Nomination of Barry W. Ashe
to the U.S. District Court for the Eastern District of
Louisiana Questions for the Record
Submitted January 17, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be "originalist"? If so, what does that mean to you? If not, how would you describe your approach?

   In general, I believe that a judge asked to interpret any provision of the United States Constitution or other law should begin with the text of the provision at issue and then evaluate that text in light of relevant precedent. If confirmed as a district court judge, I would be bound by oath to interpret the Constitution by applying all precedents of the Supreme Court and the Fifth Circuit, without regard to any label assigned to my approach to constitutional interpretation. However, in my understanding, an "originalist" approach seeks to interpret constitutional provisions according to their original public meaning. *See, e.g., District of Columbia v. Heller,* 554 U.S. 570, 581-87 (2008) (interpreting Second Amendment terms by using founding-era dictionaries and other sources); *id.* at 575-77 (observing that constitutional interpretation "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation"). Where the Supreme Court and the Fifth Circuit have interpreted specific constitutional provisions by seeking to discern their original public meaning, I would fully and faithfully follow those precedents. *See, e.g., Crawford v. Washington,* 541 U.S. 36, 42-56 (2004) (interpreting Sixth Amendment's Confrontation Clause according to founding-era understanding of English common law).

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

   As a general rule, in construing a statute, there is no need to go beyond its text when its meaning is clear and unambiguous. If the text alone does not provide a clear insight into the meaning of the statute, the judge has a number of tools available to aid in construing the statute, including, among others, the canons of statutory construction. However, it is my understanding that, according to governing Supreme Court precedent, courts may also have recourse to legislative history when the relevant statutory text is ambiguous. As a judge, I would fully and faithfully follow any binding precedents that relied on legislative history to construe a statutory provision.

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

   a. When, if ever, is it appropriate for a district court to depart from Supreme Court or the relevant circuit court's precedent?

   It is never appropriate for lower courts – including especially federal district courts

– to depart from binding Supreme Court or circuit court precedent. Only the Supreme Court has the "prerogative … to overrule one of its precedents." *Bosse v. Oklahoma,* 137 S. Ct. 1, 2 (2016).

b. When, if ever, is it appropriate for a district court judge to question Supreme Court or the relevant circuit court's precedent?

District judges are bound to follow Supreme Court and circuit court precedent regardless of personal belief. This requirement makes expression of disagreement with such precedent almost always immaterial and inappropriate for a district judge. In rare circumstances, it may be proper in an appropriate case for a district judge to write to point out a developing legal issue that needs the clarity or resolution that can be afforded by decision from a higher court, provided that the opinion makes clear that the judge is nonetheless bound to follow all binding Supreme Court and circuit court precedent regardless of the judge's view of its merits.

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

As a nominee to a lower federal court, it would be inappropriate for me to comment on what circumstances might justify the Supreme Court in overturning its own precedent. Only the Supreme Court has "the prerogative of overruling its own decisions." *Rodriquez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989).

4. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A 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?"

A district court judge must treat all Supreme Court precedent as "superprecedent," in the sense that all of the Supreme Court's decisions – including *Roe v. Wade* and *Planned Parenthood v. Casey* – are binding on all lower federal courts. In like fashion, a district judge in the Fifth Circuit is bound by all Fifth Circuit precedent applying these cases.

b. Is it settled law?

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

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

Obergefell is a precedent of the Supreme Court and therefore binding on all lower federal courts. If confirmed as a district judge, I would apply it fully and faithfully.

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

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

As a nominee to a lower federal court, under the canons of judicial ethics, it would be inappropriate for me to express my personal views of agreement or disagreement with a particular Supreme Court opinion. Regardless, my personal views would have no bearing on my role in deciding the constitutionality of any particular government regulation of firearms. As with any other issue that might come before me, my role would be to decide such questions based on a full and faithful application of controlling precedent. With respect to the interpretation of the Second Amendment, the majority opinion in *Heller* is binding upon all lower courts and, if confirmed, I would apply that decision fully and faithfully.

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

The Supreme Court in *Heller* expressly stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and the Court emphasized that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."' *District of Columbia v. Heller,* 554 U.S. 570, 626-27 (2008). The Court added that "[w]e are aware of the problem of handgun violence in this country [and] [t]he Constitution leaves the District of Columbia a variety of tools for combating the problem, including some measures regulating handguns." *Id.* at 636. *Heller* is binding precedent of the Supreme Court, and I would follow it, as I would follow all precedent of the Supreme Court and the Fifth Circuit.

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

As a nominee to a lower federal court, it would be inappropriate for me to express my personal views on the question, and I understand that the majority

and dissent in that case had different views of it. Regardless, *Heller* is binding upon all lower courts, and if confirmed, I would apply that decision fully and faithfully, just as I would apply all binding Supreme Court precedent.

7. From 1994-2000, you represented the Tangipahoa Parish Board of Education and its members in a challenge to a "disclaimer" the Board required to be read before teaching evolution in public school classrooms. The disclaimer stated that the teaching of evolution "should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." A federal district court struck down this "disclaimer" as a violation of the First Amendment's Establishment Clause. The Fifth Circuit upheld the decision and the U.S. Supreme Court denied the petition for certiorari you filed.

   Shortly after filing the petition for certiorari, you told a local newspaper that "[t]here are many scientists and others who view that evolution isn't a proven fact, and if that's so, and if the School Board teaches evolution only in terms of a theory that has explanatory power for this concept, then isn't it better science to permit other opinions . . . than to exclude them?" (Craig Malisow, *ACLU to oppose disclaimer petition before high court*, THE DAILY STAR (Hammond, LA) (Apr. 19, 2000)).

   a. In your view, how did the language of the disclaimer promote "better science"?

   In the referenced interview, as the school board's counsel, I was expressing the view of my client that the disclaimer was consistent with the scientific method, in that it affirmed that the scientific theory of evolution would be taught in the public schools while also noting the existence of other concepts of the origin of life, and it expressly "urged [students] to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." It would be inconsistent with my obligations as lawyer to client under the Rules of Professional Conduct to offer my personal views on the matter.

   In the same interview, you stated that the "[t]he School Board feels strongly that it would like to make the classroom an environment in which every child will feel welcome."

   b. Were you concerned that in making explicit mention of one particular religion in the "disclaimer," the School Board would be unable to realize its intent to make "every child" feel welcome in the classroom? Please explain your view.

   In the referenced interview, as the school board's counsel, I was expressing the viewpoint of my client that the disclaimer would have assisted in making every child feel welcome in the school community without regard to their personal beliefs regarding the theory of evolution as an explanation of life's origins,

consistent with the Supreme Court's holding in *Edwards v. Aguillard,* 482 U.S. 578 (1987). As urged in its court filings, the school board believed that its explicit mention of one particular religion in the disclaimer was a helpful example of what was meant by concepts of life's origins other than evolution. *See Tangipahoa Parish Bd. of Ed. v. Freiler,* 530 U.S. 1251, 1255 (2000) (Scalia, J., dissenting from denial of certiorari) ("To think that this reference to (and plainly not endorsement of) a reality of religious literature – and this use of an example that is not a contrived one, but to the contrary the example most likely to come into play – somehow converts the otherwise innocuous disclaimer into an establishment of religion is quite simply absurd."). However, it would not be consistent with my obligations as a lawyer to my client under the Rules of Professional Conduct to offer my personal views on the matter.

8. On your Senate Questionnaire, you note that you were a Board Member on the Christian Health Ministries Foundation from 2000-2004.

a. What duties did your board membership entail?

I was never very active as a board member of the Christian Health Ministries Foundation, which was one of the reasons I chose to resign this position after such a short tenure. My recollection is that my duties as a board member involved periodic attendance at board meetings (which I believe were quarterly) and brainstorming about and participating in the Foundation's fundraising activities.

In 2017 guidelines, the organization explained that its "members have agreed not to share medical bills for pregnancies of unwed mothers. Instead…we encourage you to seek help from a compassionate, Christian pregnancy center if you find yourself in this situation. That agency will be best suited to address all of your needs – spiritual, emotional, financial, and physical."

It is also my understanding that under the 2017 guidelines, the organization refuses to cover birth control, fertility treatments, surrogacy, sterilization, and abortion.

b. During your board service, did Christian Health Ministries Foundation publish guidelines regarding the specific health needs and services that could be covered within the organization's cost-sharing structure?

I believe that the question has in view, and quotes the guidelines of, a wholly different organization – namely, the Christian Health***care*** Ministries based in Barberton, Ohio – rather than the organization (Christian Health Ministries Foundation) on whose board I once served. Accordingly, the guidelines referenced by the question are those of a different organization. That being said, I have no recollection of the Foundation's having published any guidelines, much less these guidelines, during my tenure on the board. If it did so, I was not aware of it. My recollection is that the mission of the Foundation at the time of my brief service involved no policymaking, but was confined to fundraising and the

provision of certain limited chaplaincy and nursing functions.

c. If so, did you contribute to any of the guidelines, or was your approval of any of them required for their adoption by the organization?

Not to my knowledge or recollection. See my response to Question 8(b) above. I did not contribute to any guidelines that may have been issued by the Foundation, and to the best of my knowledge and recollection, my approval of any such guidelines was never required for their adoption.

d. Additionally, if there were guidelines promulgated during your board service, did they include the limitation above declining coverage for unmarried pregnant women? What about the other restrictions on reproductive health options?

See my response to Questions 8(b) and (c) above.

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

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

Without disclosing specific advice by any attorneys, I understood that I was to disclose all responsive information truthfully and to the best of my ability.

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

It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

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

No, I have never maintained a public blog or public social media account. It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

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

No, I have not posted commentary on legal, political, or social issues on public websites either under my own name or a pseudonym. It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet," and I have done so truthfully and to the best of my ability.

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

No, I have taken no such steps.

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

I received the questions from the Department of Justice in the evening of Wednesday, January 17, 2018. I reviewed the questions, performed limited research, personally drafted answers to all of the questions, solicited comments from the Department of Justice attorneys working on my nomination, and revised my draft answers as I deemed appropriate in light of those comments.

Senator Dick Durbin
Written Questions for Kurt Engelhardt, Howard Nielson and Barry Ashe
January 17, 2018

For questions with subparts, please answer each subpart separately.

Question for Barry Ashe

1. From 1994-2000 you represented the Tangipahoa Parish Board in litigation involving the disclaimer that the Board required to be read before the teaching of evolution in public school classes. The disclaimer said that the lesson regarding the theory of evolution "should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." After a district court and the Fifth Circuit held that the disclaimer violated the Establishment Clause and after the Supreme Court denied certiorari in 2000, you said to the *Houston Chronicle* "those who do not adhere to the view of evolution as the origin of man are somehow second-class citizens in the school community…Their view is not even acknowledged." **What did you mean by this quote?**

   As the school board's counsel in the case, I was expressing in this quotation my client's disappointment in the Supreme Court's decision to deny certiorari to hear the case, which fell just one vote shy and included a very rare dissenting opinion joined by the three justices who voted to hear the case. The school board's view was that its disclaimer would make all members of the school community feel welcome, including those who might harbor doubts about the theory of evolution as an explanation of *the origin of man* (as opposed to a theory for the more limited scientific concept of the development of living organisms). The school board was concerned that, without the disclaimer, this segment of the school community might believe that their viewpoint was not being heard. The quotation was meant to capture, on behalf of my client, the sentiment expressed by Justice Scalia in his dissent from the denial of certiorari. *See Tangipahoa Parish Board of Ed. v. Freiler,* 530 U.S. 1251, 1254 (2000) (Scalia, J., dissenting from denial of certiorari).

   In the wake of the decision by the Fifth Circuit in *Freiler* and the Supreme Court's denial of certiorari in 2000, the school board was counseled to heed and, to my knowledge, has heeded the courts' mandate in the case. If confirmed as a judge, I would fully and faithfully apply *Freiler* and any other governing precedents of the Supreme Court and the Fifth Circuit concerning the Establishment Clause.

Nomination of Barry W. Ashe to the
United States District Court
For the Eastern District of Louisiana
Questions for the Record
Submitted January 17, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
    a. Do you agree with Justice Roberts' metaphor? Why or why not?

    I agree with Chief Justice Roberts' metaphor to the extent it means that judges should resolve disputes by applying the law to the facts of the cases before them and not by imposing the judges' own personal preferences. Only in this way will the nation benefit to the fullest measure from the separation of powers and judicial independence built into our constitutional structure.

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

    If the law governing a particular case requires a judge to take into account the practical consequences of a ruling, then the judge should do so. For example, the standard for entering a preliminary injunction requires a judge to consider, among other things, whether there is "a substantial threat that [a person] will suffer irreparable harm if the injunction is not entered." *Bluefield Water Ass'n, Inc. v. City of Starkville,* 577 F.3d 250, 252-53 (5th Cir. 2009).

    c. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a judge to make a subjective determination?

    No. Under well-settled principles, a court must find that "[a] genuine dispute as to a material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Rogers v. Bromac Title Servs., LLC,* 755 F.3d 347, 350 (5th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). That is an objective standard. The Supreme Court has emphasized that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
    a. What role, if any, should empathy play in a judge's decision-making process?

A federal judge takes an oath to "administer justice without respect to persons, and do equal right to the poor and the rich." 28 U.S.C. § 453. Accordingly, in each case, the judge must apply the law to the facts; a judge's personal opinions and emotions must not lead the judge to favor one party over another. Judges are certainly human and experience a wide range of emotions, including empathy for individuals who are suffering. However, the judge must remain mindful of his or her oath and duty to "faithfully and impartially discharge and perform all the duties incumbent upon [him/her] ... under the Constitution and laws of the United States." *Id.*

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

Judges are human and having empathy for others – especially for those who are marginalized or suffering or mistreated – is a natural and praiseworthy human response. It cannot, however, lead a judge to privilege one side of a legal dispute over the other, because that would violate the judge's oath to "administer justice without respect to persons, and do equal right to the poor and the rich, and … [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. 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?

As reflected in my answer to Question 2 above, I am mindful of the oath I would take as a judge to "administer justice without respect to persons, and do equal right to the poor and the rich, and … [to] faithfully and impartially discharge and perform all the duties incumbent upon [the judge]." 28 U.S.C. § 453. This oath would require me to uphold equally the interests of the "little guy" and the corporation, resolving the case before me on the basis of its merits and not the parties' status.

Moreover, my professional record and personal history should assure the Committee and the American people that I will render decisions impartially and treat all persons that come before the court with equal dignity and respect. In my legal career, I have represented a diverse group of clients, each of whom received the same level of attention regardless of their race, background, socioeconomic status, or education. This included individuals who might be characterized as the "little guy," including an injured seaman, a dyslexic student and her mother, and small business owners, among others. I always served these clients zealously and provided them with the same level of respect, courtesy, and diligent representation as I did any large

corporate clients. In addition, throughout my legal career, I have assisted in advancing the programs of bar associations to provide legal and non-legal services to those less fortunate.

a. In civil litigation, well-resourced parties commonly employ “paper blizzard” tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

   As recognized in well-established case law and in amendments to the Federal Rules of Civil Procedure as far back as 1983 and as recent as 2015, "[a federal court] must apply the standards [of discovery] in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent." Fed. R. Civ. P. 26 Advisory Committee Notes to 1983 and 2015 Amendments. Thus, the rules of court have long recognized that such "paper blizzard" tactics are unacceptable. In like manner, it would be inappropriate to allow pretrial motions or the like to overwhelm parties or force settlements as a result of their burdensomeness and apart from their merits. To prevent this kind of conduct, a judge should apply the rules of procedure as prescribed, including any and all considerations of proportionality encompassed within the rules and standards for discovery and pretrial submissions.

Questions for the Record for Barry W. Ashe

Senator Mazie K. Hirono

1. As I mentioned at the hearing, as part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees for a lifetime appointment to the federal bench, 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, I have not.

   b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

   No, I have not.

2. In a 2000 law review article you wrote, called *Constitutional Law: The Fifth Circuit's War Against Religion in the Public Square*, you argued that the "Fifth Circuit is waging a war against religion in the public square" based on five Fifth Circuit decisions.

   a. Do you believe this "war against religion in the public square" is still going on today?

   The phrase "war against religion in the public square" was used to evocatively describe a series of five decisions involving Establishment Clause or related issues rendered by the Fifth Circuit in the 1999 – 2000 timeframe to which the *Loyola Law Review*'s issue was then devoted. In each of the five cases, the Fifth Circuit happened to have ruled against the position espoused by advocates of religious freedom. Whether or not this was fairly characterized as a "war," it is unlikely (though I have not studied the question) that, in the years since the 1999 – 2000 timeframe, the Fifth Circuit has dealt with this same number of significant and different aspects of the Establishment Clause in a one or two-year period with the same uniformity of result. In this sense, the "war" is not going on today.

   However, let me be clear that it is my belief that, in resolving the cases, the Fifth Circuit was faithfully performing its duty to interpret and apply the relevant constitutional provisions and principles in a way as would lead to what the court saw as the correct result on the facts presented by each of the cases. The Fifth Circuit most certainly continues to perform this duty today.

   b. What was your intent in describing the Fifth Circuit's decisions as a "war against" religion in the public square? Was it your view that the issues addressed—such as public funding of parochial education, school prayer, the use of disclaimers about teaching evolution in public schools, volunteer counseling by clergy in schools, and the use of school buildings for religious activity—were

being unfairly attacked?

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

3. You defended the Tangipahoa Parish Board of Education's requirement that a "disclaimer" be read before evolution was taught in public schools. The Fifth Circuit found that "the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation." After the district court and the Fifth Circuit found that using the disclaimer violated the Establishment Clause, you pursued this case all the way to the Supreme Court, which denied further review.

   a. Is it your view that the Establishment Clause permits public schools to present creationism as an alternative theory to evolution?

   In *Edwards v. Aguillard,* 482 U.S. 578 (1987), the Supreme Court applied the Establishment Clause to invalidate Louisiana's Balanced Treatment Act, which had required that creation science be taught in public schools if evolution were taught, or that evolution not be taught at all. The Court noted, however, that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." *Id.* at 594. As a district judge, I would fully and faithfully apply all binding precedents and laws concerning this question.

   b. Do you believe that the Fifth Circuit's decision was incorrect?

   As a nominee, under the canons of judicial ethics, my personal beliefs about a binding decision of the Fifth Circuit are irrelevant. Instead, I am duty-bound to apply all such binding precedents and laws and will fully and faithfully do so.

Questions for the Record from Senator Kamala D. Harris
Submitted January 17, 2018

For the Nominations of:

Barry W. Ashe, to be United States District Judge for the Eastern District of Louisiana

Howard C. Nielson, Jr., to be United States District Judge for the District of Utah

James R. Sweeney II, to be United States District Judge for the Southern District of Indiana

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

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

    If confirmed to serve as a district court judge, I would approach sentencing decisions with a great deal of preparation, thought, and consideration. I would follow the statutes, rules, and procedures required by law. Prior to sentencing, I would consider the Presentence Investigation Report, the Advisory Sentencing Guidelines, the statutory sentencing factors set out at 18 U.S.C. § 3553(a), the arguments of counsel, any written or oral statements made by victims, and any requests for leniency by the defendant and/or others. At each sentencing hearing, I would do my best to impose a sentence that is "sufficient, but not greater than necessary" to achieve the sentencing purposes that Congress enumerates at 18 U.S.C. § 3553(a)(2).

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

    See my response to Question 1(a) above.

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

    "Departure" is a term of art used in the Sentencing Guidelines. Part K of Section 5 of the Guidelines sets forth numerous circumstances where it may be appropriate for the sentencing judge to "depart" by imposing a sentence below or above the sentencing range otherwise called for by the Guidelines. It would not be appropriate for the sentencing judge to impose a departure without first providing the parties reasonable advance notice that the judge is contemplating such a departure. Fed. R. Crim. P. 32(h). Additionally, a sentencing judge may impose a sentence above or below the range called for by the Guidelines by way of a variance. While a departure is based on the circumstances listed in Part K of Section 5 of the Guidelines, a variance is justified by the factors listed in 18 U.S.C. § 3553(a). A district judge's authority to sentence by variance is grounded

in the Supreme Court's holding that the Guidelines are merely advisory. *See United States v. Booker,* 543 U.S. 220 (2005). Regardless of the guideline range, a judge must impose a sentence that is "sufficient, but not greater than necessary" to achieve the sentencing purposed that Congress enumerates at 18 U.S.C. § 3553(a)(2).

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

i. Do you agree with Judge Reeves?

The inclusion of mandatory minimum sentences in criminal statutes falls within the purview of Congress under Article 1 of the United States Constitution. As a nominee and prospective district judge, it would be inappropriate for me to publicly comment on matters of legislative policy or to address political questions. Additionally, future cases may come before me involving such statutes. It would compromise the appearance of my impartiality in any such future cases to publicly comment on the propriety and efficacy of the statutes at the center of those cases. *See* Canon 3(A)(6), Code of Conduct for United States Judges. If confirmed to be a district judge, I will faithfully apply all federal statutory and guideline sentencing provisions, as interpreted by the Supreme Court and the Fifth Circuit.

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

See my response to Question 1(d)(i) above.

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

See my response to Question 1(d)(i) above.

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

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[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf

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

proactive efforts to address the injustice, including:

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

   Decisions to include mandatory minimum sentences in criminal statutes fall within the authority and discretion of Congress under Article I of the United States Constitution. While judges have criticized statutes that lead to unjust results in extreme cases, judges must generally be careful not to encroach upon the purview of Congress to make such policy decisions. See also my response to Question 1(d)(i) above.

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

   Decisions as to what charges to bring before a grand jury fall within the authority and discretion of the United States Attorney under Article II of the United States Constitution. Just as judges must be careful not to encroach upon the authority the Constitution affords Congress to make legislative decisions, they must also be careful to not encroach upon the deference afforded to the United States Attorney to make charging decisions consistent with the separation of powers enshrined in the Constitution. That said, I believe that in extreme cases, a judge may discuss such decisions with the United States Attorney's office.

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

   "Federal clemency is exclusively executive." *Harbison v. Bell,* 556 U.S. 180, 187 (2009); *see also Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 280-81 (1998) (executive clemency is "a matter of grace" that allows "the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations"); *Faulder v. Texas Bd. of Pardons & Paroles,* 178 F.3d 343 (5th Cir. 1999) ("[P]ardon and commutation decisions are not traditionally the business of courts …"). Thus, if federal judges reach out to the United States Attorney's office regarding clemency, they must do so with substantial deference to the executive's authority over such decisions.

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

Yes. If confirmed as a district court judge, I will assess the prudence of a sentence other than imprisonment in appropriate cases where permitted by the applicable statutes and warranted by the facts of the case.

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

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

   Yes. A judge takes an oath to administer justice faithfully and impartially without respect to persons, and do equal right to the poor and to the rich. 28 U.S.C. § 453. A judge should take this commitment very seriously, and if I am confirmed as a district court judge, I pledge to do so.

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

   Racial disparities have all too often plagued our criminal justice system. I have not conducted sufficient research or investigation to understand the prevalence of racial disparities in our criminal justice system today. An important first step in combatting such disparities is that a judge should treat every person that comes into the courthouse with equal courtesy, dignity, and respect and should apply the law without favor or prejudice.

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

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

   Yes. It is important to have a chambers staff and law clerks with a range of backgrounds, life experiences, viewpoints, talents, and interests. As a district court judge, I would give serious consideration to all qualified applicants for positions on my staff regardless of their age, gender, race, color, national origin, or religion.

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

   Yes. When reviewing applications and conducting interviews for positions at my law firm, I have ensured that the firm does not discriminate against applicants based on their age, gender, race, color, national origin, or religion. I have encouraged law firm decisions to hire minorities and women. As a district court judge, I would ensure that all qualified applicants for positions over which I have

hiring authority are given serious consideration without bias or prejudice.