Nomination of Stephanos Bibas to the
U.S. Court of Appeals for the Third Circuit
Questions for the Record
Submitted October 11, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper role of precedent.

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

   I cannot imagine any circumstance in which it would be appropriate for a lower court to depart from governing Supreme Court precedent. Lower courts should "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, 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?

   Lower court judges are bound to apply Supreme Court precedent. If I am so fortunate as to be confirmed, I will do so faithfully and to the best of my ability. There are circumstances in which it might be appropriate for a circuit judge to question a Supreme Court precedent in a separate opinion. *See, e.g.*, *Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring) (questioning the requirement that courts follow two steps in order to decide qualified-immunity cases); *cf. Pearson v. Callahan*, 555 U.S. 223, 236-43 (2009) (overturning earlier decisions that had mandated two-step order, citing Judge Sutton's concurrence in *Lyons*). But even if a lower court judge raises questions about it, if a Supreme Court decision is on point, the judge must follow it.

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

   "Under [the Third Circuit's] Internal Operating Procedures, a panel of [the Third Circuit] cannot overrule an earlier binding panel decision; only the entire court sitting en banc can do so." *Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 94 (3d Cir. 2011). Federal Rule of Appellate Procedure 35(a) provides that hearing or rehearing en banc "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." If I am fortunate enough to be confirmed, I will be bound to follow those rules and will do so faithfully.

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

As a nominee to become a lower court judge, I am not in a position to offer an opinion on when it is appropriate for the Supreme Court to overturn its own precedent.

2. Many conservative judges and legal scholars believe that the Constitution should be interpreted consistent with its "original meaning"—in other words, the meaning it had at the time it was enacted.

a. With respect to constitutional interpretation, do you believe judges should rely on the "original meaning" of the constitution?

As Justice Kagan explained to Senator Leahy at her confirmation hearing, "sometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. So in that sense, we are all originalists."

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

Lower court judges are not free to interpret the Constitution anew, but must faithfully follow controlling Supreme Court and circuit precedent interpreting and applying constitutional provisions, regardless of the methodology on which those precedents rested.

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

I have not studied the issue, but I know that at least one prominent originalist scholar has concluded that it does. Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. Miami L. Rev. 648 (2016). This methodological issue is purely academic and immaterial to a lower court judge. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court recognized a constitutional right to same-sex marriage. If I am so fortunate as to be confirmed, that precedent (and every other precedent of the Supreme Court) will be binding upon me and I will apply it faithfully.

d. Does the "original meaning" of the Constitution explain the right to marry persons of a different race recognized by the Court in *Loving v. Virginia*?

I have not studied the issue, but I know that at least one prominent originalist scholar has concluded that it does. Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 BYU L. Rev. 1393. This methodological issue is purely academic and immaterial to a lower court judge. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court recognized a constitutional right to marry a person of a different race. If I am so fortunate as to be confirmed, that precedent (and every other precedent of the Supreme Court) will be binding upon me and I will apply it faithfully.

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

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

From the perspective of a lower court judge, it matters not whether one calls a Supreme Court decision "super-stare decisis," "super precedent," "settled law," or the like. Any Supreme Court precedent, including *Roe v. Wade*, is binding on all lower federal courts. If I am so fortunate as to be confirmed, I will be bound to apply that precedent (and every other precedent of the U.S. Supreme Court), and I will do so faithfully.

b. Is it settled law?

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

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

Please see my responses above to Questions 2(c) and 3(a).

5. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the

several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

I have not had occasion to study the issue. Regardless, my personal views are irrelevant to what my role will be as a circuit judge, if I am so fortunate as to be confirmed. *Heller* is binding upon all lower courts, and I will apply it (and all other Supreme Court precedents) faithfully.

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

While I have not studied *Heller* closely, the Supreme Court stated: "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

I have not had occasion to study the line of cases that preceded *Heller*. Regardless, *Heller* is a binding Supreme Court precedent, and if I am so fortunate as to be confirmed, I will apply it (and all other Supreme Court precedent) faithfully.

6. You signed a letter in 2015 criticizing the University of Pennsylvania's new procedures for handling sexual assault cases on the basis that the procedures were insufficiently fair to students accused of sexual assault.

a. During your time at the University of Pennsylvania, have you ever undertaken any advocacy or efforts on behalf of sexual assault victims on campus? If so, please describe.

In the criminal procedure class I teach every year, I introduce students to the problems of the criminal justice system's historic indifference to victims of sexual assault and domestic violence and teach them how effective advocacy on behalf of victims has prodded police and prosecutors to become more supportive of victims and vigorous in prosecuting wrongdoers. And in the February 18, 2015 open letter you reference, my colleagues and I began by "fully recogniz[ing] serious concerns about the problem of sexual assaults on college campuses" and the need to strengthen "comprehensive protections for those who are abused and seek either criminal prosecution or University

sanctions. Accordingly, we fully support[ed] procedures that ensure confidentiality in reporting incidents of sexual assault, counseling for victims, full and fair investigations by University officials trained in the dynamics of this type of offense, [and] referral of cases to the police where such action is requested …."

b. The letter you signed stated that "[S]tudents need clear rules defining what constitutes consensual sexual conduct, but there are too often troubling ambiguities on questions such as what constitutes valid consent, and such ambiguities leave students vulnerable to sometimes unpredictable, after-the-fact assessments of their behavior." Can you say more about what you meant by "troubling ambiguities" on "what constitutes valid consent"? What constitutes valid consent for students engaged in sexual conduct?

I did not draft that sentence and am not exactly sure what it means, but as a general matter, promulgating clear, consistent rules can only assist campus officials and students in understanding their rights and obligations.

c. The letter you signed stated, "Perhaps it is time to funnel the more serious cases through the criminal justice process and to make that process much more accessible and supportive of sexual assault complainants." What suggestions do you have for making the criminal justice system more "accessible and supportive" of sexual assault complainants?

As I teach my students every year, police departments and prosecutors have made strides in hiring dedicated sexual-assault and domestic-abuse specialists, training them, offering shelter and support, and encouraging confidential reporting, but there is still a long way to go. These cases take more work and result in more dismissals or acquittals than many other types of cases, so police and prosecutors need to be encouraged to persist with them and measured on their success in bringing them. As discussed in my response above to Question 6(a), the February 18, 2015 letter also recognized the need to strengthen "comprehensive protections for those who are abused" and so "fully support[ed] procedures that ensure confidentiality in reporting incidents of sexual assault, [and] counseling for victims."

d. Have you ever undertaken any advocacy or efforts on behalf of sexual assault victims in the criminal justice system?

See my responses above to Questions 6(a) and 6(c).

e. A March 2015 survey by Known Your IX and the National Alliance to End Sexual Violence found that 88 percent of survivors said that if campuses were required to turn rape reports over to the police without survivors' consent, fewer victims would report sexual assault incidents to anyone at all. In your view, does the risk of decreased reporting of sexual assault

incidents on college campuses constitute a harm that should be weighed as schools evaluate whether to "funnel the more serious cases through the criminal justice system"?

I have never said that campuses should be required to turn rape reports over to the police without survivors' consent. The February 18, 2015 letter made clear that the decision whether to pursue criminal or campus proceedings must rest ultimately with victims, which is why "we fully support[ed] procedures that ensure confidentiality in reporting incidents of sexual assault, counseling for victims, [and] full and fair investigations by University officials trained in the dynamics of this type of case." My colleagues and I also supported "referral of [such] cases to the police," but *only* "where such action is requested by the complainant."

7. 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?**

   I have not had occasion to study the issue. Regardless, if I am fortunate enough to be confirmed, my personal views and opinions about any Supreme Court precedent will be irrelevant to my responsibilities as a circuit judge. *Citizens United* is a precedent binding on lower courts, and I will apply it (and all other Supreme Court precedents) faithfully.

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

   Please see my response above to Question 7(a).

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

   Please see my response above to Question 7(a).

8. In 1999, you prosecuted Linda Williams for the alleged theft of $7 from a cash register while she was working as a cashier in the cafeteria at the Veterans Affairs Medical Center in the Bronx. Although the alleged crime was a minor one punishable by a fine, you pressed ahead to trial when Williams, who denied having taken the money, refused to settle. Williams was acquitted after exculpatory evidence was introduced at the last

minute.

a. Please explain why you brought this case and proceeded to trial.

As I testified at my hearing, I was the first-year prosecutor in the entry-level General Crimes Unit assigned to ticket duty that day, prosecuting minor violations that happened to have occurred on federal property. When law-enforcement agents brought this case in, alleging that the one theft observed on video camera was part of a pattern of thousands of dollars being missing from this cashier's cash register over time, I brought it to my supervisor for guidance and he told me to charge it as a misdemeanor and proceed toward trial. When, in the week or two before trial, I informed him that I could not prove the pattern of other thefts beyond a reasonable doubt, my supervisor instructed me to proceed to trial on the original theft violation. In retrospect, I wish that I had pushed back and questioned why I was taking this case to trial.

b. What, if any, consideration did you give to the conservation of federal prosecutorial resources in proceeding to trial in such a case? Did you bring such concerns, or any others, to any supervisor in connection with bringing this case to trial?

Please see my response to Question 8(a). I wish that I had pushed back against the guidance I had received, but at the time I did not do so.

c. During your hearing, you said that your actions in that case were attributable to your being a "novice prosecutor." But just months before, you had supervised an FBI investigation and served as chief counsel in a complex trial involving the theft of Tiffany glass windows from mausoleums. You won an award from the Department of Justice and the FBI for your work on this matter, which you described in your Senate Judiciary Questionnaire as your "most notable trial." In light of this significant prior experience, why would you describe yourself as a "novice prosecutor" at the time you handled the Williams trial?

I was a first-year prosecutor in the entry-level General Crimes unit. At the time that I was first assigned this case, in May 1999, I had never tried a criminal case. At the time that I tried this case, I had never tried a case solo before.

d. It's my understanding that there was also an issue in the Williams trial regarding whether certain key exculpatory evidence was turned over to the defense in a timely manner as required by *Brady v. Maryland*. Please describe when and how that exculpatory evidence was disclosed to the defense.

Brady v. Maryland requires that prosecutors disclose exculpatory (and

impeachment) evidence to defendants "in time for its effective use at trial." *United States v. Coppa*, 267 F.3d 132, 135, 142 (2d Cir. 2001). Right before the trial began, I learned of a key piece of exculpatory material. I disclosed that information the morning of the trial and apologized to the Court and defense counsel for not having obtained and disclosed it earlier. Defense counsel was careful to specify that he "certainly d[id]n't want to suggest any misconduct on Mr. Bibas' part, far from it" and "want[ed] to stress that [he was] not accusing Mr. Bibas of any misconduct." Sept. 14, 1999 Tr. 194, 210. The Court found no misconduct, Tr. 195, 210, defense counsel obtained the evidence and used it effectively on cross-examination, and as a result Ms. Williams was rightfully acquitted.

As I testified at my hearing, I made a mistake, I apologized, I learned from my mistake, and I have spent my career since then trying to diagnose and remedy the structural causes of such errors, including new-prosecutor syndrome, tunnel vision, jumping to conclusions, inadequate screening of cases, inadequate supervision, and lack of second opinions. *See, e.g.*, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 1984 (2010) (I served as reporter for the working group on training and supervising prosecutors to better comply with *Brady*). Indeed, I brought this case up as an example of those *Brady*-related problems when I testified before this Committee on June 6, 2012 as an expert on *Brady* and discussed the matter with then-Senator Sessions and Senator Coons.

9. In 2009, you wrote a draft paper called *Corporal Punishment, Not Imprisonment*. In that piece, you argued that although imprisonment is the proper punishment for certain crimes, "[f]or the broad middle of the spectrum, the default punishment should be non-disfiguring corporal punishment, such as electric shocks."

a. Why did you decide not to publish that paper?

I decided not to publish the paper (and rejected the idea in my book) because I soon saw that the idea was wrong and deeply offensive. Over the summer of 2009, as I brainstormed alternatives to long-term mass incarceration, I workshopped this idea, took to heart the very serious objections to its cruelty and inhumaneness and affront to human dignity, and rejected it. In particular, workshop discussions with my friend Professor Tracey Meares of Yale Law School underscored the role that corporal punishment played in the eras of slavery and Jim Crow in degrading African-Americans as an instrument of racial subordination. In her letter of August 25, 2017 to Chairman Grassley and to you, Professor Meares praised me for "listen[ing] and engag[ing] with colleagues" and "chang[ing my views on that topic] as a result of our discussions."

b. You had an exchange with Senator Durbin at your hearing about this paper. As he noted, the disclaimer now affixed to this paper—which states that you now reject the idea of corporal punishment as "racially polarizing," and believe that returning to such "hallmarks of slavery would deeply divide public opinion"—is not tantamount to disavowing these practices because you believe they are wrong. To be clear: do you believe that it is ethically permissible for society to engage in corporal punishment of prisoners?

No, never. It is wrong and deeply offensive. As I told Senator Durbin, corporal punishment for crimes is wrong, it is cruel, and it is un-American. *See Hope v. Pelzer*, 536 U.S. 730 (2002); *see also Weems v. United States*, 217 U.S. 349, 366-67 (1910). It is degrading, inhumane, and an affront to human dignity. I categorically, emphatically, and unequivocally reject it.

c. Can you describe for the Committee more about the process by which workshopping this paper helped you reach your new understanding of corporal punishment?

See my response above to Question 9(a).

d. Do you still believe that there are any instances in which corporal punishment is a preferable alternative to prison?

No, never.

10. In your book *The Machinery of Criminal Justice*, you propose "drafting convicts into the military" in lieu of prosecution. **Please describe under what circumstances you believe that drafting convicts into the military in lieu of prosecution would be beneficial for the criminal justice system.**

In that book, at pages 137 to 139, I floated the idea of military service only tentatively, noting that it would be "controversial and tricky," that there were an array of legitimate ethical and practical problems that would first need to be addressed, and that if these could be surmounted, the idea was "at least worth trying." My academic speculations, however, are irrelevant to what my obligations would be as a circuit judge, if I am so fortunate as to be confirmed. To the extent that it asks for my policy views as opposed to my past writings, this question calls for me to opine on a political question, which as a judicial nominee I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

11. You indicate on your Senate Questionnaire that you have been a member of the

Federalist Society since 1991. The Federalist Society's "About Us" webpage states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. You have been a law school professor for many years. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

I had no role in writing that statement, and I do not know exactly what the Federalist Society means by it. I do not recall ever seeing this statement before members of this Committee identified it earlier this year.

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

I had no role in writing that statement, and I do not know exactly what the Federalist Society means by it. I do not recall ever seeing this statement before members of this Committee identified it earlier this year.

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

I had no role in writing that statement, and I do not know exactly what the Federalist Society means by it. I do not recall ever seeing this statement before members of this Committee identified it earlier this year.

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

I received the questions in the evening on Wednesday, October 11, 2017. I reviewed the questions, drafted answers, and conducted research where needed. I shared the answers with attorneys working for the Office of Legal Policy at the U.S. Department of Justice. After conferring with those attorneys, I revised my answers and authorized the attorneys to submit these responses for me.

Senator Dick Durbin
Written Questions for Stephanos Bibas
October 11, 2017

For questions with subparts, please answer each subpart separately.

Questions for Stephanos Bibas

1. In 2009 you presented a lengthy draft paper entitled "Corporal Punishment, Not Imprisonment" in which you said that for a wide range of crimes "the default punishment should be non-disfiguring corporal punishment, such as electric shocks." You called for "putting offenders in the stocks or pillory, where they would sit or stand for hours bent in uncomfortable positions," or, for more severe crimes "multiple calibrated electroshocks or taser shots." You later said that you didn't publish this paper because you concluded it was "mistaken," and you said in your 2012 book *The Machinery of Criminal Justice* that "returning to chain gangs, corporal punishment, or similar hallmarks of slavery would deeply divide public opinion."

   In your paper, you wrote that "instinctively, many readers feel that corporal punishment must be unconstitutionally and immorally cruel, but neither objection withstands scrutiny." You also wrote that corporal punishment "in moderation, without torture or permanent damage, is not cruel." **Is it still your view that corporal punishment of the type you described is neither unconstitutionally nor immorally cruel?**

   No, absolutely not. I realized that the idea is wrong and deeply offensive, which is why I never sought to publish it and rejected it in my book as well. As I explained in my testimony, corporal punishment for crimes is wrong, it is cruel, and it is un-American. *See Hope v. Pelzer*, 536 U.S. 730 (2002); *see also Weems v. United States*, 217 U.S. 349, 366-67 (1910). It is degrading, inhumane, and an affront to human dignity. I categorically, emphatically, and unequivocally reject it.

2. **Is it your current view that electric shocks and other physical abuses are potentially an appropriate method to punish criminals and deter future crimes?**

   No, absolutely not. I realized that the idea is wrong and deeply offensive, which is why I never sought to publish it and rejected it in my book as well. As I explained in my testimony, corporal punishment for crimes is wrong, it is cruel, and it is un-American. *See Hope v. Pelzer*, 536 U.S. 730 (2002); *see also Weems v. United States*, 217 U.S. 349, 366-67 (1910). It is degrading, inhumane, and an affront to human dignity. I categorically, emphatically, and unequivocally reject it.

3. The conclusion to your 2009 paper said "[i]f corporal punishment is infeasible or unimaginable despite the poll data supporting it, perhaps we can experiment with other intense punishments." You went on to suggest "very short terms of solitary confinement,

ranging from two days to two weeks, to intensify imprisonment while avoiding its long-term pathologies."

When I was Chairman of the Subcommittee on the Constitution, Civil Rights, and Human Rights, I held two hearings on the human rights, fiscal, and public safety consequences of solitary confinement. Anyone who heard the chilling testimony of Anthony Graves and Damon Thibodeaux—exonerated inmates who each spent more than a decade in solitary confinement—knows that this is a critical human rights issue.

a. **Do you believe that solitary confinement can have a dangerous impact on inmates?**

Yes, certainly. In my book, I lamented that "[w]here inmates were kept completely alone without work, they went insane or attempted suicide." Stephanos Bibas, *The Machinery of Criminal Justice* 21 (2012); *see* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinq. 124, 130-32 (2003) (cataloguing copious studies documenting that confinement "lasting for longer than 10 days" produces "negative psychological effects," including "appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations," "negative attitudes," "insomnia," "cognitive dysfunction," "irritability, aggression, and rage," and "suicidal ideation and behavior"); Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 Pace L. Rev. 497, 509-14, 516-18 (2004).

b. **Do you agree that the practice should be subject to strict limitations?**

Please see my response above to Question 3(a). To the extent that it asks me to go beyond that response, this subpart calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

4. **What do you see as the role for a federal judge in considering physical abuse as punishment for a criminal offense?**

Corporal punishment is not and will not be an authorized punishment for crimes. Apart from the few crimes eligible for capital punishment, the punishments authorized by the Sentencing Reform Act are probation, fines, and imprisonment (including supervised release). 18 U.S.C. § 3551(b). Likewise, the U.S. Sentencing Guidelines authorize those punishments but not corporal punishment. No legal authority of which I am aware ever authorizes a federal judge to impose corporal punishment.

5. In the 2002 case *Hope v. Pelzer*, the Supreme Court held Alabama's practice of restraining prisoners to a "hitching post" in uncomfortable positions constitutes "cruel and unusual punishment" in violation of the 8th Amendment. **Was *Pelzer* wrongly decided?**

Please see my responses above to Questions 1, 2, and 4. I have never taken issue with *Hope v. Pelzer*, which held not only that the hitching-post punishment was cruel and unusual (and thus unconstitutional) but also that this proposition is clearly established law. 536 U.S. 730 (2002). If I am fortunate enough to be confirmed, my personal views and opinions about any Supreme Court precedent will be irrelevant to my responsibilities as a circuit judge. *Hope v. Pelzer* is a precedent binding on lower courts, and I will apply it (and all other Supreme Court precedents) faithfully.

6. In a 2015 op-ed that you wrote in the *National Review* entitled "The Truth About Mass Incarceration," you criticized calls for federal drug sentencing reforms for non-violent drug offenders, claiming that President Obama and other observers were wrong to "blame[ ] mass incarceration on the racially tinged War on Drugs." **Do you believe that drug sentencing policies have played any role in contributing to mass incarceration?**

   Drug sentencing policies have undoubtedly played a role in contributing to mass incarceration. When one looks beyond federal prisoners to include the much larger number of state prisoners, drug offenders compose only 18% to 20% of the overall prison population. Even if the United States released every drug offender from prison, our incarceration rate would still be far higher than that of most countries and far higher than it was in the mid-20th century. My point in the article you cite was only that solutions to mass incarceration cannot end with criticism of the War on Drugs or drug sentencing policies, but also have to address the much larger population of inmates convicted of other crimes as well.

7. Your 2015 *National Review* op-ed argues for what you view as conservative reforms to the criminal justice system. You said "to deter crime effectively, punishment must speak to the same short-sighted wrongdoers who commit crime – not primarily through threats of long punishment far off in the future, but more through swift, certain sanctions that pay back victims while knitting wrongdoers back in to the social fabric." Your article cites a proposal that:

   > [M]ost inmates could be released early and watched round the clock with webcams, drug and alcohol testing, and electronic ankle bracelets via GPS. They could live in government-rented apartments, see their families, and work at public-service jobs, all at much less expense than prison. These surveillance methods could enforce rules such as strict curfews, location limits, and bans on drug and alcohol use, with swift penalties for noncompliance.

   Do you still believe this proposal would help improve our criminal justice system?

   That passage relayed Professor Mark Kleiman's suggested alternative to prison. Because this question seeks my views on specific criminal-justice proposals, it calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

8. In your paper "Corporal Punishment, Not Imprisonment," you wrote that "seven-eighths of federal drug inmates have never been convicted of a violent crime and more than two-thirds have neither violent convictions nor involvement with guns." You went on to note that a majority of federal drug inmates are retail dealers. **Do you believe that our current federal sentencing laws for nonviolent drug offenses give judges an appropriate amount of discretion to make sure that sentences fit the crime?**

   As an academic, I have repeatedly criticized broad mandatory minimum sentencing laws for removing sentencing power from judges and juries and giving unilateral control to prosecutors, disrupting the checks and balances of sentencing power. In my first book, I argued for giving a check on that power to restorative sentencing juries. "Minima would no longer be mandatory. Juries, not just prosecutors, would have to decide whether the minimum punishment fit the crime." Stephanos Bibas, *The Machinery of Criminal Justice* 159 (2012).

   To the extent that this question seeks any further response, it calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

9. **Do you believe that any racial disparities have resulted from our federal drug sentencing policies?**

   Yes. As the Supreme Court observed, the U.S. Sentencing Commission studied the issue and reported: "Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio [for crack versus powder cocaine] are imposed 'primarily upon black offenders.'" *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (quoting U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 103 (May 2002)). "[T]he crack/powder sentencing differential 'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race.'" *Id.*

10. **What role do you see for federal judges to point out or consider racial disparities in our system of criminal drug laws?**

    In *Kimbrough*, the Supreme Court held that given these racial disparities as well as other factors, "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve [18 U.S.C.] § 3553(a)'s purposes, even in a mine-run case." *Kimbrough v. United States*, 552 U.S. 85, 110 (2007). In addition, federal judges serve on the U.S. Sentencing Commission and can draw upon the opinions and accumulated experience of the judiciary in formulating and revising the U.S. Sentencing Guidelines to combat racial disparities in federal drug sentencing.

11. **Do you believe that our nation does a good job helping people leaving the prison system re-enter society and re-establish themselves as productive citizens? Do you believe judges should play a role in helping identify ways to reduce recidivism?**

    As an academic, I have discussed at length how poor a job the United States does at helping prisoners to re-enter society, re-connect with their families and neighborhoods, and find housing and lawful work. I have criticized the web of collateral consequences that exclude ex-convicts from lawful work where there is no public safety justification for doing so, and I have called upon our society to forgive those who have paid their debts to society and to partner with private nonprofits to promote successful re-entry. Stephanos Bibas, *The Machinery of Criminal Justice* 140-44 (2012).

    To the extent that this question seeks any further response, it calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

12. When you were an Assistant U.S. Attorney in New York, you prosecuted Linda Williams, a cashier at the cafeteria of the VA Medical Center in the Bronx, for the alleged theft of seven dollars from the cash register. You brought a misdemeanor charge and the case went to trial. The customer involved in the transaction said he gave Ms. Williams seven crumpled one-dollar bills, and the detective who had questioned Ms. Williams confirmed that he checked the register and found seven crumpled one-dollar bills. Nonetheless, you argued to the magistrate judge that Ms. Williams "is guilty and she knows it." The magistrate decided to acquit Ms. Williams before hearing the closing argument from the defense counsel. However, Ms. Williams had already lost her job by this point. At your hearing you expressed contrition for your role in this prosecution.

    a. **Do you believe it was appropriate for Ms. Williams to be fired from her job after she was charged in this case?**

       Ms. Williams was acquitted and rightfully so, so by definition it was inappropriate for her to have lost her job. She was presumed innocent all along and never merited any punishment, including the loss of her job.

    b. **Did you take any steps to try to help Ms. Williams regain her job?**

       My understanding was that her acquittal meant that she would regain her job, so I did not believe I needed to take any further steps.

    c. **Have you expressed your contrition to Ms. Williams?**

       Yes, as I testified, immediately after the verdict I walked over to Ms. Williams and said I was sorry. She was very gracious and expressed her forgiveness.

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

Please see my responses to Senator Whitehouse's Questions 2(a), 2(b), and 2(c). Judges must sometimes consider individuals' backgrounds and characteristics in order to understand the complete person before them. For instance, in imposing a noncapital criminal sentence, a federal judge must reflect on "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Thus, a probation officer must prepare a presentence investigation report specifically to inform the sentencing judge about the defendant's history and characteristics. 18 U.S.C. § 3552(a). Likewise, at capital sentencing, the sentencer (whether judge or jury) must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion)) (emphasis omitted). At the same time, judges must take care to avoid discriminating or showing favoritism, and even to avoid the appearance of doing so. *Cf.* Code of Conduct for U.S. Judges canon 2(C) & cmt. 2C.

14.

a. **Do you believe that the role of a judge on the federal court of appeals is to apply Supreme Court and Circuit precedent in all cases?**

Yes.

b. **Do you believe there are cases that come before the Circuit Courts that are of first impression or that are not directly covered by precedent?**

Yes, occasionally.

c. **In such cases, what would be your approach to reaching a decision if you are confirmed?**

I would study the reasoning and logic of Supreme Court and Third Circuit decisions as well as persuasive decisions rendered by other federal and state courts on the same or analogous issues, and strive to apply the most nearly applicable and best-reasoned precedents on point, in an effort to harmonize with existing law and to avoid or minimize any division of authority with decisions of other federal courts of appeals or state supreme courts when possible.

15.

a. You say in your questionnaire that you have been a member of the Federalist Society since 1991. **Are you aware that President Trump publicly thanked 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."

Yes, I have read news reports to that effect in the popular press.

b. **What message does it send to young lawyers and law students, like the students you've taught at the University of Colorado Law School, when the President designates interest groups like the Federalist Society as gatekeepers for judicial selection?**

I have never taught students at the University of Colorado Law School. This question calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

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

I know that I attended the annual lawyers' conference in 2013 and 2016, the annual student symposium in 1992 and/or 1993 (or it may have been 1993 and/or 1994) and 2010, and the annual faculty conference in 2005. It is possible that I attended an additional time or two but I have no recollection and can find no record of having done so.

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

The Judicial Crisis Network has also spent money on advertisements supporting President Trump's Circuit Court nominees, including Justice Joan Larsen.

a. **Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?**

No, I have neither sought nor desired nor solicited any advertisements or donations of any sort in support of my nomination.

b. **Will you condemn any attempt to make undisclosed donations on behalf of your nomination?**

As a judicial nominee, I cannot speak publicly about the nominating process. To the extent that this question asks me to go beyond my response to Question 16(a), it calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for

U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

c. **Will you call for any such undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

See my response above to Questions 16(a) and 16(b). I have not had occasion to study the recusal issue. If such an issue arises, I will consult 28 U.S.C. § 455 and the Code of Conduct for U.S. Judges, as well as the Chief Judge of my court, other judges, and others designated by the court to offer impartial advice.

17.

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

I have never studied this issue. Regardless, this question is the subject of controversy that may result in litigation. Accordingly, I am ethically forbidden to opine on it. Code of Conduct of U.S. Judges canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending *or impending* in any court.") (emphasis added); *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

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

See my response above to Question 17(a).

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

See my response above to Question 17(a).

18. **Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?**

This question calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

Nomination of Stephanos Bibas to the
United States Court of Appeals
for the Third Circuit
Questions for the Record
Submitted October 11, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

   I am not a big sports fan and generally resist sports metaphors. Judges must perform their duties "fairly, impartially[,] and diligently"; "should not be swayed by partisan interests, public clamor, or fear of criticism"; and must "avoid impropriety and the appearance of impropriety," to maintain the public's faith and confidence in the impartiality of the justice system. Code of Conduct for U.S. Judges canons 2, 3, 3(A)(1), 3(C)(1). The law is about real people's lives, and all people need to know and believe that judges will apply the law impartially and evenhandedly to all litigants, regardless of their wealth or power.

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

   Judges must sometimes weigh practical consequences for others, such as the balance of harms required for a necessity defense in the criminal law, or how authorizing a warrantless search might undermine people's privacy interests. *See United States v. Bailey*, 444 U.S. 394, 410 (1980); *Riley v. California*, 134 S. Ct. 2473, 2485 (2014). They must not, however, be swayed by possible consequences to themselves, such as "partisan interests, public clamor, or fear of criticism"; Article III of the Constitution guarantees judicial independence precisely so that judges can "act[ ] without fear or favor." Code of Conduct for U.S. Judges canon 1 cmt., canon 3(A)(1).

   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?

   I have not had occasion to consider that question (and am not exactly certain what you mean by a "subjective determination") and would await the benefit of briefing, legal research, oral argument, and consultation with my law clerks and colleagues before addressing that issue. I would first have to familiarize myself with controlling Supreme Court and Third Circuit precedent on that issue, would be bound by those precedents, and would faithfully apply those precedents to the case and issue before

me.

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?

    Judges must sometimes consider individuals' backgrounds and characteristics in order to understand the complete person before them. For instance, in imposing a noncapital criminal sentence, a federal judge must reflect on "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Thus, a probation officer must prepare a presentence investigation report specifically to inform the sentencing judge about the defendant's history and characteristics. 18 U.S.C. § 3552. Likewise, at capital sentencing, the sentencer (whether judge or jury) must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J., plurality opinion)) (emphasis omitted). At the same time, judges must take care to avoid discriminating or showing favoritism, and even to avoid the appearance of doing so. *Cf.* Code of Conduct for U.S. Judges canon 2(C) & cmt. 2C.

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

    Judges doubtless bring to bear the lessons they have learned over their careers and lifetimes as they seek to understand each case and the claims of each litigant who comes before them.

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

    I have sought throughout my career to empathize with everyone I have come across, regardless of his or her personal characteristics. Empathy makes us better counselors, advocates, friends, and human beings. I believe that I have succeeded in showing empathy to a wide range of people. Chairman Grassley and Ranking Member Feinstein have received a letter dated July 10, 2017 from Professor Sandra G. Mayson, whom I mentored for two years while she was a fellow at the University of Pennsylvania Law School from 2015 through 2017. She writes:

    > "Stephanos is also one of the most deeply humane people I know. Legal academia has not always been friendly to women, let alone to women with children and a

working spouse. As a gay woman in that situation I have sometimes found this career path to be daunting. Stephanos has been an antidote to that anxiety. He has understood from the start that my wife and daughter are my absolute priority. Every career conversation we have ever had began and ended with them. Of the many wonderful mentors to whom I am indebted, no one has been more empathic. I believe that empathy is an essential quality for a judge and will make Stephanos a great one."

Others agree. For example, Penn's long-time Dean of Students praised me as "supportive and compassionate" in "dealing with students experiencing personal or academic problems and in need of support" and observed that "as gay men, my husband and I have always found Stephanos to be warmly supportive of our relationship and our marriage." Letter from former Dean of Students Gary Clinton to Chairman Grassley and Ranking Member Feinstein (July 20, 2017).

3. In response to a question from Senator Lee, you stated, "Maybe we can make people work inside [prison], give them skills so that they have a way back on the outside and can also make restitution." Based on this comment and your other published work on criminal justice reform, do you support the availability of Pell Grants to fund higher education for the incarcerated?

   As an academic, I have critiqued the paucity of funding: "Not many inmates receive education or vocational training. On the contrary, legislatures have repeatedly cut prison-education programs such as Pell grants." Stephanos Bibas, *The Machinery of Criminal Justice* 134 (2012). My response to Senator Lee summarized and explained what I have previously written as an academic. As a judicial nominee, I can go no further than that; to the extent that it asks me to do so, this question calls for me to opine on a political question, which I cannot ethically do. *See* Code of Conduct for U.S. Judges canon 5; *see also id.* canon 1 cmt. ("The Code is designed to provide guidance to judges and nominees for judicial office.").

4. You received criticism for your decision, while serving as an AUSA, to prosecute a woman for allegedly stealing $7 from a cash register. She was ultimately acquitted. How would that experience change your perspective as a judge?

   As I discussed at the hearing, that experience was a humbling one. I immediately apologized to Ms. Williams (who graciously forgave me), and I have learned from my mistakes. Among the lessons I have learned are that judges must hold prosecutors to their burden of proof beyond a reasonable doubt and must ensure that defendants receive effective assistance of counsel to probe possible weaknesses in the government's case. Judges also play an important role in ensuring that the prosecution promptly complies with its obligations under *Brady v. Maryland* to turn over exculpatory and impeachment information to the defense in time for its effective use at trial.

5. In your scholarship you have been critical of the criminal justice system, advocating for a

"return to criminal justice's populist moral roots" by involving victims, defendants, and the public more in the process. How will this view shape your judicial decision-making? Will you consult with these groups in reaching your decisions? How would morality play into your judicial decision-making process?

The academic writings to which you refer in this question, such as *The Machinery of Criminal Justice* chapter 6 (2012), largely focus on reforms that legislatures and other policymakers would have to implement. As a judge, I would be bound to apply the Constitution, congressional statutes, and controlling Supreme Court and Third Circuit precedent, which structure and limit the appropriate roles of criminal defendants, victims, and members of the community. *See, e.g.*, Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(4) (guaranteeing victims "the right to be reasonably heard" at bail, plea, sentencing, and parole hearings but not a veto over any of these).

Nomination of Stephanos Bibas, to be United States Circuit Judge for the Third Circuit
Questions for the Record
Submitted October 11, 2017

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   I would review the parties' and amicus briefs and the underlying precedents, and discuss with my law clerks and fellow judges, in order to identify and apply the factors set forth by Supreme Court and Third Circuit precedent for ascertaining whether a claimed right is fundamental and protected under the Fourteenth Amendment.

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

      Please see my response above to Question 1.

   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?

      Please see my response above to Question 1.

   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?

      Please see my response above to Question 1.

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

      Please see my response above to Question 1.

   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*).

      Please see my response above to Question 1.

   f. What other factors would you consider?

      Please see my response above to Question 1.

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

Over the course of nearly half a century, the Supreme Court has repeatedly held that the Fourteenth Amendment's guarantee of equal protection applies to classifications beyond race. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex couples); *United States v. Virginia*, 518 U.S. 515 (1996) (gender); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). There is pending litigation before courts on how the Fourteenth Amendment applies to particular groups, so I can offer no further comment. *See* Code of Conduct for U.S. Judges canon 3(A)(6) (forbidding public comment "on the merits of a matter pending or impending in any court); *see also id.* canon 1 cmt. (noting the Code's "guidance to judges and nominees for judicial office."). If I am fortunate enough to be confirmed, and if such a case comes before me, I will read the briefs and research the applicable precedents to resolve any such case that may come before me.

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?

   Please see my response above to Question 2.

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?

   Please see my response above to Question 2.

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

   Please see my response above to Question 2.

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

   Please see my response above to Question 2.

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

   The Supreme Court has held that the constitutional right to privacy protects a woman's right to use contraceptives. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). If I am so fortunate as to be confirmed, the Court's decisions on this issue, as on all others, will be binding on me, and I will apply them faithfully.

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

The Supreme Court has held that the constitutional right to privacy protects a woman's right to obtain an abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If I am so fortunate as to be confirmed, the Court's decisions on this issue, as on all others, will be binding on me, and I will apply them faithfully.

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

The Supreme Court has held that the constitutional right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders. *Lawrence v. Texas*, 539 U.S. 558 (2003). If I am so fortunate as to be confirmed, the Court's decisions on this issue, as on all others, will be binding on me, and I will apply them faithfully.

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

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

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

The Constitution must of course be applied to our changing society and courts must consider evidence relevant to those circumstances to the extent allowable under the rules of evidence and judicial notice. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2484-85 (2014) (declining to extend the doctrine authorizing warrantless searches incident to arrest to cell phones, because the risks of not searching are much less and the harm to privacy is much greater than those in traditional searches incident to arrest).

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

I have not had occasion to consider those questions and would await the benefit of briefing, legal research, oral argument, and consultation with my law clerks and colleagues

before addressing those issues. I would first have to familiarize myself with controlling Supreme Court and Third Circuit precedent on those issues and would faithfully apply those precedents to the particular case before me.

5. You have given speeches to the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

      I have never personally assessed whether *Brown* is consistent with originalism, although my understanding is that other scholars have done so and have concluded that it is. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 Mich. St. L. Rev. 429.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited October 11, 2017).

      I have never studied this issue, but I do not believe that leading originalists dispute that such constitutional terms "are not precise or self-defining." Rather, I believe they hold only that to the extent that one can discern their original meaning, that original meaning should play an important role in interpreting those provisions. But this scholarly debate is academic as far as a lower-court judge is concerned. If I am so fortunate as to be confirmed, my responsibility will be to apply existing Supreme Court and Third Circuit precedent, which I would do faithfully.

6. In a 2005 article entitled, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, The Unlikely Friend of Criminal Defendants?*, you wrote that originalism and formalism make sense where "firm constitutional soil" will support their roots. What did you mean by "firm constitutional soil," and how would this shape your view of the law?

   The article to which you refer contrasted two provisions of the Sixth Amendment. As an academic, I argued that the Confrontation Clause's text and history supported the requirement of live cross-examination of witnesses in open court, as required by *Crawford v. Washington*, 541 U.S. 36 (2004). In that article, I contrasted the Confrontation Clause with the Jury Trial Clause, whose text and history did not address the allocation of power between judges and

juries at sentencing, as the modern sentencing phase did not exist in the eighteenth century. *Contra Apprendi v. New Jersey*, 530 U.S. 466 (2000). But my academic appraisal of these cases or their interpretive method is not material to the job of a lower court judge. A lower court judge is not free to disregard precedent and construe constitutional provisions anew. If I am so fortunate as to be confirmed, regardless of any academic views that I have previously expressed, I will be bound to apply *Crawford*, *Apprendi*, and all other Supreme Court precedents and will do so faithfully.

7. In a 2010 article discussing *Miranda* rights entitled, *Refocusing on Innocence and Compulsion*, you stated, "We should not stand in the way of interrogation techniques that produce truthful confessions so long as they do not create an unacceptable risk of producing false ones."
   a. How do you determine what level of risk is unacceptable?

      As an academic, I did not have occasion to specify a particular level of risk, though I did repeatedly express concerns about the heightened risks that juvenile, mentally disabled, or mentally ill suspects might falsely confess even after receiving *Miranda* warnings. If I am so fortunate as to be confirmed as a lower court judge, however, I will be bound to apply controlling Supreme Court and Third Circuit precedent regulating interrogation methods, regardless of any academic views that I had previously expressed, and will do so faithfully.

   b. Should you be confirmed, what standard would you apply?

      Please see my response above to Question 7(a).

   c. In the same piece, you assert that many of our normative desires to protect criminal defendants from self-incrimination came from *Miranda* and subsequent case law, not from the Fifth Amendment itself. Do you believe there is a relevant legal distinction between Fifth Amendment prohibitions against compelled confessions compared to protections stemming from *Miranda*?

      The Supreme Court has rejected any distinction between the binding effects of the Fifth Amendment itself and that of *Miranda* and its progeny. *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that *Miranda* is "a constitutional decision of this Court" and thus "govern[s] the admissibility of statements made during custodial interrogation in both state and federal courts"). *Dickerson* is precedent binding upon lower courts, and I would apply it (and all other Supreme Court precedent) faithfully.

   d. In the same article, you described interrogations as a "seduction, not a compulsion." Is it your view that false confessions are not a substantial concern for competent adults in police custody?

      No, not at all. While juvenile, mentally disabled, and mentally ill defendants are at particular risk, researchers studying wrongful convictions (many of which are catalogued in the National Registry of Exonerations) have identified at least 251 convictions that rested on false confessions, at least 105 of which were made by

competent adults in police custody, according to a not-yet-published article by University of Michigan Law School Professor Samuel Gross, who maintains the Registry.

e. Do you acknowledge that there have been demonstrated cases of false confessions by competent adults that have contributed to wrongful convictions?

Yes, there have been at least 105 documented exonerations involving false confessions by competent adults. Please see my response above to Question 7(d).

8. You have written extensively about the coercive forces that affect plea bargains and the barriers to ineffective assistance of counsel claims. What role do you think judges should have in ensuring a justice system that is fair for all defendants?

Judges must vigorously enforce constitutional and statutory guarantees to ensure a justice system that is fair for all defendants. I am proud to have played a role in the Supreme Court's landmark decisions extending the Sixth Amendment's guarantee of effective assistance of counsel to defendants pleading guilty who receive incomplete or faulty advice during plea bargaining. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (served as cocounsel to petitioner); *Lafler v. Cooper*, 566 U.S. 156, 168 (2012) (relying in part on one of my articles). Judges are obligated to ensure that every criminal defendant receives effective assistance of counsel, and I would apply these (and all other) precedents of the Supreme Court faithfully.

9. During the hearing, you and Senator Durbin discussed your unpublished 2009 paper entitled, *Corporal Punishment, Not Imprisonment*, in which you argued in favor of using corporal punishment, such as electric shock. Do you believe the use of corporal punishment is ever constitutionally permissible?

Please see my responses to Senator Durbin's Questions 1, 2, and 4 and to Senator Feinstein's Questions 9(a) through 9(d). Corporal punishment is wrong and deeply offensive, which is why I never sought to publish that paper and rejected the idea in my book as well. Stephanos Bibas, *The Machinery of Criminal Justice* 135 (2012). As I told Senator Durbin, it is wrong, it is cruel, and it is un-American. *See Weems v. United States*, 217 U.S. 349, 366-67 (1910); *Hope v. Pelzer*, 536 U.S. 730 (2002). It is degrading, inhumane, and an affront to human dignity. I categorically, emphatically, and unequivocally reject it. In short, no, it is wrong.

10. In a 2016 article entitled, *The Truth About Mass Incarceration*, you wrote, "Though the Left paints drug addiction as a disease requiring costly medical intervention, drug addicts can in fact choose to stop using drugs." During the hearing, you clarified that there are two separate questions – one about whether drug addiction is a disease and another about how society can treat and/or punish it. What should the court's role be in determining whether medical intervention is necessary or whether prison alone is the appropriate sentence for a drug-related offense?

The Sentencing Reform Act requires sentencing judges to weigh "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical

care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). The probation officer's presentence investigation report provides individualized detail about the particular defendant's background and prospects, casting further light on his or her amenability to medical intervention and treatment. 18 U.S.C. § 3552(a). But, in deciding whether to impose imprisonment, courts must "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a); *see Tapia v. United States*, 564 U.S. 319 (2011). If I am so fortunate as to be confirmed, and if such a case were to come before me, I will apply these statutes and precedents faithfully in light of the background and circumstances of the particular defendant before me.