Nomination of Michael Scott Bogren to the United States District Court for the Western District of Michigan
Questions for the Record
May 29, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

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

   A district court judge is required to faithfully apply Supreme Court precedent. I do not believe it is ever appropriate for a district court judge to question Supreme Court precedent.

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

   One district court judge's rulings are not binding on another district court judge. However, whenever possible rulings should be harmonized to avoid confusion and discourage "judge shopping." Rules 59 and 60 of the Federal Rules of Civil Procedure provide the standard for when it is appropriate for a district court to reconsider a ruling previously made in a case.

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

   As a district court nominee I believe it would be inappropriate for me to opine on when the Supreme Court should or should not overrule its own precedent. The Court itself determines when that is appropriate. "[I]t is this Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016).

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or

induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

All Supreme Court precedent is binding on a district court and entitled to dispositive effect. No district court has the authority to pick and choose the Supreme Court precedents it will apply.

b. Is it settled law?

Yes, *Roe v. Wade* is settled law.

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

Yes.

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

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

As a district court nominee I believe it would be inappropriate for me to comment on my opinion of a particular Supreme Court opinion, whether it is a majority opinion, concurrence, or dissent, especially when the issues raised in the decision are the subject of current litigation in the federal courts.

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

The Supreme Court in *Heller* found "the right secured by the Second Amendment is not unlimited," and affirmed longstanding restrictions on firearms, including possession by convicted felons and the mentally ill, restricting or prohibiting carrying firearms in restricted areas and imposing conditions and qualifications governing their commercial sale. *District of Columbia v. Heller*, 554 U.S. 570, 626 – 627 (2008).

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

The *Heller* majority held that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

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

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

   If I am confirmed as a district court judge I would be bound to follow the holding in *Citizens United* and all other Supreme Court precedents. The scope of corporations' First Amendment rights is the subject of pending or impending litigation and political debate. Therefore it would be inappropriate for me to make further comment.

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

   If I am confirmed as a district court judge I would be bound to follow the holding in *Citizens United* and all other Supreme Court precedents. The scope of corporations' First Amendment rights is the subject of pending or impending litigation and political debate. Therefore it would be inappropriate for me to make further comment.

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

   The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 691 (2014), that owners of closely held corporations do not forfeit all protections under the Religious Freedom Restoration Act when they organize as closely held corporations. The scope of the protection afforded a corporation under the RFRA and the First Amendment is currently the subject of pending or impending litigation. Therefore it would be inappropriate for me to make further comment.

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

   a. Did anyone in this Administration, including at the White House or the

Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

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

Administrative law has made up a very small part of my practice. As a result I do not have an overarching view of "administrative law." I am familiar with the deferential standard of review the Supreme Court requires when courts review administrative agency action under the *Chevron* case.

7. On your Senate Questionnaire, you estimated that you were a member of the Federalist Society from 2004 to 2007. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I never read that portion of the Federalist Society's website. I did not write that statement and do not know what the author was trying to convey.

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

I never read that portion of the Federalist Society's website. I did not write that statement and do not know what the author was trying to convey.

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

I never read that portion of the Federalist Society's website. I did not write that statement and do not know what the author was trying to convey.

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

During the course of this process I have had general discussions with many members of the legal community about my possible nomination, including individuals who may be members of the Federalist Society. I have had no contact with any representative of the Federalist Society.

8. On your Senate Questionnaire, you estimated that you were a member of the Republican National Lawyers Association ("RNLA") from 2004 to 2010. The RNLA's "About Us" webpage states that "[e]ach member . . . must ascribe to the accomplishment" of the organizations missions, which include: "Advancing Republican Ideals. The RNLA further builds the Republican Party goals and ideals through a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates."

a. Please detail the activities that your membership in this organization has entailed.

Apart from paying dues and receiving e-mail notifications of various events, I do not recall being involved in any activities with the organization.

b. In what ways do you believe that you have "directly support[ed] Republican policy, agendas and candidates"?

To the best of my knowledge I did not do so through that organization apart from paying dues.

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

If a party argues legislative history is relevant to the issues before the court, it is incumbent upon the court to consider that argument and the associated legislative history. If a statute is ambiguous the legislative history can be useful in determining legislative intent.

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

No.

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

I carefully reviewed these questions after receiving them from DOJ's Office of Legal Policy (OLP). I reviewed my Senate Judiciary Questionnaire, any materials referenced by these questions and relevant statutes and caselaw. I prepared draft responses and shared them with OLP staff. I then finalized these responses on my own.

Written Questions for Michael Bogren
Submitted by Senator Patrick Leahy
May 29, 2019

1. You wrote in 2012 that the Supreme Court's holding *in Florence v. Board of Chosen Freeholders* that mandatory strip searches of all detainees regardless of offense or suspicion was "a return to…common-sense." Such a blanket policy is incredibly invasive and raises serious privacy questions under the Fourth and Fourteenth Amendments.

    (a) Under what standard do you believe that law enforcement may disregard the fundamental privacy interests of the Fourth and Fourteenth Amendments? What are the limits of a security defense as discussed in *Florence*? Under what circumstances would a search of a detainee in jail violate the Fourth Amendment?

    I wrote about *Florence v. Board of Chosen Freeholders* in my position as a practitioner providing an update on the decision to municipal officials, many of whom were responsible for the administration of jails and lock-ups. There are limits on the types of searches correctional facilities may conduct for individuals in their custody. As Justice Alito explained in his concurrence in *Florence*, the Court's holding was narrow and limited to giving jail administrators the discretion to require all arrestees who are committed to the general population of a jail to undergo visual strip searches not involving physical contact by corrections officers. The Sixth Circuit has recognized that detainees and inmates maintain "some reasonable expectations of privacy while in prison . . . even though those privacy rights may be less than those enjoyed by non-prisoners." *Stoudemire v. Michigan Dep't of Corr.*, 705 F.3d 560, 572 (6th Cir. 2013). More invasive searches must be based on an individualized evaluation of the circumstances and the need for such a search. The courts have required those searches to be performed by corrections officers of the same gender as the detainee. Those searches must be conducted in a private setting, not open to view by others in the facility. Even more intrusive searches, such as manual body cavity searches, generally are allowed only after obtaining a warrant. *See*, *United States v. Booker*, 728 F.3d 535 (6th Cir. 2013).

2. **As an attorney who specializes in civil rights, constitutional law, and employment law, do you agree with the EEOC's holdings in *Baldwin v. Foxx* and *Macy v. Holder* that employment discrimination on the basis of sexual orientation and gender identity is prohibited by Title VII? If not, why not?**

    The Sixth Circuit ruled in 2004 that Title VII protects gender identity, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), a ruling it recently reaffirmed. *Equal Employment*

Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 572 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019).

In *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 764 (6th Cir. 2006), the Sixth Circuit held sexual orientation is not protected under Title VII. If confirmed as a district court judge for the Western District of Michigan I would follow binding Sixth Circuit precedent.

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

> "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'"

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

Yes.

4. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(b) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

I believe it is inappropriate for me to comment on statements made by the President on a political issue.

(c) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

Our country is rightfully proud of the protections we offer to speakers on virtually every topic, even though the protected speech might be uncivil, critical in the extreme or unseemly. The Constitution insulates Article III judges from being influenced by that criticism. I believe the judiciary as an institution has remained steadfast in the face of criticism over our history and has remained highly respected by our citizens even in the face of periodic criticism.

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

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

I believe it is inappropriate for me to comment on statements made by the President or his advisors on a political issue. There are discussions of the authority of the federal courts – and the curtailment of that authority – in *Ex parte McCardle*, 7 Wall. 506 (1869) and *Ex parte Milligan*, 4 Wall. 2 (1867). However, since this is an issue that might come before the federal courts it would be inappropriate for me to offer any specific comment on this issue.

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

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

The Supreme Court held in *United States v. Nixon*, 418 U.S. 683, 715 (1974), "that a President is [not] above the law," and enforced a validly issued subpoena directed to the President. The courts have a variety of enforcement methods available including the contempt power. Each situation would have to be judged on its specific facts and equities.

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

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

Article I of the Constitution grants express powers to Congress. For example, Congress has the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Capture on Land and Water"; "[t]o raise and support Armies"; and "[t]o provide for organizing, arming, and disciplining, the Militia." Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

Since this is an issue that might come before the federal courts it would be inappropriate for me to offer any further comment on this issue. However, if confirmed as a district court judge I will faithfully apply all U.S. Supreme Court holdings, including the holdings in *Hamdi v. Rumsfeld*.

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

Since this is an issue that might come before the federal courts it would be inappropriate for me to offer any specific comment on this issue. However, in general I believe the framework outlined by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), would be instructive in addressing an issue of this nature.

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

Since this is an issue that might come before the federal courts it would be inappropriate for me to offer any specific comment on this issue. Moreover, without having a specific controversy with established facts and the arguments of the parties I would not be able to offer an informed opinion.

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

The courts must always be cognizant of the separation of powers established by the Constitution and must be vigilant not to overstep the authority of the judiciary and intrude into the authority reserved to the executive branch. However, as the Supreme Court recognized in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *United States v. Nixon*, 418 U.S. 683 (1974), the executive branch is not above the law. The court must carefully analyze any controversy that comes before it, and if there is a justiciable case reach the result dictated by the Constitution and any applicable statutes.

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

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

The Supreme Court has explicitly held the Equal Protection Clause extends to women and prohibits discrimination against women. *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed I would faithfully apply Supreme Court and Sixth Circuit binding precedent on the topic.

10. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

I was not aware Justice Scalia had made that statement. I believe the right to vote is the ultimate exercise of civil rights. Congress has been afforded wide latitude in protecting the right to vote, especially in the face of evidence of racial discrimination against voters. If confirmed I would faithfully apply all federal statutes on voters' rights and all Supreme Court and Sixth Circuit binding precedent on the topic.

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

Article I, §9, cl. 8 of the United States Constitution states: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."
It is my understanding this issue is currently being litigated in multiple federal courts. As a result it would be inappropriate to offer any further comment.

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

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

    As a nominee to a district court position I would not presume to suggest when the Supreme Court should or should not adopt factual findings. I believe congressional fact-finding is entitled to great weight.

13. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

The Constitution vests Congress with wide latitude to enforce those amendments "by appropriate legislation" and, accordingly, Congress's authority to legislate in those areas is expansive.

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

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

    Yes. *Lawrence* so held and that holding has been re-affirmed. If confirmed I would faithfully apply *Lawrence* and all Supreme Court precedent.

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

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

    As a nominee to a district court position I believe district court judges are strictly required to follow binding decisions of the Supreme Court and the relevant Court of Appeals. A district court has no authority to depart from binding precedent of the relevant Court of Appeals or the Supreme Court. In the Sixth Circuit a panel is bound by a prior ruling of an earlier panel on the same issue. Only the Sixth Circuit sitting en banc or the Supreme Court has the authority to overrule prior precedent of the circuit. The Supreme Court alone can overrule its prior precedent, although Congress can take legislative action in some areas to address Supreme Court decisions.

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

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

    I believe an impartial judiciary is of utmost importance in our system – including avoiding the appearance of impropriety. My wife, my son and my sister are all attorneys in Michigan. If I am confirmed none of them could appear before me in any case. I have been employed as an attorney at Plunkett Cooney for almost 36 years. I have served on the Board of Directors for almost 15 years and have served as Board Chair for seven years. If confirmed I will not hear any case in which Plunkett Cooney appears for any party (or is a party) for a minimum of two years. After two years I will assess whether a longer time is appropriate. I will also consider recusing myself in cases where a former client is a party in order to avoid the appearance of impropriety. If a close friend were a party in a case I would likely recuse myself. I would consider recusing myself from any case in which an organization I am or have been a member of was a party. There are also mandatory disqualification requirements based on financial interest in a company (e.g. stock ownership) and I would of course adhere to all of those requirements.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the

constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

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

Carolene Products established the foundation for modern constitutional review. The controversy before the Court involved economic regulation that the Court subjected to deferential rational basis review. The Court concluded that such regulations would withstand constitutional challenge "unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. 144, 152 (1938). However, the Court stated in footnote four that "a correspondingly more searching judicial inquiry" might be required when "prejudice against discrete and insular minorities" existed that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id*. at 152 – 153, n.4. This is the familiar language that has become established as strict scrutiny review in cases under the equal protection clause when suspect classifications are involved; the due process clause when fundamental rights are involved; and various aspects of the First Amendment. If confirmed I would faithfully apply Supreme Court precedent in the areas of suspect classifications, fundamental rights, and the First Amendment.

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

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

Yes.

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

I have never been involved in a case involving a presidential pardon and have not studied this issue. I cannot offer an informed opinion on this issue. Additionally, it would be

inappropriate to comment on a political issue of this nature.

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

    The Supreme Court has repeatedly held that Congress enjoys broad, although not unlimited, authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment.

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

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

    I think such an analysis would have to be made on a case-by-case basis and would depend entirely on the particular facts of a case. I cannot offer an opinion on what is "appropriate weight" essentially in a vacuum. The same is true with respect to the level of evidence of pretext. While such a point undoubtedly exists I cannot offer an opinion as to what that point might be.

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

    The Supreme Court has described the undue burden standard as a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992). The Court held that "the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion" and they are not "an undue burden on the right." *Id*. at 878.

Additionally, the Court held that "the State may enact regulations to further the health or safety of a woman seeking an abortion" if they are not "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion[and] impose an undue burden on the right." *Id*. The Court further held that when analyzing abortion restrictions, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894. Therefore, if, "in a large fraction of the cases in which [the abortion restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," then reviewing courts should find that the restriction is an "undue burden, and therefore invalid." *Id.* at 895. If confirmed as a district court judge I will faithfully apply all United States Supreme Court holdings, including the holding in *Casey*.

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

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

    Having practiced in this area for over thirty years, in my experience qualified immunity has not become a doctrine of blanket immunity. Both district courts and courts of appeal deny qualified immunity routinely in appropriate cases.

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

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

    The effect of *Carpenter* in future cases is a matter currently before the courts, and it would therefore be inappropriate for me to offer an opinion

on that question.

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

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

    Since this issue is currently being litigated in the federal courts it would be inappropriate for me to comment or opine on this issue.

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

    Justice Rehnquist referred to an independent judiciary as the "crown jewel" of our constitutional system of self-government. I wholeheartedly agree with that statement. The separation of powers created by Articles I, II and III is, in my opinion the true genius of our Constitution. Allowing judges to serve during times of "good behavior" insulates them from political pressure and public pressure. The independence of the judiciary allows citizens to have confidence that judges make decisions because they are correct – not because they are being coerced into a particular outcome. I do not believe our system would have thrived as it has over the last 240+ years without an independent judiciary.

Nomination of Michael S. Bogren
to the United States District Court for the Western District of Michigan
Questions for the Record
Submitted May 29, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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.

2. You were a member of the Federalist Society from 2004 to 2007.
   a. If confirmed, do you plan to rejoin the Federalist Society?

      No.

   b. If confirmed, do you plan to donate money to the Federalist Society?

      No.

   c. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

      During the course of this process I have had general discussions with many members of the legal community about my possible nomination, including individuals who may be members of the Federalist Society. I have had no contact with any representative of the Federalist Society.

3. You were a member of the Republican National Lawyers Association from 2004 to 2010.
   a. If confirmed, do you plan to rejoin the Republican National Lawyers Association?

      No.

   b. If confirmed, do you plan to donate money to the Republican National Lawyers Association?

      No.

   c. Have you had contacts with representatives of the Republican National Lawyers Association in preparation for your confirmation hearing? Please specify.

      During the course of this process I have had general discussions with many members of the legal community about my possible nomination, including individuals who may be members of the Republican National Lawyers Association. I have had no contact with any representative of the Republican National Lawyers Association.

4. Recent reporting in the Washington Post ("A conservative activist's behind-the-scenes campaign to remake the nation's courts," May 21, 2019) documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the

selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

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

I had not read the article or listened to the recording before reading this question. I have done so in compliance with the request in this question.

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

I have not studied that issue and thus do not have an opinion on that question.

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

These policy questions are appropriately left to the political branches for resolution, and it would be inappropriate for me to comment as a judicial nominee..

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

I am not aware if Mr. Leo, the Federalist Society, or any of the entities identified in that story have taken a position on, or otherwise advocated for or against, my judicial nomination.

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

I have never considered the issue before.

f. In your questionnaire, you indicated that you have been a member of the Federalist Society. Please describe any involvement you have had as a member of the Federalist Society related to advocacy for judicial nominations described in the Washington Post story.

I did not actively participate in any activity of the Federalist relating to advocacy on behalf of judicial nominations.

5. 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?

Yes, I do. A judge's duty is apply the law (the rules) as created by the Constitution, acts of Congress and Supreme Court precedent. It is not appropriate for judges to influence the outcome based on his or her personal views, just as it is not appropriate for an umpire to influence the outcome of a baseball game by making calls that favor one team over another. Finally, just as an umpire has to employ judgment in applying the rules (ball vs. strike; swing vs. check swing) a judge must at times exercise judgment in applying the law to a particular case.

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

There are times when that is a requirement of a decision – for example when deciding whether to issue an injunction.

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

I believe that deciding whether the Rule 56 standard has been met involves the exercise of judgment.

7. 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?

   I think it is important for a judge to understand the circumstances of the parties that come before her or him. However, I do not think it is appropriate for a judge's subjective empathy to influence the outcome of a case.

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

   I think it is impossible for any judge's life experiences to be removed from her or his decision-making process. However, it is important for a judge to make decisions based on the facts and the law and not based on her or his personal preferences or policy choices.

   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 believe I can. I was raised in a family of six. My father worked in a factory and we did not have much money. I can recall times when we were treated rudely or ignored in stores or restaurants because it was evident we were not people of means. I also spent a year in a wheel chair when I was a child before the advent of barrier free designs. I

remember the frustration of not being able to go into a store or use a bathroom. I will bring those life experiences to bear if I am confirmed.

8. The Seventh Amendment ensures the right to a jury "in suits at common law."
    a. What role does the jury play in our constitutional system?

    The jury plays a fundamental role in our judicial system. The right to a trial by jury is the only specific right identified in the Constitution applicable to civil cases. A unanimous jury is constitutionally required for a criminal conviction in federal court. Juries serve to act as a buffer between the government or powerful entities and the average citizen. A jury of peers is a great equalizer in our system.

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

    I have never considered the issue before as my practice only rarely involves arbitration. If confirmed I will faithfully apply all Supreme Court and Sixth Circuit binding precedent on this issue.

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

    I have never considered the issue before as my practice only rarely involves arbitration. If confirmed I will faithfully apply all Supreme Court and Sixth Circuit binding precedent on this issue.

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

    Congressional fact-finding is entitled to substantial deference when used as a basis for invoking congressional authority – for example under the Commerce Clause or Section 5 of the Fourteenth Amendment.

10. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.
    a. Have you read Advisory Opinion #116?

    Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

        I commit to taking whatever action is necessary to ensure that my attendance at any educational seminar comports with all ethical rules.

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

Please see my response to Question 10(b)(i).

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

Please see my response to Question 10(b)(i).

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

Please see my response to Question 10(b)(i).

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

Please see my response to Question 10(b)(i).

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

If it is obvious that a neutral observer would reach that conclusion I would not participate in that program. If the issue is in doubt I would seek guidance from the Chief Judge and other judges in the district.

Questions for the Record for Michael Bogren
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

    a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

    No.

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

    No.

Nomination of Michael S. Bogren
United States District Court for the Western District of Michigan Questions for the Record
Submitted May 29, 2019 QUESTIONS

FROM SENATOR BOOKER

1. You represented three police officers from the City of Coldwater, Michigan, in a case where the plaintiff was hospitalized for a head injury after the officers pushed her face into a concrete floor.[1] According to press reports, the woman needed 17 stitches in her face after the incident.[2]

    a. No information on the case is available on online databases. What was the disposition of the case?

    I (and my firm) represent three police officers who were present in the jail sally port when the incident took place, none of whom were the arresting officer. I also represent the City of Coldwater and supervisory officials in the case. Neither I nor my firm represents the officer accused of using excessive force. That officer was terminated by the City of Coldwater as a result of this incident. The case remains pending. Discovery is ongoing and the parties are in the process of scheduling facilitative mediation.

2. In 2012, you wrote about the Supreme Court's decision in *Florence v. Board of Chosen Freeholders of County of Burlington*, which held that a policy of mandatory strip searches of any person entering a jail, regardless of the nature of the offense, did not violate the Constitution.[3] You applauded the decision writing, "The courts of appeal have eroded this common-sense approach over the years in favor of complicated and unworkable case-by-case determinations of the 'need' to search a detainee. The Supreme Court has forcefully reiterated the deference that the federal courts must give to those charged by the states to maintain safety, order and discipline in jails."[4]

    a. Justice Breyer's dissent noted that the searches at issue in the case involved more than an undressing and taking a shower.[5] Rather, the dissent pointed out that "the searches here involve close observation of the private areas of a person's body and for that reason constitute a far more serious invasion of that person's privacy."[6] Do you believe there are any limits on the types of searches correctional facilities may conduct on individuals in their custody? If so, what are those limits?

    Yes, there are limits on the types of searches correctional facilities may conduct on individuals in their custody. As Justice Alito explained in his concurrence in *Florence*, the Court's holding was narrow and limited to giving jail administrators the discretion to require all arrestees who are committed to the general population of a jail to undergo visual strip searches not involving physical contact by corrections officers. The Sixth Circuit has recognized that detainees and inmates maintain "some reasonable expectations of privacy while in prison . . . even though those privacy rights may be less than those enjoyed by non-prisoners." *Stoudemire v. Michigan Dep't of Corrections*, 705 F.3d 560, 572 (6th Cir. 2013).

    More invasive searches must be based on an individualized evaluation of the circumstances and the need for such a search. The courts have required those searches to be performed by corrections officers of the same gender as the detainee. Those searches must be conducted in a private setting, not open to view by others in the facility. Even more intrusive searches, such as manual body cavity searches, generally are allowed only after obtaining a warrant. *See United States v. Booker*, 728 F.3d 535 (6th Cir.

2013).

3. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[7] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[8] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[9] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[10]

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[1] Don Reid, *Coldwater claims some immunity in lawsuit*, COLDWATER DAILY REPORTER, Jan. 20, 2018 (on file with the Senate Judiciary Committee).
[2] *Id.*
[3] Michael Bogren, U.S. Supreme Court Upholds Jail Strip Search Policy, PLUNKETT COONEY (May 21, 2012) (SJQ Attachment 12(a) at pp. 145-46).
[4] *Id*.
[5] *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 343 (2012).
[6] *Id.*
[7] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[8] *Id.*
[9] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[10] *Id.*

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

Yes.

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

Yes.

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

No, I have not.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of
19.1 percent longer.[11] Why do you think that is the case?

I have not studied that report and thus do not have an opinion on that question. However, I believe all judicial nominees should recognize that implicit racial bias may be a factor.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men are to be charged with federal offenses that carry harsh mandatory minimum sentences.[12] Why do you think that is the case?

I have not studied that report and thus do not have an opinion on that question. However, I believe all judicial nominees should recognize that implicit racial bias may be a factor.

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

Federal judges should be cognizant of the risk that implicit bias could be influencing decisions made in the criminal justice system. Every judge must ensure that her or his decisions on sentencing, trial rulings and all other aspects of the process are free from such bias. Judges must stringently enforce *Batson*, for example. Judges must also create an atmosphere that demonstrates that racial bias (or any other bias) will not be tolerated.

4. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[13] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[14]

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

I have never studied this issue nor read any papers or articles on this issue and thus have no opinion on whether there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have never studied this issue nor read any papers or articles on this issue and thus have no opinion on whether there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state.

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

Yes.

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

I would not place any particular label on myself in terms of constitutional philosophy. My practice has required me to advocate on behalf of my clients' varied positions using different approaches.

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

I would not place any particular label on myself in terms of constitutional philosophy or statutory construction. My practice has required me to advocate on behalf of my clients' varied positions using different approaches. In my experience if the plain language of a statute is unambiguous on its face, it

is a heavy burden to prevail on an argument the statute means something else.

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

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

        Yes, if it is germane to the particular matter or issue in controversy.

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

        Yes, and if those arguments are made I would certainly consider them.

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

    Yes.

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

    Yes, I believe *Brown* was correctly decided. I believe it is generally inappropriate for nominees to federal judicial positions to comment on the correctness of Supreme Court decisions because future litigants arguing a particular position might believe they or their arguments will not be treated fairly and impartially. However, because I believe a *de jure* racial segregation case will never again come before the federal courts I believe I can answer this question.

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

    No, I do not believe *Plessy* was correctly decided. I believe it is generally inappropriate for nominees to federal judicial positions to comment on the correctness of Supreme Court decisions

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[11] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research- publications/2017/20171114_Demographics.pdf.
[12] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)
[13] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates
-continue-to-fall.
[14] *Id.*

because future litigants arguing a particular position might believe they or their arguments will not be treated fairly and impartially. However, because I believe a *de jure* racial segregation case will never again come before the federal courts I believe I can answer this question.

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

    No.

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

    I believe it is inappropriate for me to comment on statements made by the President on a political issue. However, I will state as a general proposition that, just as jurors cannot be dismissed from a case based on their race or ethnicity alone, such a challenge against a judge would also fail.

14. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[18] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    I believe it is inappropriate for me to comment on statements made by the President on a political issue. However, both United States statutes and federal court decisions applying those statutes provide for due process protections and the fair adjudication of claims involving immigrants.

[15] 347 U.S. 483 (1954).
[16] 163 U.S. 537 (1896).
[17] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[18] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted May 29, 2019
For the Nomination of

Michael Bogren, to the U.S. District Court for the Western District of Michigan

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 as a district court judge I will, in every case, give consideration to the factors Congress identified in 18 U.S.C. § 3553(a) before imposing a sentence. I will review the Sentencing Guidelines independently as well as the Presentence Report and consider any objections submitted by the defense and the government. I will allow the defendant, counsel for the defendant and counsel for the government to provide input at the sentencing hearing. In appropriate cases the victim will also be allowed to provide input to the court. I will then determine whether a departure or variance from the Sentencing Guidelines is appropriate in a given case. Finally, I will determine the appropriate sentence and impose it.

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

    The sentence imposed must be sufficient to comply with the purposes of sentencing, but no greater. That judgment must be made on an individualized basis. However, it is also necessary to review other sentences imposed in similar cases to ensure consistency in sentencing decisions to the greatest extent possible.

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

    It is a district court judge's duty to review the facts of an individual case and determine an appropriate sentence for each defendant. A departure from the Guidelines (as opposed to a variance) is warranted when, in a particular case a judge determines the Sentencing Guidelines will not result in a sentence that accomplishes the legitimate goals of sentencing. District courts also have the authority to reject a Guidelines result if the court concludes that it ordinarily produces sentences greater than necessary to achieve the purposes of sentencing. *Spears v. United States*, 555 U.S. 261, 264 (2009). The most important point is that sentences must be individualized and there is no formula that can dictate a sentence in a particular case without taking into account all relevant facts of the case.

    d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum

sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

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

I am not familiar with Judge Reeves' comments or the rationale for them. I have not had occasion to consider the issue. If confirmed to the district court I would be obligated to follow and apply any mandatory minimum sentence required by an act of Congress.

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

I have not had occasion to consider the issue. If confirmed to the district court I would be obligated to follow and apply any mandatory minimum sentence required by an act of Congress.

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

I have not personally been involved in any case where a mandatory minimum sentence has been imposed. I am aware there is significant public and political debate about mandatory minimum sentences. However, I cannot comment based on personal knowledge or experience on this issue.

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

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

   I believe it would be appropriate for a judge to suggest in a written opinion that Congress should review a statute that results in the imposition of an unjust sentence.

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

[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

No. I do not believe the judiciary should discuss charging policies with prosecutors. Charging decisions have been committed to the executive branch and the judiciary should respect the separation of powers in that regard.

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

   No. I do not believe the judiciary should discuss clemency with prosecutors. Clemency decisions have been committed to the executive branch and the judiciary should respect the separation of powers in that regard.

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, in appropriate cases.

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

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

      Yes.

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

      Yes. Please see my response to Question 3 of Senator Booker.

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

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

      Yes.

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

      If confirmed I would encourage qualified candidates from all backgrounds, including women and minorities, to apply for a position in my chambers, and I would give serious consideration to each individual.