my clients, which have not necessarily reflected my own views. *See* Wash. R. Prof. Conduct 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."). Respectfully, it is thus not true that I "have found against the stated interest of tribal parties." I understand the different roles of an advocate and a judge and, if I were to be confirmed to the Ninth Circuit, the positions I advanced on behalf of my clients as an attorney would play no role in my decisionmaking.

On the specific issues raised in the question, my understanding of the law is as follows:

The Supreme Court has held that Indian tribes are "separate sovereigns pre-existing the Constitution," and therefore "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). "Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (internal quotation marks omitted). Tribes also retain significant regulatory and adjudicatory jurisdiction.

The Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. That clause applies to treaties with Indian tribes. Such treaties must be interpreted "to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

The Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). Thus, "[i]n carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party" and "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). In addition, when Congress has "give[n] the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians," it has "establish[ed] a fiduciary relationship and define[d] the contours of the United States' fiduciary responsibilities." *Mitchell*, 463 U.S. at 224.

2. In June 2017, you authored an opinion piece in support of the defendant manufacturer in *Taylor v. Intuitive Surgical, Inc.*, 389 P.3d 517 (Wash. 2017), arguing that requiring manufacturers to warn purchasing hospitals was an "overly broad expansion of product-liability law." The letter was published through Washington Legal Foundation, a conservative advocacy group.

a. What is your understanding of the Washington Legal Foundation's political and philosophical views and of its role in the legal community?

I am aware that the Washington Legal Foundation is generally considered to be a conservative organization, but I have not examined its views in detail and do not know enough about its activities to answer this question.

b. Are you aware that the Washington Legal Foundation is funded by the Koch Family Foundation, fossil fuel interests, and tobacco interests, along with dark money interests?

Until reading this question, I did not know anything about the Washington Legal Foundation's funding sources. I was not compensated for the piece I wrote.

c. Do you align yourself with stated views of the Washington Legal Foundation, which describes itself as a counterweight to "unelected bureaucrats, plaintiff's lawyers, and other special interests"?

The opinion piece reflected my views of the *Taylor* decision. By permitting the Washington Legal Foundation to publish it, I did not intend to endorse that organization's views on other issues.

3. As a judge, would your personal views prevent you from objectively evaluating scientific evidence that demonstrates that there is overwhelming consensus that human activity is a contributing factor to climate change?

No. If I were to be confirmed, I would base any decision involving climate change—or any other issue—on a careful examination of the parties' arguments, the governing law, and the evidentiary record. I have no personal views that would prevent me from conducing such an examination objectively.

4. 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?

All metaphors are necessarily somewhat inexact, and this one is no exception. Nevertheless, the metaphor captures an important idea: judges are not the primary actors in our political system. Policymaking authority is committed to the Legislative and Executive Branches, and the role of judges is to impartially uphold the law.

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

Judges should always be aware that the process of judging is not merely an academic exercise but will affect the lives of real people. In addition, there are many contexts in which the law expressly requires courts to consider the practical consequences of a ruling. For example, a court deciding whether to grant a preliminary injunction must evaluate the "balance of equities" and "the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Likewise, in construing a statute, a court may be required consider whether a particular interpretation would generate absurd results. As a general matter, however, it is a judge's duty to follow the law, leaving the consideration of practical consequences to the political branches.

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?

Empathy is an important human quality because it allows us to understand other people. It is a valuable quality in a judge because a judge's

consideration of a case must begin with understanding the parties, their dispute, and their respective arguments, and empathy can be useful in developing a fuller understanding. Ultimately, however, a judge's decision must be based on the facts and the law, not on personal feelings about the litigants. As Justice Kagan put it, "When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it's true of statutory law—the question is what the law requires." *Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010) (statement of Hon. Elena Kagan).

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

Everyone's personal views are influenced by their background and life experiences. Judges should strive to be aware of their personal views in order to ensure that those views do not affect the outcome of cases. It is the duty of a judge to apply the law impartially.

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. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

I have devoted a majority of my career to public service, serving as a career attorney in the Department of Justice during the Administrations of both George W. Bush and Barack Obama. Over the course of my career, I have represented a variety of clients with a variety of interests. I have defended and challenged government regulations; I have argued on behalf of plaintiffs alleging unlawful discrimination and on behalf of businesses defending against discrimination claims; and I have represented both plaintiffs and defendants in class actions.

I understand the difference between the role of an advocate and the role of a judge. As an advocate, I have worked zealously to advance the interests of my clients within the bounds of the law. Were I to become a judge, I would no longer be an advocate for any particular interest. Instead, I would take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . impartially discharge" my duties as a judge. 28 U.S.C. § 453. In carrying out that oath, I would uphold the rights of all litigants equally and would impartially apply the law to all.

Senate Judiciary Committee
"Nominations"
Questions for the Record
October 24, 2018
Senator Amy Klobuchar

Questions for Mr. Miller, nominee to the Ninth Circuit Court of Appeals

- How would you view the importance of adhering to precedent – even precedent where you felt that the case was wrongly decided – if you are confirmed to the Ninth Circuit?

  Adherence to precedent is critical to the stable and orderly functioning of our legal system. As a lower federal court, the Ninth Circuit is strictly bound to follow Supreme Court precedent in all cases. In addition, the Ninth Circuit is bound to follow the precedent of prior Ninth Circuit panels, except in those unusual circumstances in which an intervening Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), or in which the Ninth Circuit sits en banc to reconsider its precedent, *see* Fed. R. App. P. 35. I would have no hesitation in upholding and applying precedent even when I personally disagreed with it.

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

  Yes. One benefit of the practice of sitting in panels of three judges is that the members of the panel can learn from the different perspectives and insights of the other panel members. Judges should listen carefully and respectfully to their colleagues and should be open to being persuaded by them. In addition, judges should strive to find common ground and to issue unanimous opinions that will provide clear guidance to litigants and lower courts. Deciding a case narrowly can be one way to do that, and it is often a good practice in any event. Of course, there may be cases in which judges are unable to find agreement; in such cases, any expression of dissenting views should always be measured and respectful.

Nomination of Eric David Miller, to be United States Circuit Judge
for the Ninth Circuit
Questions for the Record
Submitted October 31, 2018

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 articulated by the Supreme Court, including in cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

      Yes, taking into account any Supreme Court or Ninth Circuit precedent bearing on the weight to be given the express enumeration of a particular right.

   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. Under *Glucksberg*, the inquiry takes account of historical practice under the common law, practice in the American colonies, the history of state statutes and judicial decisions, and long-established traditions. *See* 521 U.S. at 710-16.

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

      Yes. If the right had been previously recognized or rejected by the Supreme Court or the Ninth Circuit, I would be bound to follow that precedent. In the absence of such precedent, I would look to the decisions of other circuits as persuasive authority.

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

      Yes.

   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*).

      Yes. Both *Casey* and *Lawrence* are binding precedent, and I would faithfully apply

them.

f. What other factors would you consider?

I would consider any other relevant Supreme Court or Ninth Circuit cases, and any factors described in those cases.

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

The Equal Protection Clause applies to both race and gender. *See 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?

I would respond to that argument by pointing to binding Supreme Court precedent resolving the issue, including *United States v. Virginia*.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I am not familiar with the history of the litigation in *United States v. Virginia* and do not know why the decision in that case was not issued earlier.

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

The Supreme Court has so held in a variety of contexts. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

It is my understanding that this question is currently the subject of litigation. Canon 3(A)(6) of the Code of Conduct for United States Judges therefore prohibits me from answering it.

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

Yes. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

Yes. *See Roe v. Wade*, 410 U.S. 113 (1973).

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. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

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

Not applicable.

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 for judges to consider evidence that sheds light on our changing understanding of society?

   The Supreme Court has considered such evidence in a variety of contexts—including, as the question notes, in *Obergefell*. If I were confirmed, I would consider such evidence in light of any relevant Supreme Court and Ninth Circuit precedent.

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

   It is appropriate to consider such evidence whenever it is relevant and based on a reliable methodology. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

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?

Yes.

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

I have not studied this particular question. If I were to be confirmed, and if the question were to come before me, I would resolve it by carefully examining *Obergefell* and any other relevant Supreme Court and Ninth Circuit precedent relating to substantive due process.

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?

   Although I have not studied the question in depth, I understand that it has been the subject of some scholarly debate. Regardless of its resolution, however, *Brown* remains binding Supreme Court precedent, and judges on lower courts must faithfully apply it.

   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 October 31, 2018).

   I am not familiar with the cited article, but I am generally aware of the academic debate to which it contributes. That debate might be relevant to the Supreme Court, but it has little impact on the work of a lower court. The Free Speech Clause, the Equal Protection Clause, and the Due Process Clause have each been the subject of many Supreme Court cases. A lower-court judge is bound by that body of Supreme Court precedent, whether based on an analysis of original public meaning or not.

   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?

   In some cases, the Court has looked to the original public meaning in interpreting a provision of the Constitution. *See*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

In others, it has not. *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005). Whichever approach the Supreme Court has taken in a particular context, a lower-court judge is bound to follow it.

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

Please see my answer to question 6(c) above.

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

I would apply Supreme Court and Ninth Circuit precedent, including precedents specifying the sources to employ in constitutional interpretation. Those sources might vary depending on the constitutional provision at issue.

7. You served in the Office of Legal Counsel in the Department of Justice from 2003 to 2004.
   a. Were you involved in preparing memos about the treatment of detainees or enemy combatants? These memos include but are not limited to the "Response to Preliminary Report of the ABA Taskforce on Treatment of Enemy Combatants" and "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," https://www.thetorturedatabase.org/search/apachesolr_search (last visited October 31, 2018).

   I served in the Office of Legal Counsel from December 15, 2003 to November 5, 2004, and I did not work on either of the listed memos, which predate my service. Other memos responsive to this question are identified in my response to questions 7(b) and 7(c) from Senator Booker.

   b. While working in the Office of Legal Counsel, did you provide any oral or written advice related to detention and/or interrogation to any U.S. government official or employee?

   I did not provide advice on those subjects to anyone outside the Office of Legal Counsel. As described in more detail in my response to questions 7(b) and 7(c) from Senator Booker, I assisted more senior attorneys within the Office of Legal Counsel in providing advice on those subjects.

8. In notes for a speech that you submitted to the Senate Judiciary Committee, you wrote, "Constitution – fixed meaning." What did you mean to convey?

The quoted notes are from a panel discussion held shortly after the death of Justice Scalia and devoted to examining his jurisprudential legacy. I sought to describe Justice Scalia's theory of constitutional interpretation, and an important part of that theory was the belief that the Constitution has a fixed meaning. *See* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 40-41 (1997). Neither I—nor, to my recollection, any of my fellow panelists—attempted to articulate our own views on

constitutional interpretation.

9. You are listed on a brief the government filed in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), which asserted, "The expulsion of aliens is a sovereign power largely immune from judicial interference, and facially legitimate and bona fide policies must be upheld even if they implicate the First Amendment rights of citizens."
   a. Are there circumstances in which the expulsion of aliens is subject to judicial review?

      Yes.

   b. Are First Amendment rights limited to U.S. citizens?

      No.

10. In slides for a presentation that you submitted to the Senate Judiciary Committee, you wrote, "Looking to 'purpose' is inappropriate: 'Legislation is compromise and it's rare to find a statute that pursues a single purpose unrelentingly.'"
   a. Is it always inappropriate to look at the stated purpose of legislation?

      No, and I did not suggest otherwise in the presentation. The presentation was entitled "Judge Gorsuch: An Introduction," and was an overview of the jurisprudence of then-Judge Gorsuch, who had recently been nominated to serve on the Supreme Court. The quoted language is from a slide describing Judge Gorsuch's approach to statutory interpretation, with the language in internal quotation marks being taken from the opinion authored by Judge Gorsuch in *United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc). The phrase introducing the internal quotation represented my effort to summarize Judge Gorsuch's views; it was not an expression of my own views on statutory interpretation.

   b. In an amicus brief you drafted on behalf of the Chamber of Commerce, you wrote, "amicus submits this brief to explain that the policies underlying the CPA counsel against applying the statute in the circumstances of this case." Brief for the Chamber of Commerce of the United States of America as Amici Curiae Supporting Respondents at 3, *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wash. 2d 793 (2015). Why was it appropriate to look at the underlying purpose of the law in that case?

      In construing the Consumer Protection Act, the Washington Supreme Court has taken into account the statute's purposes. *See*, *e.g.*, *Segura v. Cabrera*, 362 P.3d 1278, 1281-82 (Wash. 2015).

   c. Please explain why an out-of-state corporation that enlists an agent to operate in the relevant state should not be subject to claims under that state's law.

      This question has been resolved by the decision of the Washington Supreme Court, which has the final word on the interpretation of Washington law. If I were to be confirmed, and if the issue were to come before me in a case in which Washington law supplied the rule of decision, I would faithfully apply the decision of the

Washington Supreme Court. *See* 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

11. As counsel of record on an amicus brief filed on behalf of the National Confectioners Association, you stated that allowing former forced child laborers to proceed with a lawsuit against Nestlé would "undermine the cooperative framework that the political branches have selected to address the problem of child labor, replacing the policy of constructive engagement with a system of ad hoc private adjudication." Brief for National Confections, et al. as Amici Curiae Supporting Petitioners at 3, *Doe v. Nestle, et al.*, 766 F.3d 1013 (9th Cir. 2015). The brief points to the Harkin-Engel protocol, which was not promulgated in an act of Congress or signed by the President in an Executive Order. Please explain whether this declaration constitutes a policy framework promulgated by the political branches.

    As explained in the brief (at pages 4-5), it was the position of my firm's clients that "the judgment of the political branches [was] that constructive engagement and public-private partnership are the best ways to eliminate abusive labor practices." Although the Harkin-Engel Protocol itself was not promulgated in an Act of Congress, the brief cited a subsequent statute, an official statement of the Department of Agriculture that was published in the *Federal Register*, and an agreement between the Department of Labor and the governments of Ghana and Cote d'Ivoire, all of which reflected a commitment to the Harkin-Engel Protocol (pages 12-13).

12. In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), you argued that the common law "immovable property exception" to sovereign immunity would preclude the tribe from invoking tribal sovereignty in their land dispute with your client. In your brief, you explained this position by noting that "[t]he limited nature of tribal sovereignty suggests that to the extent tribal sovereign immunity differs from that of other sovereigns, it should be narrower, not broader. Unlike foreign and state sovereignty, tribal sovereignty has been significantly divested."
    a. Please explain your understanding of the doctrine of implicit divestiture.

        The brief filed on behalf of the Lundgrens in *Upper Skagit Indian Tribe* did not articulate a theory of "implicit divestiture." The principal argument advanced in the brief was that the scope of tribal sovereign immunity in immovable-property cases should be the *same* as the scope of immunity afforded to other sovereigns, such as States and foreign nations. As explained on page 21 of the brief, "a foreign nation or another State would not enjoy sovereign immunity in these circumstances. If the Tribe is treated like other sovereigns, it does not enjoy immunity either."

        As the question notes, the brief went on to argue that tribal sovereignty is in some respects more limited than the sovereignty of States and foreign nations. In support of that argument, the brief noted (at page 28) that the Supreme Court has stated that the "incorporation [of Indian tribes] within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the

sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Thus, "[t]he sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008).

b. How do you resolve the conflict between the doctrine of "implicit divestiture" and Congress's explicit authority to regulate tribal affairs?

Congress indeed has broad authority to regulate with respect to Indian tribes. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ("[T]ribes are subject to plenary control by Congress."). In this area of the law, as in all others, federal statutes and treaties "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. To the extent that Congress has addressed the scope of tribal sovereignty in a particular context, Congress's action would control.

13. During your confirmation hearing before the Senate Judiciary Committee, you stated that you would follow the "important principles from the Supreme Court" that "treaties must be respected and understood as the tribes understand them." Yet in *Washington v. United States*, 138 S. Ct. 1832 (2018), you submitted an amicus brief on behalf of a group of businesses in which you argued that the Court should apply a strict textual interpretation of the treaties in dispute. The Supreme Court has consistently asserted that courts should "give effect to the [treaty] terms as the Indians themselves would have understood them," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), and held that "Indian treaties are to be interpreted liberally in favor of Indians, . . . and that any ambiguities are to be resolved in their favor." *Id.* at 200. Why did you advocate for the Supreme Court to apply a strict textual approach in *Washington v. United States*?

The amicus brief submitted on behalf of my firm's clients in *Washington v. United States* emphasized the text of the treaties because, as the Supreme Court explained in *Mille Lacs*, "the starting point for any analysis . . . is the treaty language itself." 526 U.S. at 206. But the brief did not take a "strict textual" approach or suggest that the Court should ignore the history and context of the treaties. To the contrary, consistent with the Court's direction that treaty language must be interpreted "in light of the common notions of the day," the brief contained an extensive discussion of historical context (at pages 8-13) and of prior interpretations of the treaties by the political branches (at pages 18-21). *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). The brief also expressly acknowledged (at page 16) the principle that treaties must "be construed . . . in the sense in which they would naturally be understood by the Indians."

Although the tribal respondents in *Washington v. United States*, unsurprisingly, disagreed with the interpretation set out in the amicus brief, they did not suggest that it reflected an illegitimate interpretive approach. And the attorney who represented the tribal respondents is among the former Department of Justice attorneys who has signed a bipartisan letter of support for my nomination.

Nomination of Eric D. Miller to be
United States Circuit Judge for the Ninth Circuit
Questions for the Record
October 31, 2018

QUESTIONS FROM SENATOR BLUMENTHAL

In 2015, you assisted with an amicus brief on behalf of the Chamber of Commerce in *Thornell v. Seattle Service Bureau, Inc*. The case dealt with whether a Texas resident who received deceptive debt collection letters from a Washington state corporation could pursue a cause of action under the Washington Consumer Protection Act (CPA). The brief you assisted with argued that "applying the CPA to cases brought by non-resident plaintiffs against Washington defendants would do nothing to 'protect the public' of Washington, and it would significantly undermine 'the development and preservation of business' in the State." The brief also argued that siding with the plaintiff "would harm not only Washington businesses dealing directly with consumers but also Washington businesses seeking to partner with businesses in other States." The Supreme Court of Washington disagreed and sided with the plaintiff.

1. **Is it your position that holding corporations civilly liable to suit from out of state plaintiffs would do nothing to protect the public from abusive business practices?**

   No, nor was that the position advanced in the brief in *Thornell*. The brief presented the narrower argument that extending Washington's Consumer Protection Act to cases brought by non-Washington plaintiffs would not protect the public *of Washington*.

2. **Do you believe the interest in the development and preservation of business supersedes consumer protection concerns?**

   No.

In 2017, you wrote an opinion letter to the *Washington Legal Foundation* criticizing the Washington Supreme Court's decision in *Tylor v. Intuitive Surgical, Inc.* There, the court held that manufacturers of medical devices have not only a duty to warn physicians about the potential dangers of a medical device, but a duty warn hospitals as well. You argued that decision was unwarranted and that warning persons in the chain of distribution would have no additional, positive effect on patient safety.

1. **Before publishing this opinion letter did you consider that hospitals may have a role in determining what devices are available to the doctors they employ?**

   As I noted in the opinion letter, the Washington Supreme Court has previously held that if a product is properly labeled, "the manufacturer may reasonably assume that the

physician will exercise the informed judgment thereby gained in conjunction with his own independent learning, in the best interest of the patient." *Terhune v. A.H. Robins Co.*, 577 P.2d 975, 978 (Wash. 1978) (emphasis added).

2. **What harm do you believe additional warnings in the supply chain create?**

   The law recognizes that, at least in some contexts, excessive numbers of warnings may be ignored and may reduce the effectiveness of other warnings that are potentially more important to safety. *Cf.* Restatement (Third) of Torts, Products Liability § 2, cmt. j (1998); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (observing that "[m]eaningful disclosure" requires "a balance between competing considerations of complete disclosure . . . and the need to avoid . . . informational overload") (emphasis and internal quotation marks omitted). Of course, warnings can also be an important way to promote safety. Because this issue is governed by Washington law, balancing the competing policy considerations is ultimately the responsibility of the Washington Legislature. The Washington Supreme Court has definitively interpreted Washington law on the subject. If I were to be confirmed, and if the issue were to come before me in a case in which Washington law supplied the rule of decision, I would faithfully apply the decision of the Washington Supreme Court. *See* 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

3. **Given the nature of medical procedures, should we not err on the side of caution with warning requirements?**

   Please see my answer to question 2 above.

I am concerned about public faith in the judiciary's impartiality and integrity. Please address the following question in light of our nation's constitution, laws, and code of conduct for the judiciary.

1. **Do you believe that a sitting judge or justice who is shown to have committed perjury or substantially misled the Senate Judiciary Committee about the truth of a matter should continue to serve on the bench?**

   A judge or justice is subject to removal from the bench upon "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. The implementation of that constitutional provision is the responsibility of the House of Representatives and the Senate, and it raises a number of political questions. *Cf. Nixon v. United States*, 506 U.S. 224 (1993). Because I am a judicial nominee, it would be inappropriate for me to opine on those questions.

There have been recent reports that the Heritage Foundation was planning to run a secret clerkship training program. I am generally concerned about growing attempts by outside groups to buy influence in the judiciary.

1. **Other than your law school, please list all people and organizations that provided you with any training relating to your service as a federal law clerk. Please include a description of the content of the training that was provided.**

   I received no such training from anyone other than the judge and justice for whom I clerked and their respective staffs.

2. **Do you believe it is appropriate for sitting judges to participate in trainings designed to help law clerks with a particular ideological perspective advance their beliefs within the judiciary?**

   Canon 5 of the Code of Conduct for United States Judges prohibits judges from participating in political activity. To the extent that the activities described in the question are political in nature, it would be inappropriate for a judge to participate in them. Were I to be confirmed, I would not anticipate participating in any law-clerk training program other than those conducted by the Ninth Circuit.

3. **Please list all meetings, conferences or events affiliated with the Federalist Society in which you have participated.**

   I do not remember all of the events I attended while I was in law school, and I have no records that would permit me to give a complete answer to this question with respect to those years. I am confident, however, that I was not a speaker at any Federalist Society events in that period.

   Although my recollection may be imperfect, I can remember attending only five Federalist Society events in the 19 years since my graduation from law school:

   1. The 1999 national convention in Washington, D.C. I attended portions of the convention but was not a speaker.
   2. A speech by Tony Snow in Washington, D.C., in approximately 2000 or 2001; I attended the speech but did not otherwise participate in the event.
   3. A speech by retired Washington Supreme Court Justice James Johnson at the Puget Sound Lawyers Chapter of the Federalist Society on September 25, 2014; I attended the speech but did not otherwise participate in the event.
   4. A presentation I gave to the Puget Sound Lawyers Chapter of the Federalist Society on November 4, 2014, which I disclosed in response to question 12(d) on my Senate Judiciary Committee Questionnaire.
   5. A presentation I gave to the Puget Sound Lawyers Chapter of the Federalist Society on March 17, 2017, which I disclosed in response to question 12(d) on my Senate Judiciary Committee Questionnaire.

The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." This has long been understood to mean that children of undocumented immigrants born in the United States are United States citizens. Given that this is a settled issue of constitutional law, previous nominees have been willing to speak on this issue.

1. **Do either *United States v. Wong Kim Ark* and *Plyler v. Doe* help answer the question of whether the children of undocumented immigrants are entitled to birthright citizenship? If so, please explain how.**

   In *United States v. Wong Kim Ark*, the Supreme Court stated: "The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes." 169 U.S. 649, 693 (1898). The Court's statement concerning Indian tribes has been abrogated by the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

   In *Plyler v. Doe*, the Court stated: "[N]o plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful." 457 U.S. 202, 211 n.10 (1982).

   The decisions in *Wong Kim Ark* and *Plyler v. Doe* are binding precedent. Any interpretation of the Citizenship Clause of the Fourteenth Amendment must comport with those and all other relevant Supreme Court decisions.

2. ***Wong Kim Ark* is a precedent that is over 100 years old. *Plyler v. Doe is* over 35 years old. How would you apply the principles of stare decisis to these cases?**

   All Supreme Court cases, whether old or recent, are strictly binding upon the lower courts. Were I to be confirmed, I would faithfully apply both *Wong Kim Ark* and *Plyler v. Doe*.

3. **Do you agree that the Fourteenth Amendment guarantees birthright citizenship to children of undocumented immigrants who are born in the United States?**

   This question may be the subject of impending litigation. Canon 3(A)(6) of the Code of Conduct for United States Judges therefore prohibits me from answering it.

Questions for the Record for Eric D. Miller
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. When you were no longer working for the federal government, you spent a significant part of your private practice career arguing against the rights of Indian tribes. At the hearing, you even acknowledged that you represented those who "tended to be adverse to tribes in litigation." You attempted to distance yourself from this work by claiming that this work was for your "firm's clients." But in fact, you devoted a substantial number of hours working on these issues on a volunteer, pro bono basis. You even highlighted two such cases as among your "most significant pro bono matters"—Upper Skagit Indian Tribe v. Lundgren and Lewis v. Clarke. In both pro bono cases, you sought to narrow the scope of sovereign immunity of Indian tribes.

   a. Why did you portray these cases as your "firm's clients" when they include clients you volunteered to help for free? Did your firm, Perkins Coie LLP, dictate to you which clients you had to take on or which issues you had to work on in your pro bono representation?

      All of the cases I have handled in private practice have been for clients of Perkins Coie LLP; clients sign an engagement letter in which they agree to retain the firm, not any individual lawyer, as their counsel. The decision to undertake a pro bono representation is not one that can be made unilaterally by an individual attorney at the firm. Rather, all new representations must be cleared by the firm's conflicts attorneys, and pro bono representations must be approved by the firm's pro bono counsel and sometimes also the pro bono committee.

   b. You spent nearly 700 volunteer hours providing free legal services to your pro bono clients to help them limit the rights of Indian tribes. If you are confirmed, why should tribes and indigenous peoples believe that you will treat them fairly and respect their rights?

      Respectfully, the suggestion that my firm's pro bono clients sought to "limit the rights of Indian tribes" is inaccurate. The pro bono matters to which the question principally

refers were *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), and *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), both of which I argued in the Supreme Court of the United States. In both cases, my firm's clients were individuals seeking to vindicate their right to access the courts. The clients in *Lewis* were Brian and Michelle Lewis, who were injured in an off-reservation automobile accident caused by the negligence of a tribal employee who ran into their car with his limousine. The Lewises sought to sue the employee in his individual capacity in state court, as any accident victim would sue an individual whose negligence had caused injury. The clients in *Upper Skagit Indian Tribe* were Sharline and Ray Lundgren, individuals who live on off-reservation land in Washington State. After the Upper Skagit Indian Tribe purchased the adjoining parcel in an open-market transaction, it asserted ownership of a portion of the Lundgrens' property and threatened to tear down their fence and clearcut the trees on their land. The Lundgrens sought to bring a quiet-title action in state court to resolve the property dispute between the parties, as any landowner would do.

In both cases, the defendants asserted that principles of sovereign immunity should deprive our clients of an opportunity to have their claims heard in court. In both cases, our clients' principal argument was that other sovereigns, such as States or foreign nations, would not enjoy immunity in similar circumstances, and that tribes should be treated the same as other sovereigns. In *Lewis*, the Supreme Court agreed with our clients' position in a unanimous decision. In *Upper Skagit Indian Tribe*, the Supreme Court remanded the case without reaching the issue raised by our clients, and on remand, the case was resolved in our clients' favor.

Every lawyer has a professional responsibility to provide pro bono legal representation. *See* Wash. R. Prof. Conduct 6.1. I am proud to have discharged that responsibility in many cases at Perkins Coie, including *Maryland v. King*, 569 U.S. 435 (2013), in which I supported the position of a criminal defendant in a Fourth Amendment case, and also *Lewis* and *Upper Skagit Indian Tribe*, in which I assisted the Lewises and the Lundgrens in vindicating their right of access to courts to seek redress for their injuries. But that does not mean that I necessarily share those clients' views or the positions advanced in litigation on their behalf. The role of a lawyer in our adversary system is to advocate for the client, not to express his or her own personal opinions. *See* Wash. R. Prof. Conduct 1.2(b). That is equally true whether the representation is for a fee or is provided pro bono.

3. When addressing your extensive work as a private attorney siding against the rights of Native Americans, you stated at the hearing that your role in these cases was "not to advance [your] own views, but to advance the client's views" that were "within the bounds of the law." However, you subsequently stated that there are "fundamental principles" with respect to Indian tribes, including (1) the "foundational principle of Indian law that tribes have an independent sovereignty that preexists the Constitution" and (2) that "treaties with tribes must be respected and must be understood as the tribes would have understood them." You commented that these principles "sadly were not always honored throughout our history" and claimed that, if confirmed, you would abide by these principles.

   But your record in private practice shows that you have ignored these principles when you

repeatedly and consistently argued against the rights of tribes and indigenous peoples. For example, you filed an amicus brief in Washington v. United States (2018), a case concerning whether tribal fishing rights under 19th century treaties between the United States and northwest Indian tribes had been violated by the state's placement of under-road culverts (structures that allow water flow) that obstruct salmon passage. In the brief, you argued that the text of the treaties guaranteed only the right "to engage in the act of catching fish," not the right for there to be enough fish to catch. You claimed that "[i]f tribes have a right to ensure that States maintain a particular number of fish for tribal interests, then few activities in the West will escape judicial superintendence at the behest of tribes."

a. How is your argument in Washington v. United States consistent with the "fundamental principles" of respecting the independent sovereignty of tribes and understanding treaties with tribes as the tribes would have understood them? Is it your view that tribes, when signing these treaties, believed that they were agreeing to only have the right to engage in the act of fishing in particular locations and understood that the State could take any actions elsewhere to eliminate any presence of fish in those particular locations?

   The amicus brief in *Washington v. United States* expressly acknowledged (at page 16) the principle that treaties must "be construed . . . in the sense in which they would naturally be understood by the Indians." Consistent with the Court's direction that treaty language must be interpreted "in light of the common notions of the day," the brief contained an extensive discussion of historical context (at pages 8-13). *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). It explained that the historical context supported the interpretation of the treaties advanced in the brief—an interpretation consistent with the position taken in the brief filed by Attorney General Bob Ferguson on behalf of the State of Washington. Although the tribal respondents in *Washington v. United States*, unsurprisingly, disagreed with the position taken in the amicus brief, they did not suggest that it reflected an illegitimate interpretive approach. And the attorney who represented the tribal respondents is among the former Department of Justice attorneys who has signed a bipartisan letter of support for my nomination.

   Insofar as the question refers to my personal views about the matters addressed in the brief, it appears to rest on an incorrect assumption. As an advocate, my role in the case was to advance the interests of my firm's clients, not to express my own personal views. *See* Wash. R. Prof. Conduct 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

b. Given your record as a private attorney, why should the American public believe that you will follow these fundamental principles, if confirmed, when your record shows otherwise?

   My record as a private attorney should be evaluated in conjunction with the record of the more than 10 years I spent as a Department of Justice attorney in two different administrations, during which I argued in support of Indian tribes. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). Viewed as a whole, my career demonstrates that I have properly understood the role

of an attorney: to serve as an advocate for his or her client's positions and to advance their interests within the bounds of the law. If I were to be confirmed, I would properly understand the role of a judge: to uphold the law in a neutral and impartial manner.

4. In petitioning the Supreme Court for certiorari in Citizens Against Reservation Shopping v. Zinke, you argued, in part, that a Native American tribe is not a federally recognized tribe for purposes of the Indian Reorganization Act (IRA) unless "it had federally managed lands set aside for its benefit" as of the IRA's enactment in 1934. This is similar to the offensive argument put forth by Brett Kavanaugh in an amicus brief and Wall Street Journal op-ed relating to the Supreme Court case Rice v. Cayetano, in which he argued that indigenous communities in the United States derive their rights from having been herded onto reservations and cheated out of their land.

   a. Is it your view that indigenous communities cannot be federally recognized tribes for purposes of the IRA unless they had "federally managed lands set aside for [their] benefit" as of 1934?

      No, and, respectfully, that is not what was argued in the petition. The argument in that case was that the IRA limits the Secretary's authority to acquire land in trust to federally recognized tribes that were "under Federal jurisdiction" in 1934. 25 U.S.C. § 5129; *see Carcieri v. Salazar*, 555 U.S. 379 (2009). The central question was what the phrase "under federal jurisdiction" meant in 1934. Our client's position was that, under the Department of the Interior's long-standing understanding of its jurisdictional authority, a tribe could not have been "under Federal jurisdiction" in 1934 if it was landless at that time. The petition relied in part on the Department's 2000 Final Determination for Federal Acknowledgment that "the Cowlitz Indians were not a reservation tribe under Federal jurisdiction or under direct Federal supervision" from 1880 to 1940, and similar Departmental findings. Pet. at 26, *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017) (No. 16-572).

   b. Do you believe that programs that benefit Natives Hawaiians or Alaska Natives are constitutional? In your view, under what legal standard should such programs be reviewed?

      I have never had occasion to work on any legal issue relating to Native Hawaiians or Alaska Natives, and I have not studied these questions.

5. The National Congress of American Indians is "the oldest and largest national organization of American Indian and Alaska Native tribal governments." On October 16, 2018, in response to the Judiciary Committee's decision to proceed with a hearing on your nomination during the Senate recess, the National Congress of American Indians (NCAI) Executive Committee took the extraordinary step of adopting an emergency resolution opposing your nomination. The emergency resolution notes that your "record makes clear that [you] do[] not possess a mainstream understanding of tribal sovereignty, treaty rights, and the federal trust responsibility, or their role in the Constitution and federal law." Rather,

as NCAI's resolution explains, the "positions [you] ha[ve] repeatedly advocated would have very serious consequences on the federal-tribal relationship and would undermine fundamental principles of tribal sovereignty, governance, and self-determination."

Given the important role the Ninth Circuit plays in addressing the rights of indigenous peoples, do you believe it is important that a Ninth Circuit judge have a mainstream understanding of fundamental issues related to the rights and sovereignty of Indian tribes? Please explain your view.

I respect the right of the National Congress of American Indians, or any other organization, to offer its opinions on matters of public concern, including judicial nominations. As explained in more detail in my answers to other questions, a fair review of my record does not suggest that I lack a mainstream understanding of federal Indian law.

6. On August 21, 2018, the National Congress of American Indians, together with the Native American Rights Fund (NARF) also sent a letter to the Senate Judiciary Committee stating:

> "Our concern is that [Miller] chose to build a law practice on mounting repeated challenges to tribal sovereignty, lands, religious freedom, and the core attribute of federal recognition of tribal existence. His advocacy has focused on undermining the rights of Indian tribes, often taking extreme positions and using pejorative language to denigrate tribal rights."

How do you reconcile the above statements by the National Congress of American Indians and the Native American Rights Fund with your claim that you believe in honoring the independent sovereignty of Indian tribes and their treaties and interpreting those treaties as the tribes would have understood them? Do you believe "using pejorative language to denigrate tribal rights" is showing respect to the sovereignty of Indian tribes and their treaty rights?

The quoted statement is not an accurate characterization of my record. I have not "built a law practice" on challenges to tribal rights. Over the course of my career as a generalist appellate litigator, Indian law has been a small part of my practice, and I have handled cases both supporting and opposing tribes. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

In addition, my record of success in litigation in this area demonstrates that the positions I have advocated on behalf of my clients have been well-founded in law, not "extreme." In private practice, I have presented oral argument in appellate courts in six cases involving Indian tribes. In five of those cases, my client's position prevailed in a unanimous decision. *See Lewis v. Clarke*, 137 S. Ct. 1285 (2017); *Saint Regis Mohawk Tribe v. Mylan Pharm., Inc.*, 896 F.3d 1322 (Fed. Cir. 2018); *New Mexico v. Department of the Interior*, 854 F.3d 1207 (10th Cir. 2017); *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). In the sixth, the Court remanded the case without reaching the merits of the argument I advanced on behalf of my client. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018).

It is also incorrect to claim that I have used "pejorative language" to describe Indian tribes or tribal rights. The letter quoted above offers two examples in support of that claim, but neither withstands scrutiny.

First, the letter points to a certiorari petition in *Friends of Amador County v. Jewell*, 135 S. Ct. 717 (2014). That case involved the Buena Vista Rancheria of Me-Wuk Indians of California. The Buena Vista Rancheria is a federally recognized Indian tribe, but the underlying legal dispute in the case was whether it had been validly recognized. Our clients' position was that the decision by the Secretary of the Interior to recognize the Buena Vista Rancheria had violated the Administrative Procedure Act and was therefore unlawful. Since the question was whether the Buena Vista Rancheria had been validly recognized as a tribe, to have referred to it simply as a "tribe," without noting the disagreement over its status, would have conceded the key issue and forfeited our client's position. The petition therefore referred to the Buena Vista Rancheria as a "putative tribe." The word "putative" is not pejorative; it is a commonly used legal term that means "[r]eputed; believed or supposed by most people" while suggesting the possibility of disagreement. *Black's Law Dictionary* 1432 (10th ed. 2014).

Second, the letter refers to *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals, Inc.*, 896 F.3d 1322 (Fed. Cir. 2018). In that case, Allergan, Inc., sought to extend its monopoly on Restasis, a drug for alleviating the symptoms of dry eye, by preventing the Patent and Trademark Office from conducting an *inter partes* review to reconsider the patents covering the drug. To do so, it assigned the patents to the Saint Regis Mohawk Tribe, which took no part in the development of the patents and plays no role in the manufacturing, distribution, or marketing of the drug. The Tribe simultaneously licensed the patents back to Allergan in exchange for payments of millions of dollars. Thus, rather than the Tribe paying Allergan to acquire the patents that protect a billion-dollar-per-year drug franchise, Allergan paid the Tribe to take nominal title to the patents. The Tribe then asserted sovereign immunity before the Patent and Trademark Office. I was part of a team of attorneys representing Mylan Pharmaceuticals in a challenge to Allergan's patents. Although the letter asserts that our brief used "demeaning language to address both tribal rights and motivations," the language used was essentially the same as that used by the district court. *See Allergan, Inc. v. Teva Pharm. USA, Inc.*, No. 2:15-CV-1455-WCB, 2017 WL 4619790, at *2 (E.D. Tex. Oct. 16, 2017) (describing Allergan's transaction as an "artifice," a "ploy," and a "tactic" that "if successful, could spell the end of the PTO's [*inter partes* review] program"). And that language was principally directed to Allergan's actions, not the actions of the Tribe.

I am strongly committed to the belief that it is important for all participants in litigation—parties, lawyers, and judges—to treat each other with civility and respect. I have done so throughout my career, and the bipartisan letters of support for my nomination from attorneys with whom I have worked reflect that record.

7. In addition to the National Congress of American Indians and the Native American Rights Fund, at least 30 tribes and native organizations have submitted letters to the Senate Judiciary Committee expressing deep concern regarding your nomination. Your record of opposing tribal rights and interests is particularly relevant because "there are 427 federally recognized tribes in the Ninth Circuit, more than any other Federal Court of Appeals." As the National

Congress of American Indians explained, "the Ninth Circuit hears more tribal cases than any other, it is a leader in the field of federal Indian law, other circuits often follow its example, and it feeds more tribal cases into the Supreme Court."

Why shouldn't the Senate Judiciary Committee give serious weight to these numerous letters opposing your nomination from tribes and native organizations, given the significant role of the Ninth Circuit in addressing the rights of Indian tribes?

The Constitution gives the Senate the authority to give advice and consent to judicial nominations. U.S. Const. art. II, § 2, cl. 2. It is up to the Senate to decide what information it should take into account in the exercise of that authority.

Although I respect the right of any individuals, organizations, or tribes to offer their opinions on matters of public concern, including judicial nominations, I believe that concerns about my nomination reflect a misunderstanding of my record. In any event, I would respectfully suggest that, in conjunction with any letters expressing opposition to my nomination, the Senate may also wish to consider the letters supporting my nomination, including the bipartisan letter of support from former career employees of the Department of Justice as well as senior political appointees in the Administrations of George W. Bush and Barack Obama.

8. In June 2017, you wrote an opinion letter to the Washington Legal Foundation criticizing a Washington Supreme Court decision, Taylor v. Intuitive Surgical, Inc., which determined that manufacturers of extremely complex and inherently dangerous medical devices have a duty to warn purchasing hospitals in addition to the doctors. You argued that this decision was an "unwarranted expansion of the duty to warn under Washington's product-liability law," which "is silent on who should receive such warnings." You further claimed that this decision "may harm patients in the long run by discouraging the development and use of new medical devices that are beneficial despite their inherent risks." The published letter notes that the "views expressed" in the letter are your own.

   a. What was the evidentiary basis for your claim that requiring medical device manufacturers to warn purchasing hospitals in addition to doctors may discourage the development and use of new devices?

      My two-page opinion piece on the *Taylor* decision did not claim to be based on an empirical study. As a general matter, however, scholarly commentators have recognized that although expanding the scope of products liability offers potential benefits by creating greater incentives for safety, there are also "possible negative effects of judicially imposed liability on the cost and availability of valuable medical technology." Restatement (Third) of Torts, Products Liability § 6 cmt. b (1998). Because this issue is governed by Washington law, balancing the competing policy considerations is ultimately the responsibility of the Washington Legislature. The Washington Supreme Court has definitively interpreted Washington law on the subject. If I were to be confirmed, and if the issue were to come before me in a case in which

Washington law supplied the rule of decision, I would faithfully apply the decision of the Washington Supreme Court. *See* 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

b. Is it your view that where a consumer protection law is ambiguous or silent on an issue, it should be construed narrowly in favor of manufacturers and companies?

No.

Nomination of Eric D. Miller
United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted October 31, 2018

QUESTIONS FROM SENATOR BOOKER

1. As you no doubt noticed, one side of the dais at your October 24 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.

    a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, *and* without the minority's consent—which the Committee has never done before?

    The Constitution gives the Senate the authority to give advice and consent to judicial nominations. U.S. Const. art. II, § 2, cl. 2. How the Senate chooses to exercise that authority is for the Senate to determine. As I stated at the hearing, I was honored to appear before the Committee. Beyond that observation, however, it would be inappropriate for me to offer any comment on the decisions of the Committee.

    b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

    Please see my answer to question 1(a) above.

    c. At the October 24 hearing, you received a total of 2 questions from a single Senator. Your entire live questioning lasted less than 5 minutes. Do you think that is appropriate and consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

    Please see my answer to question 1(a) above.

    d. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the scheduling of your confirmation hearing?

    Please see my answer to question 1(a) above.

2. What is the most difficult experience you have had making an oral argument before a federal court of appeals, and why?

Every appellate argument presents its own unique challenges. The advocate will come into the argument with a set of affirmative points that he or she hopes to be able to articulate in order to advance the client's position. But the ability to make those points may be limited

because the panel may interrupt with questions, and the advocate must be prepared to give answers to the questions that are responsive, that contribute to advancing the client's position, and that allow a transition back to the affirmative points. While preparing for and presenting an effective argument can be a satisfying experience, the advocate must also remember that an argument is not simply an intellectual exercise; it is an opportunity to speak on behalf of a real client with real interests. Being entrusted by a client with speaking on the client's behalf is an honor that carries with it a weighty responsibility.

One recent argument that was particularly challenging was *Portland General Electric Co. v. Liberty Mutual Insurance Co.*, 862 F.3d 981 (9th Cir. 2017). I was part of a team of attorneys at my firm who represented Portland General Electric Company, a utility in Oregon. The underlying controversy was a dispute arising from the construction of an electrical generating plant, and the issue in the appeal was whether the dispute could be heard in court or whether it was subject to arbitration. Our client's position was that the dispute should be heard in court. We argued that arbitration is appropriate only when the parties have agreed to arbitration, and that the dispute in the case was not subject to any arbitration agreement between the parties. From the moment I stood up at argument, I was subject to intense questioning from a skeptical panel. Indeed, there were so many questions that the presiding judge significantly extended the time allotted for the argument. Although our position did not prevail, I was satisfied that I had presented our arguments to the best of my ability, and that the court had given us a fair opportunity to be heard.

3. What is the most difficult experience you have had writing a brief for a federal court of appeals, and why?

Much of the challenge in writing a brief is finding an effective way to frame the issues before the court. Particularly in cases involving a complex statutory or regulatory scheme, simply explaining what the case is about in a clear and understandable way can be more difficult than offering an argument for why one side or the other should prevail. And if an advocate can offer a clear and compelling theory of what the issue is, he or she will have gone a long way toward winning the case—provided, of course, that the issue has been carefully chosen to present the client's position in the best possible light.

One case that illustrates those challenges is *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006). In that case, I represented the United States as the plaintiff in a case under the False Claims Act based on allegedly fraudulent Medicare billing. The alleged fraud was complex, and understanding it required understanding the details of Medicare's reimbursement regulations. In addition, the case had a long procedural history, and the opposing parties were represented by highly skilled counsel who wrote a compelling brief. All of those factors combined to make writing the government's brief particularly challenging.

4. Please describe your most significant experiences litigating before the Ninth Circuit.

I have argued 16 cases in the Ninth Circuit and have briefed several others. In addition to *Portland General Electric Co. v. Liberty Mutual Insurance Co.*, 862 F.3d 981 (9th Cir. 2017),

discussed in my response to question 2 above, some of my other noteworthy Ninth Circuit cases have included the following:

Murray v. BEJ Minerals, LLC, ___ F.3d ___, No. 16-35506, 2018 WL 5795968 (9th Cir. Nov. 6, 2018). I argued this case on behalf of the owners of a ranch in Montana who sold the surface rights to the ranch, retaining a portion of the mineral rights. After the sale, the new owners announced the discovery of several valuable dinosaur fossils. The question presented was whether, under Montana law, a valuable dinosaur fossil constitutes a "mineral," so that it belongs to the owner of the mineral estate of the private land under which the fossil is found, rather than to the owner of the surface estate.

In re Grand Jury Subpoena, 875 F.3d 1179 (9th Cir. 2017). I argued this case on behalf of Glassdoor, Inc., which operates a website that allows workers to post anonymous reviews of their employers. A grand jury had issued a subpoena to Glassdoor seeking to compel it to reveal identifying information about some Glassdoor users who, the government believed, were potential witnesses to wrongdoing by their employer. Glassdoor sought to assert a First Amendment privilege, akin to the reporter's privilege, to resist the subpoena. We argued that a subpoena burdening First Amendment rights—here, the right to engage in anonymous speech and association—should be subject to heightened scrutiny.

In re National Security Letter, No. 13-16732 (9th Cir. Aug. 24, 2015). This case involved a challenge to the statutory provision authorizing the FBI to impose a gag order on the recipients of national security letters. I filed an amicus brief on behalf of Google and other technology companies, arguing that the statute violated the First Amendment.

Hoang v. IMDb.com, Inc., 599 F. App'x 674 (9th Cir. 2015). I argued this case on behalf of IMDb.com Inc., which operates the Internet Movie Database. We defended a favorable judgment entered following a jury trial in a breach of contract action. The plaintiff, an actress with a profile on IMDb, alleged that the website had breached a contract with her when it listed her true age on her profile, rather than the inaccurate age she wished to have listed.

United States Trustee v. Keravision, Inc., 421 F.3d 1153 (9th Cir. 2005). I argued this case on behalf of the United States Trustee, arguing that a law firm was disqualified from representing a debtor in possession in a bankruptcy case if one of the firm's partners had served as the debtor's corporate secretary before the bankruptcy filing.

5. Over the course of your nomination process, what interactions have you had with Senator Patty Murray (D-WA), Senator Maria Cantwell (D-WA), their offices, or the judicial nominating commission for Washington that they oversee?

On August 17, 2017, I sent a letter to Senator Murray, sending a copy by email to her chief of staff. In the letter, I introduced myself and stated, "[s]hould you feel that it would be helpful for us to meet, I would be happy to meet with you at any time and place that is convenient for you." On August 20, I received an email from Senator Murray's chief of staff, who said that he would "be back in touch with [me] to talk about next steps in our process." I have had no further communications with Senator Murray or any of her staff.

At the same time I wrote to Senator Murray, I sent a similar letter to Senator Cantwell, sending a copy by email to her chief of staff. I received no response.

The selection committee referred to in the question is a bipartisan merit selection committee for the United States District Court for the Western District of Washington. *See* Letter from the Honorable Patty Murray, United States Senate, to the Honorable Charles E. Grassley, Chairman, Committee on the Judiciary, United States Senate (Oct. 22, 2018) ("[T]he bipartisan committee selects candidates for nominees to the district courts in Washington state, and the consultation on nominees for the Ninth Circuit Court of Appeals is entirely unrelated."). I have not sought appointment to the United States District Court for the Western District of Washington, and I have had no interactions with the selection committee.

6. Shortly before the October 24 hearing, Senator Murray issued the following statement regarding your nomination, indicating that she would not return a blue slip:

> Senate Republicans have been trampling on long-standing Senate norms in order to rush extreme conservatives onto the courts as quickly as they can, and this needs to end. So I am not going to be complicit in this latest rushed

> process to load the courts with Trump nominees in the lame duck session and I will not be returning the blue slip that signals my approval of this process. I hope that Republican leaders step back from this mad dash, step back from the shameful partisan path they have taken on what has always been a bipartisan process—and that we can work together next Congress to consider the President's nominees in the bipartisan and considered way that has worked before.[1]

Do you wish to respond to Senator Murray's statement about the process surrounding your nomination?

The process by which the Senate considers my nomination is a matter of political controversy for the Senate to resolve, and Canon 5 of the Code of Conduct for United States Judges prohibits me from commenting on it.

I have great respect for Senator Murray and all of the other Members of this body. My understanding is that Chairman Grassley sent a letter to Senators Murray and Cantwell on October 18, 2018, summarizing the White House's account of consultations with the Senators concerning my potential nomination, which is consistent with my contemporaneous conversations with the White House about the process. As I indicated in response to the previous question, I have since offered to meet with both Senator Murray and Senator Cantwell, and I remain willing to do so.

7. In your Questionnaire responses, you wrote that, when you were an attorney-adviser in the Office of Legal Counsel at the Department of Justice from 2003 to 2004, you "drafted formal opinion memoranda and provided informal legal advice to the Executive Branch, principally in the fields of administrative law, constitutional law, and foreign-affairs law." While you were at OLC, did you work in any way on any of the following issues? Please respond to each item below individually. If the answer is yes to any of these items, please describe your work.

   I did not retain non-public documents or records when I left the Office of Legal Counsel. I therefore do not have a list of the matters on which I worked. My answers below are based on my best recollection of what I worked on during my time in the Office, which extended from December 15, 2003 to November 5, 2004.

   a. A proposed constitutional amendment to ban same-sex marriage.

      No.

   b. Torture or any other interrogation techniques.

      In June 2004, the existence of the August 1, 2002 opinion "Standards for Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A" was publicly revealed. I did not have any involvement in that opinion or any formal or informal advice in any way related to any of the issues it addressed, and I was unaware of the opinion's

existence until I read about it in the *Washington Post*. Shortly after the opinion become public, Assistant Attorney General Jack Goldsmith ordered it withdrawn.

Thereafter, the Office of Legal Counsel began a comprehensive effort to formulate a new interpretation of 18 U.S.C. §§ 2340 and 2340A. That effort involved senior leadership of the Department of Justice, including the Criminal Division and the Office of the Deputy Attorney General. Within the Office of Legal Counsel, the effort involved the head of the Office (Acting Assistant Attorney General Dan Levin, who had succeeded Assistant Attorney General Goldsmith), at least one Deputy Assistant Attorney General, senior career attorneys, and several line attorneys, of whom I was the most junior. My principal task in that effort was conducting legal research.

A review of the website of the Office of Legal Counsel reveals two opinions that appear to be related to the Office's efforts to provide guidance on the interpretation of 18 U.S.C. §§ 2340 and 2340A after the August 2002 opinion was withdrawn. Those opinions are *Definition of Torture Under 18 U.S.C. §§ 2340-2340A*, 28 Op. O.L.C. 297 (2004), and Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005). Both of those opinions were issued after I left the Office—in the case of the latter opinion, more than six months after I left. I therefore did not see the final versions before they were issued.

c. Habeas corpus, military commissions, the detention camp at Guantánamo Bay, rendition, or any other issues relating to the treatment of detainees.

I assisted senior attorneys in the Office of Legal Counsel in providing advice on various issues related to the Third and Fourth Geneva Conventions. I have been unable to identify any publicly released opinions associated with this work.

d. Warrantless surveillance programs.

I contributed to one opinion on this subject: Memorandum for the Attorney General from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Review of the Legality of the STELLAR WIND Program* (May 6, 2004). I was read into the program addressed by that opinion only a few weeks before the opinion was issued. I performed legal research and contributed to a team of attorneys working to finalize the opinion. Once the opinion was issued, I did not have any significant further involvement in issues related to it.

e. The implementation of the USA PATRIOT Act of 2001.

I worked on various matters involving federal statutes, and it is possible that some

of those matters involved statutes that were amended by the USA PATRIOT Act of 2001, but I do not specifically remember any such matter.

f. The use of National Security Letters.

No.

g. The Partial-Birth Abortion Ban Act of 2003.

No.

h. Presidential signing statements.

A significant part of my job in the Office of Legal Counsel was to draft comments on pending legislation. Those drafts were provided to other Department of Justice officials, who in some cases used them as the basis for statements to Congress of the Department's position on the legislation. It is possible that some of those drafts became the basis for signing statements by the President when the legislation was ultimately enacted. I do not, however, have any specific recollection of working on signing statements.

8. While you were at an attorney at the Justice Department, you were on several briefs for the federal government in cases concerning the ability of detainees held at Guantánamo Bay to challenge their detention, including *Boumediene v. Bush*[2] and *Hamdan v. Rumsfeld*.[3] Do you believe the Supreme Court decided those cases correctly?

Both *Boumediene* and *Hamdan* are binding Supreme Court precedent, and if confirmed, I would faithfully apply them. It would be inappropriate for me to offer my personal views on whether either of those cases—or any other decision of the Supreme Court—was correct. *See Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64 (2010) ("I think that . . . it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.") (statement of Hon. Elena Kagan).

---

[1] Press Release, Senator Murray Calls for Delay on 9th Circuit Court Nomination Hearing Scheduled To Take Place During Senate Recess, Urges Republicans To Stop Ignoring Bipartisan Process in Order to Jam Judges onto Bench (Oct. 23, 2018), https://www.murray.senate.gov/public/index.cfm/2018/10/senator-murray-calls-for-delay-on-9th-circuit-court-nomination-hearing-scheduled-to-take-place-during-senate-recess-urges-republicans-to-stop-ignoring-bipartisan-process-in-order-to-jam-judges-onto-bench.

[2] 553 U.S. 723 (2008).

[3] 548 U.S. 557 (2006).

9. You were among the Justice Department attorneys who filed an amicus brief in a case before the Sixth Circuit, *Women's Medical Professional Corporation v. Taft*,[4] to urge the court to uphold a state law that banned an abortion procedure. As Trevor Morrison, who is now the dean of NYU Law School, noted at the time, this brief "appear[ed] to be motivated principally by a desire to provide a legal justification for President Bush's political preference for certain abortion restrictions." Moreover, he explained, "DOJ should not have filed the brief, for the federal government had no proper interest in the case. The United States is not a party, and no federal program or law is directly implicated."[5] Do you think it was proper for the Justice Department to have filed that amicus brief, and if so, why?

   The responsibility to determine whether the United States should file an amicus brief in any case is committed to the Solicitor General of the United States. *See* 28 C.F.R. § 0.20(c). The government's brief stated that it was being filed because "[t]he United States [had] a significant interest in clarifying the constitutional principles that would govern federal legislation" in the area. Gov't Br. at 1, *Women's Med. Prof. Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003) (No. 01-4124). The year after the brief was filed, such legislation was enacted by Congress, and it was ultimately upheld by the Supreme Court. *See* 18 U.S.C. § 1531; *Gonzales v. Carhart*, 550 U.S. 124 (2007).

   My role in the case was to assist in advocating the government's position as that position was determined by the Solicitor General. *Cf.* Wash. R. Prof. Conduct 1.2(a) (It is for the client, not the attorney, to determine "the objectives of representation."). My ongoing professional obligations to my former client prohibit me from offering my own personal opinions about the merits of the government's position.

10. In private practice, you have represented an array of clients in court to oppose the rights and interests of Indian tribes.

    a. As a law firm partner, and now the chair of your firm's appellate group, how did you go about developing this part of your practice?

       I joined Perkins Coie to work as a generalist appellate litigator, and that is what I have done. In private practice, I have represented clients in a wide variety of subject areas, including administrative law, antitrust, contracts, employment, intellectual property, products liability, and securities. Of the appellate cases I have argued in private practice, fewer than 20% have involved Indian law.

       The great majority of the cases on which I have worked in private practice have been referred to me by other Perkins Coie partners after district court proceedings concluded. Perkins Coie has a nationally recognized practice in the area of Indian law, and it had such a practice well before I joined the firm. With a handful of exceptions, all of the Indian law matters on which I worked were referred to me by partners in that practice, often after appellate proceedings were initiated. In those cases, I have worked as part of a larger team of team of lawyers to advocate on behalf of the firm's clients in litigation. Often, that advocacy has entailed defending a favorable lower-court judgment or renewing arguments that were advanced below

as part of a challenge to an unfavorable lower-court judgment.

The few exceptions have been cases in the Supreme Court of the United States. Like many appellate lawyers, I have actively sought opportunities to practice before the Supreme Court, including by contacting attorneys who have had clients with cases before the Supreme Court and offering to assist with certiorari petitions, briefs in opposition to certiorari, or amicus briefs. Because of the high interest in practice before the Supreme Court, many attorneys are willing to offer discounts for such work or, when appropriate, to provide representation pro bono. I have sought Supreme Court work in many different areas of the law, and I have successfully attracted such work in civil procedure, criminal procedure, and intellectual property, as well as Indian law. In Supreme Court cases, as in other cases, I have worked with other attorneys at Perkins Coie to advocate on behalf of the firm's clients in litigation.

b. In the course of arguing for your clients in this series of cases, were you concerned in any way about the systemic effects of repeatedly opposing tribes' efforts to assert their interests in sovereignty and other rights?

The Supreme Court has explained that the "premise of our adversary system" is that the ends of justice are best promoted by the clash of "partisan advocacy on both sides of a case." *Herring v. New York*, 422 U.S. 853, 862 (1975). Throughout my career, I have participated in that system as an advocate, and I believe that my advocacy has played a role in a system that promotes the interests of justice. I note that, in private practice, I have presented oral argument in appellate courts in six cases involving Indian tribes. In five of those cases, our client's position prevailed in a unanimous decision. *See Lewis v. Clarke*, 137 S. Ct. 1285 (2017); *Saint Regis Mohawk Tribe v. Mylan Pharm., Inc.*, 896 F.3d 1322 (Fed. Cir. 2018); *New Mexico v. Department of the Interior*, 854 F.3d 1207 (10th Cir. 2017); *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013). In the sixth, the Court remanded the case without reaching the merits of the argument we advanced on behalf of our clients. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018).

c. A Native American leader was recently quoted as saying, "If a jurisdiction wants to fight an Indian Tribe, they hire" your firm.[6] At least with respect to the cases you have personally handled in private practice, do you dispute that characterization?

Perkins Coie is one of many law firms with expertise in the area of Native American law. As at most large law firms, the need to avoid conflicts of interest dictates that most of the firm's clients are on one side or the other of a particular area of the law. For example, firms that practice insurance law tend to represent insurance companies or policyholders, but not both. Most of Perkins Coie's Indian law clients—who include States, local governments, environmental groups, and other interests—are adverse to tribes rather than aligned with tribes. The firm has also represented tribes in business transactions and, in certain cases, when engaged in disputes with other tribes or the United States. The quoted statement reflects that

reality, as well as the nationally recognized expertise of some of the firm's lawyers who focus on Native American law. But to the extent the quoted statement suggests that the firm's work in this area is somehow unique, it is incorrect.

d. There are some 427 federally recognized Indian tribes within the Ninth Circuit. Given the extensive litigation record you built in this area as a partner, what assurances can you provide that, if confirmed, you will adjudicate cases involving tribal rights in an evenhanded manner and without any undue predisposition on the legal questions involved?

A fair review of my record would include consideration of my time in public service as well as in private practice and would reveal that I have represented many different clients with many different interests. Of particular relevance to this question, I have argued both in favor of and against tribal interests. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). In all of the cases I have handled, my role as an advocate was to represent my client's interests. If I were to be confirmed, I would have a different role, and I would take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . impartially discharge" my duties as a judge. 28 U.S.C. § 453. I would faithfully do so.

11. You have represented clients in an array of cases involving, for example, officers involved in a fatal shooting, a trade association opposing stronger minimum-wage rules, a corporation trying to shield itself from liability arising from asbestos exposure, and a corporation defending a policy that made it harder for employees to bring workplace harassment claims. Across your work in private practice, have you had any personal reservations about representing the interests of powerful entities against those who are seeking a fair hearing of their claims?

During my time in public service and in private practice, I have represented a variety of clients with a variety of interests. I have represented the plaintiff in a case involving allegations of excessive force by police officers. *See Young v. Fitzpatrick*, 133 S. Ct. 2848 (2013). I argued on the side of an employee in a Supreme Court case that resulted in a significant expansion of the ability of workers to bring discrimination claims. *See Staub v. Protcor Hosp.*, 562 U.S. 411 (2011). I argued on the side of a disabled child in a Supreme Court case about the rights of disabled students to obtain a free appropriate public education. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). I have represented the plaintiffs in a consumer class action based on misleading statements by an insurance company. *See Ross v. AXA Equitable Life Ins. Co.*, 680 F. App'x 41 (2d Cir. 2017). And I have defended the constitutionality of Section 5 of the Voting Rights Act. *See Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 555 U.S. 1091 (2009). In those cases, in the cases mentioned in the question, and in all other cases I have handled, I have zealously advanced the views of my clients, which have not necessarily been my own views. See Wash. R. Prof. Conduct 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."). Our adversary system rests on the premise that vigorous representation of both sides by counsel devoted to advancing their interests to the extent consistent with the law is the best way to ensure that both sides obtain

"a fair hearing of their claims."

---

[4] 353 F.3d 436 (6th Cir. 2003)

[5] Trevor Morrison, *Why It Was Improper for the Department of Justice To File an Amicus Brief in Support of a Law Banning "Partial-Birth" Abortion*, FINDLAW (Feb. 14, 2002), https://supreme.findlaw.com/legal-commentary/why-it-was-improper-for-the-department-of-justice-to-file-an-amicus-brief-in-support-of-a-law-banning-partial-birth-abortion.html.

[6] Richard Walker, *Trump's 9th Circuit Court Nominee Has Record of Litigating Cases Against Tribes*, INDIAN COUNTRY TODAY (Aug. 9, 2018), https://newsmaven.io/indiancountrytoday/news/trump-s-9th-circuit-court-nominee-has-record-of-litigating-cases-against-tribes-vgOXNDpPUkKd3qXMTt2IXw.

12. In law school, you published a note about *Miranda* warnings. You expressed support for a view advocated by Justice Scalia in *Davis v. United States* that federal courts should, of their own accord, consider invoking a statute, 18 U.S.C. § 3501, that exempts officers from issuing *Miranda* warnings before questioning a suspect.[7] You argued that "Justice Scalia is right—courts should consider Section 3501 *sua sponte*."[8] You added, "To refrain from doing so is to refrain from deciding the case according to the law."[9]

    a. Do you still adhere to the view you expressed in that article that "[i]n federal cases presenting Miranda issues, courts should consider the applicability of Section 3501 *sua sponte*"?[10]

    No. Two years after the comment was published, the Supreme Court reaffirmed *Miranda* and declared Section 3501 unconstitutional. *See Dickerson v. United States*, 530 U.S. 428 (2000). (I note that the decision in *Dickerson* was not inconsistent with the position set out in my comment. I had argued only that courts should *consider* Section 3501; I expressly declined to take a position on whether the statute was constitutional. *See* Eric D. Miller, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029, 1037 n.41 (1998)). In light of *Dickerson*, there is no reason for any court to consider Section 3501, whether *sua sponte* or on the motion of a party.

    b. Do you still adhere to the view you expressed in that article that "[t]o refrain from doing so is to *refrain from deciding the case according to the law*"?[11]

    Please see my answer to question 12(a) above.

    c. If confirmed, would you follow Justice Scalia's separate opinion in *Davis* and consider Section 3501 *sua sponte* as an exemption where *Miranda* warnings are at issue in a case before you?

    Please see my answer to question 12(a) above.

    d. If presented with such a case, how would you square adhering to the precedent of the Court's decision in *Davis* (and other precedents relating to the application of *Miranda*) with following Justice Scalia's concurrence in that case?

    Please see my answer to question 12(a) above.

13. 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.[12] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[13] 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.[14] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[15]

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

Yes. Regrettably, racial bias continues to exist in our society. That bias can be conscious or unconscious, and participants in the criminal justice system are subject to the same prejudices that exist in society as a whole.

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

Yes.

---

[7] 512 U.S. 452, 462 (1994) (Scalia, J., concurring).
[8] Eric D. Miller, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1029 (1998).
[9] *Id.* at 1058.
[10] *Id.*
[11] *Id.* (emphasis added).
[12] 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.
[13] *Id.*
[14] 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.
[15] *Id.*

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.

I have read articles on the subject in the popular press, but I do not recall specific titles. I have also read a number of books that, while not specifically focused on implicit bias, address broader issues of racial bias in the criminal justice system. *E.g.*, Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (2014); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012); William J. Stuntz, *The Collapse of American Criminal Justice* (2011). The United States District Court for the Western District of Washington shows prospective jurors a video on the subject of implicit bias. I have reviewed the video and have discussed it with other attorneys who practice in the Western District of Washington.

14. 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.[16] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[17]

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 that 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 that issue.

15. 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.

16. Do you believe that *Brown v. Board of Education*[18] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown is binding Supreme Court precedent, and if confirmed, I would faithfully apply it. *Brown* is also a landmark decision that is universally acknowledged to have corrected a great injustice. Nevertheless, it would be inappropriate for me to offer my personal views on whether *Brown*—or any other decision of the Supreme Court—was correctly decided. *See Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64 (2010) ("I think that . . . it would not be appropriate for me to talk about what I think about past

cases, you know, to grade cases.") (statement of Hon. Elena Kagan).

17. Do you believe that *Plessy v. Ferguson*[19] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    In *Brown v. Board of Education*, the Supreme Court recognized that *Plessy* was incorrect, and it therefore overruled that decision. 347 U.S. 483, 494-95 (1955). The "doctrine of 'separate but equal'" recognized in *Plessy* "has no place" in American law. *Id.* at 495.

18. 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?

    Lawyers from the Department of Justice have provided guidance on questions that were asked to prior nominees, on the Code of Conduct for United States Judges, and on the manner in which other nominees have understood and applied the Code of Conduct for United States Judges. The answers I am providing are my own.

19. 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."[20] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    In *Plyler v. Doe*, the Supreme Court stated: "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." 457 U.S. 202, 210 (1982). Because of the ongoing legal disputes concerning what immigration procedures comport with principles of due process, it would be improper for me to offer my own opinions on the subject.

---

[16] 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.
[17] *Id.*
[18] 347 U.S. 483 (1954).
[19] 163 U.S. 537 (1896).
[20] 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 October 31, 2018
For the Nomination of

Eric D. Miller, to the U.S. Court of Appeals for the Ninth Circuit

1. **How do you view the role of tribal governments within the United States system of government?**

   Indian tribes are "separate sovereigns pre-existing the Constitution," and therefore "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). "Among the core aspects of sovereignty that tribes possess . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (internal quotation marks omitted). Tribes also retain significant regulatory and adjudicatory jurisdiction.

2. **What is your understanding of the legal foundation for broad federal authority in Indian affairs?**

   The Supreme Court has held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). In describing the sources of that power, the Court has cited both the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Treaty Clause, U.S. Const. art. II, § 2, cl. 2. *See Lara*, 541 U.S. at 200-01.

3. **Under what authority may Congress legislate in Indian affairs?**

   Please see my answer to question 2 above.

4. The Supreme Court historically has asserted an unlimited congressional power on Indian tribes that is grounded in the commerce clause and the treaty clause, but also in a "pre-constitutional" power not found in the U.S. Constitution.

   a. **Do you agree that there are powers not found in the U.S. Constitution?**

      I have not had occasion to study this particular question.

5. At your nominations hearing, you referred to treaties that many tribes have with the United States.

   a. **Is a treaty with the United States necessary for the federal government to have a government-to-government relationship with an Indian tribe?**

      No. As of July 2018, the United States has government-to-government

relationships with 573 tribes. *See* 83 Fed. Reg. 34,863 (July 23, 2018). Some of those tribes have treaties with the United States, but many do not.

b. **Is a treaty with the United States necessary for the federal government to have a trust obligation to a tribe?**

No. The Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). That obligation extends to the implementation of treaties, but it is not limited to that context.

c. **Apart from any obligations pursuant to a treaty, what is the source of the federal government's fiduciary obligations to an Indian tribe? What is your understanding of the scope of this fiduciary obligation?**

In *Mitchell*, the Supreme Court pointed to a long line of cases establishing the "general trust relationship between the United States and the Indian people." 463 U.S. at 225; *see id.* at 225-26. The Court also noted that fiduciary obligations can arise from statutes and regulations. For example, when Congress has "give[n] the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians," it has "establish[ed] a fiduciary relationship and define[d] the contours of the United States' fiduciary responsibilities." *Id.* at 224. Any assessment of the scope of the government's fiduciary obligations must take into account pertinent treaties, statutes, and regulations.

6. **What is the source of an Indian tribe's sovereign immunity?**

In *Michigan v. Bay Mills Indian Community*, the Supreme Court stated that Indian tribes possess "the 'common-law immunity from suit traditionally enjoyed by sovereign powers'" as one of the "core aspects of [their] sovereignty." 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). The Court further explained that sovereign immunity "is 'a necessary corollary to Indian sovereignty and self-governance.'" *Id.* (quoting *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

7. **What, if any, limitations are there on the authority of the Department of the Interior to acquire and hold land in trust for the benefit of an Indian tribe?**

The Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to acquire land in trust for "Indians," 25 U.S.C. § 5108, which the statute defines to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 5129. *See generally Carcieri v. Salazar*, 555 U.S. 379 (2009). Also included are "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." 25 U.S.C. § 5129. Congress has enacted several other statutes authorizing trust acquisitions in various contexts. *See*, *e.g.*,

Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, 103 Stat. 83; Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, 101 Stat. 1556. Any trust acquisition must comply with whatever limitations are imposed by the statute authorizing the Secretary to act.

8. **When a statute specific to Indian tribes is ambiguous, which approach should be applied to resolve the ambiguity in the first instance: *Chevron* deference or the Indian canon of construction that ambiguities in statutes addressing Indian affairs will be construed to benefit tribes?**

   The Supreme Court has not spoken directly to this question, which has given rise to a conflict among the circuits. *Compare*, *e.g.*, *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) ("[T]he canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes."); *and Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (same); *with Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) ("In this circuit, an agency's legal authority to interpret a statute appears to trump any practice of construing ambiguous statutory provisions in favor of Indians."). If I were to be confirmed, I would be bound to follow Ninth Circuit law on the question.

9. In 2015, you authored a Supreme Court merits brief in *New Mexico v. Department of the Interior*. In that case, you represented New Mexico in its challenge to regulations promulgated under the Indian Gaming Regulatory Act. Your brief asserted that the regulations "diminish[ed] the State's negotiating power by establishing a mechanism that permits tribes to seek more favorable terms." In addition, your brief challenged an Interior Department finding that, in your view, "undermine[d] the State's bargaining position in negotiations with [tribes] . . . and its dignitary interests as a sovereign."

   a. **Do you still agree with your arguments in *New Mexico v. Department of the Interior*?**

      Although the question refers to "a Supreme Court merits brief," this case was litigated only in the District of New Mexico and the Tenth Circuit. The quoted language is from a brief that was filed in the Tenth Circuit.

      The question assumes that I agreed with the arguments in the brief at the time. As an advocate, my role in the case was to advance the interests of the firm's client, the State of New Mexico, not to express my own personal views. *See* Wash. R. Prof. Conduct 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."). The Tenth Circuit agreed with the position we advocated, and its decision is binding on the parties. *See New Mexico v. Department of the Interior*, 854 F.3d 1207 (10th Cir. 2017). No party sought review of the decision in the Supreme Court.

b. **Do you believe the federal government is required to advance the bargaining power of states relative to Native American tribes?**

No, and the brief did not suggest otherwise. The case involved the interpretation of a federal statute, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* Federal agencies, including the Department of the Interior, are required to comply with statutes enacted by Congress. In enacting legislation, Congress is free to consider a variety of policy considerations and is not required to advance any particular interest.

c. **Do you believe your arguments were consistent with the United States' trust relationship with Native American tribes?**

The arguments we advanced on behalf of the State of New Mexico were based on the text of the Indian Gaming Regulatory Act. That statute takes account of the United States' trust obligations by permitting the Secretary of the Interior to disapprove a gaming compact if it would violate "the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(iii). In its unanimous decision in favor of the State of New Mexico, the Tenth Circuit concluded that the statute "unambiguously" resolved the question presented. 854 F.3d at 1231.

10. In 2018, you authored a brief in *Upper Skagit Indian Tribe v. Lundgren*, which addressed whether tribes are immune from state court challenges to claims of land ownership. Your brief argued that tribes may not claim immunity in state courts to bar actions relating to immovable property in the state's territory. In addition, you argued that expanding the doctrine of tribal sovereign immunity to this scenario was "unnecessary to protect tribal interests." In a 7-2 decision, the Supreme Court disagreed with your arguments, and vacated and remanded the Supreme Court of Washington's ruling that the Upper Skagit Tribe was not immune from suit.

a. **Did you consult with any Native American tribes before arguing that expanding tribal sovereign immunity, in these limited circumstances, was "unnecessary to protect tribal interests"?**

Respectfully, it is not correct to say that "the Supreme Court disagreed" with the arguments advanced on behalf of our clients. Rather, the Supreme Court remanded the case without reaching the merits of the argument I advanced in the Supreme Court. (I was not counsel when the case was previously before the Washington Supreme Court.) Indeed, Justice Kagan suggested at oral argument that the argument I advanced was "an extremely strong argument." *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387, Tr. of Oral Arg. 39:25. On remand, the case was resolved in our clients' favor.

The issue in *Upper Skagit Indian Tribe* was whether tribal sovereign immunity bars an action involving title to off-reservation land in which a tribe claims a property interest. Other sovereigns, such as States and foreign nations, do not

enjoy sovereign immunity in actions involving title to land held within the territory of another sovereign. The principal argument advanced in the brief filed on behalf of our clients was that the scope of tribal sovereign immunity in immovable-property cases should be the *same* as the scope of immunity afforded to other sovereigns—in other words, that the sovereign interests of Indian tribes should receive the same respect as the sovereign interests of States and foreign countries. As the question notes, the brief went on to respond to potential arguments for treating Indian tribes differently from other sovereigns. The role of sovereign immunity in protecting tribal interests was one factor that was relevant to those issues, and that is why it was addressed in the brief. And as noted above, the Supreme Court did not disagree with that argument but simply declined to reach it.

My role in the case was to be an advocate for Sharline and Ray Lundgren, who were in a property dispute with the Upper Skagit Indian Tribe. Prior to briefing, we consulted with the Lundgrens, but not the other parties, to ascertain the Lundgrens' interests, which we then advocated before the Court. Separately, the Upper Skagit Indian Tribe presented its views to the Court. At various points during the litigation, we consulted with the Upper Skagit Indian Tribe to discuss the possibility of settlement.

b. **Do you agree that Native American tribes should have a role in determining what is "necessary to protect tribal interests"?**

Yes. In the *Upper Skagit Indian Tribe* litigation, the Upper Skagit Indian Tribe played such a role by filing briefs and presenting oral argument to the Supreme Court, setting out the Tribe's view of whether sovereign immunity should apply. In addition, a number of other tribes filed amicus briefs setting out their views.

c. According to the U.S. Department of the Interior, Bureau of Indian Affairs, the United States' trust responsibility over Native American tribes is "a legally enforceable fiduciary obligation . . . to protect tribal treaty rights, lands, assets, and resources."[1]

i. **Do you believe your arguments in *Upper Skagit Indian Tribe v. Lundgren* would have advanced the United States' fiduciary obligation to protect tribal lands?**

The United States appears to have taken the view that the case did not implicate its fiduciary obligation to protect tribal lands. Although the United States filed an amicus brief in the case, its brief made no mention of any fiduciary obligations. The case involved off-reservation fee land, not tribal land. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008) (explaining that "non-Indian fee parcels have ceased to *be* tribal land"). My role, as an advocate for Sharline and

[1] https://www.bia.gov/frequently-asked-questions

Ray Lundgren, was to promote the Lundgrens' interests, not those of the United States.

11. In 2014, you were counsel of record in *Friends of Amador County v. Jewell*. In that case, you represented Friends of Amador County in their petition for the Supreme Court to decide whether a tribe's federal recognition was sufficient to establish sovereign immunity. Your brief argued that a tribe's federal recognition does not compel a finding that the tribe is immune from suit. The U.S. Supreme Court declined to hear the case.

    a. **Do you believe your argument was consistent with the longstanding doctrine of tribal sovereignty?**

    Yes. The litigation in that case involved a dispute over the lawfulness of the decision by the Secretary of the Interior to extend federal recognition to the Buena Vista Rancheria of Me-Wuk Indians of California. No party challenged the principle that a validly recognized tribe would be entitled to immunity. The question presented was whether a federally recognized tribe may invoke its sovereign immunity to prevent a court from reviewing the lawfulness of the Secretary's decision to recognize it as a tribe. That question has given rise to a circuit conflict, with the D.C. Circuit holding that immunity "is inappropriately invoked when tribal sovereignty is the ultimate issue." *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997). Our client's position was that the Supreme Court should grant review to resolve the circuit conflict and adopt the D.C. Circuit's position.

    b. For more than a decade, Friends of Amador County challenged the Buena Vista casino, which, after several legal battles, is scheduled to open next year. In 2016, you also represented Citizens Against Reservation Shopping in its opposition to the proposed Cowlitz casino-resort in Washington.

    According to the National Bureau of Economic Research, Native American casinos come with several positive trends, including an 11.5% population increase on reservations; an adult employment increase of 26% on reservations; and a 14% decline in the number of working poor on reservations.[2]

        i. **Were you aware of these economic benefits during your advocacy in opposition to Native American casinos?**

        I am not familiar with the particular statistics cited in the question, but I am aware that casinos can provide economic benefits. My firm's advocacy in the cited cases was not "in opposition to Native American casinos" as a general matter, but rather was on behalf of community organizations that believed that the Secretary of the Interior's decision-making process in particular cases had violated federal statutes, including the Administrative Procedure Act, the National Environmental Policy Act, and the Indian

[2] https://www.nber.org/digest/feb03/w9198 html

Reorganization Act of 1934. I note that, in one of the cited cases (the litigation involving the Cowlitz Tribe), our clients' position was aligned with the position of another Indian tribe, the Confederated Tribes of Grande Ronde.

ii. **Do you agree that casinos provide economic opportunities to Native Americans?**

I have not studied the issue in sufficient detail to say that all casinos provide economic opportunities to Native Americans, but I agree that many casinos do so.

iii. **Do you agree that the federal government, as part of its trust relationship, should protect the economic opportunities available to Native Americans?**

Yes.

12. In 2015, you filed an amicus brief on behalf of the Washington Chamber of Commerce in a case called *Thornell v. Seattle Service Bureau, Inc.* That case addressed whether an out-of-state resident could sue an in-state corporation for deceptive practices under the Washington Consumer Protection Act. Among other things, your brief argued that applying the Washington Consumer Protection Act to cases brought by non-resident plaintiffs "would do nothing to 'protect the public' of Washington," and would "significantly undermine 'the development and preservation of business' in the State." The Supreme Court of Washington rejected your arguments, holding instead that non-resident plaintiffs could bring suit under the state law.

a. **Do you still agree with the position you took in *Thornell*?**

The question assumes that I agreed with the position at the time. As an advocate, my role in the case was to advance the interests of my client, not to express my own personal views. *See* Wash. R. Prof. Conduct 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

As the question notes, the Washington Supreme Court adopted a position contrary to that of my client. The Washington Supreme Court has the final word on the interpretation of Washington law. If I were to be confirmed, and if the issue were to come before me in a case in which Washington law supplied the rule of decision, I would faithfully apply the decision of the Washington Supreme Court. *See* 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

b. **Do you agree that consumers are protected whenever courts enforce prohibitions on deceptive corporate practices?**

Yes.

c. **More broadly, do you believe that consumer protection is dependent on corporate accountability?**

Yes. Corporations should be held accountable when they engage in wrongdoing. And the Washington Legislature has declared that enforcement of the laws "governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices" is necessary "in order to protect the public and foster fair and honest competition." Wash. Rev. Code § 19.86.920.

13. In 2003, you co-authored a brief in *Britell v. United States*, which argued that the Department of Defense was not required to reimburse the spouse of a servicemember for the cost of an abortion. Your brief noted that Congress had prohibited the Department of Defense from using any federal funds to pay for abortions. Your brief also asserted that Congress's ban on federal abortion funding "plainly advances the government interest in protecting and promoting respect for all potential human life."

a. **Do you believe that a fetus is entitled to any protection under the U.S. Constitution? If the answer is "yes," please provide citations.**

No. *See Roe v. Wade*, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

14. In *Whole Woman's Health* in 2016, the U.S. Supreme Court invalidated two provisions of Texas law that imposed new restrictions on health care facilities that provide abortions. After the law passed, the number of those facilities in Texas dropped in half, severely limiting access to health care for the women of Texas.

a. **Was *Whole Woman's Health* correctly decided?**

The decision in *Whole Woman's Health* is binding Supreme Court precedent, and if confirmed, I would faithfully apply it. It would be inappropriate for me to offer my personal views on whether *Whole Woman's Health*—or any other decision of the Supreme Court—was correct. *See Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64 (2010) ("I think that . . . it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.") (statement of Hon. Elena Kagan).

b. **Did the Court in *Whole Woman's Health* change or clarify the "undue burden" test used to evaluate laws restricting access to abortion? If so, how?**

The Court in *Whole Woman's Health* clarified the undue-burden test by applying it to the facts presented in the case and by correcting the interpretation of the test

that had been adopted by the court of appeals. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("The Court of Appeals' articulation of the relevant standard is incorrect."). As in any area of the law, understanding the legal tests adopted by the Supreme Court requires examining how the Court has applied those tests in practice.

c. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

The Court in *Whole Woman's Health* noted the district court's finding that the statute at issue "erect[ed] a particularly high barrier for poor, rural, or disadvantaged women." 136 S. Ct. at 2302. That factor must be evaluated according to the standards set out in the Court's opinion.

d. **When you co-authored your amicus brief in 2003, did you consider the abortion access of poor women?**

The question refers to an amicus brief filed on behalf of the United States in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003). I contributed to the brief in my capacity as a line attorney in the Appellate Staff of the Civil Division of the United States Department of Justice.

The government's amicus brief speaks for itself. My professional obligation to safeguard the confidences of former clients prohibits me from disclosing what factors the government considered in formulating its position. *See* Wash. R. Prof. Conduct 1.9(c).