Nomination of Daniel Bress to the U.S. Court of Appeals for the Ninth Circuit
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. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *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?

   A circuit judge is bound by Supreme Court precedent and must faithfully follow it. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). In rare circumstances, it may be appropriate for a lower court judge respectfully to suggest that a decision of the Supreme Court is, for example, inconsistent with other prior or subsequent Supreme Court decisions or is causing confusion in the lower courts. Regardless, in these circumstances a lower court judge remains obligated to follow Supreme Court precedent.

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

   Under Ninth Circuit precedent, "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*). Otherwise, "[g]enerally, a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit." *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009).

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

   A lower court judge must follow Supreme Court precedent. The decision whether to overturn Supreme Court precedent is for the Supreme Court alone. The Supreme Court has identified factors that it considers in evaluating that question, such as whether the precedent is workable, whether it has been eroded by other precedents,

and whether the precedent has led to reliance interests. As a nominee to a lower federal court, it would not be appropriate for me to comment upon when the Supreme Court should revisit its own prior decisions. If confirmed, I would faithfully adhere to the precedents of the Supreme Court.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as "super-stare decisis." One text book on the law of judicial precedent, co-authored by Justice 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"? "superprecedent"?

   The decision in *Roe v. Wade*, 410 U.S. 113 (1973), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

   b. Is it settled law?

   Yes. For lower court judges, all Supreme Court precedent, including *Roe v. Wade*, 410 U.S. 113 (1973), is settled law. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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. For lower court judges, all Supreme Court precedent, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is settled law. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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?

The decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to opine as to whether the majority decision or a dissent in *Heller* was correct.

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

In *Heller*, the Supreme Court stated that "the right secured by the Second Amendment is not unlimited," and that "[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). As a judicial nominee, it would not be appropriate for me to opine as to how *Heller* may apply in a future case. *See* Code of Conduct of U.S. Judges, Canon 3A(6). If confirmed, I would faithfully apply *Heller* and all other precedents of the Supreme Court.

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

Please see my answer to Question 4(a) above.

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?

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court explained that "First Amendment protection extends to corporations." *Id.* at 342 (citing cases). According to the Supreme Court, "political speech does not lose First Amendment protection simply because its source is a corporation." *Id.* (quotations omitted). As a judicial nominee, it would not be appropriate for me to opine as to whether *Citizens United* was correct. If confirmed, I would faithfully apply *Citizens United* and all other precedents of the Supreme Court.

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

Please see my answer to Question 5(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that certain corporations could assert claims under the Religious Freedom Restoration Act of 1993 (RFRA). The Court further held that its "decision on that statutory question makes it unnecessary to reach the First Amendment claim" that had also been raised in the case. *Id.* at 736. As a judicial nominee, it would not be appropriate for me to opine as to whether *Hobby Lobby* was correct. If confirmed, I would faithfully apply *Hobby Lobby* and all other precedents of the Supreme Court.

6. According to court records you have litigated approximately 25 cases before California state and federal courts. **How many clients did you represent before California state and federal courts in these cases?**

   By my estimate, I believe I have appeared on behalf of approximately fifteen clients in California state and federal courts. With respect to California state and federal cases where I did not enter an appearance but where I played a role in the litigation, I estimate an additional approximately fifteen clients.

7. **How many oral arguments have you made before California state and federal courts?**

   I have not maintained written records on this issue, but I estimate that I have handled approximately 30 arguments in California state and federal court and have been involved in numerous additional hearings as well. Litigating in the courts of California is a regular part of my practice.

8. **Are you a legal title holder of any real property located in California? If so, where is this property located?**

   I am not a legal title holder of real property in California or any other place, including the Washington, D.C. area. With my parents and brothers, I own a family real estate company, Bress Properties LLC, which has legal title to certain homes and acreage in California. These properties are located in Hollister, California (San Benito County) and Aptos, California (Santa Cruz County).

9. As recently as November 2018, your profile on the Kirkland & Ellis LLP website listed you as an attorney working exclusively in the firm's Washington, D.C. office. Your profile page likewise provided contact information — phone and fax — only for the Washington, D.C. office. However, at some point after November 2018, your Kirkland & Ellis profile was revised to list you as an attorney in both the Washington, D.C. and San Francisco, California offices of the firm.

   a. **When was this revision made?** In the fall of 2018, my law firm was in the process of overhauling its website and the managing partner of my firm's Washington, D.C. office suggested that the firm cross-list me in both the Washington and San Francisco offices, in view of the amount of time I was spending in California and the amount of litigation I was doing there. He explained that for business development purposes, he

wanted clients to appreciate this aspect of both my practice and our firm's work in California. I agreed. Like other changes to our firm's website, this change was long overdue. Cross-listing me in both offices most accurately reflects the nature of my practice, which involves significant legal work and time spent in California.

b. Did you discuss this revision to your Kirkland & Ellis LLP profile with anyone in the Justice Department, the White House, or in the Trump Administration?

I did not discuss this revision to my law firm webpage with anyone in the Justice Department, the White House, or the Trump Administration at the time the revision was made. I did discuss this issue with the Department of Justice's Office of Legal Policy many months later, in May 2019, as part of preparing for my Senate Judiciary Committee hearing that took place on May 22, 2019.

c. If your practice involved a significant amount of California litigation, why was your firm's San Francisco, California office not previously included on your profile?

Please see my answer to Question 9(a).

10. **Please identify every motion, brief, or other legal filing you have submitted before state and federal courts where you listed as your address Kirkland's San Francisco office.**

It is common practice to list only one address on a brief for each lawyer. It has been my practice to use my Washington, D.C. address on briefs.

11. As of the date of your Senate Judiciary Committee hearing, the State Bar of California website lists you as a "Non-California" attorney with a Washington, D.C. address.

Why does the California State Bar list you as a "Non-California" attorney?

I have been a member of the California bar my entire career as a practicing lawyer. The State Bar of California website does not list me as a "'Non-California' attorney." Rather, following the listing of my Washington, D.C. work address, the State Bar website states under "County": "Non-California County." I presume this is in reference to the fact that my work address listed is in Washington, D.C.

12. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2003. You also indicated that have been a member of the Federalist Society Executive Committee for Criminal Law and Procedure Practice Group from 2009 to 2010. 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 did not draft this language and there cannot opine on its intended meaning. I have not discussed it with anyone employed by the Federalist Society.

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

Please see my answer to Question 12(a).

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

Please see my answer to Question 12(a).

d. What did your role as member of the Civil Rights Practice Group entail?

I have never been a member of the Federalist Society Civil Rights Practice Group. From 2009 to 2010, I was a member of the Federalist Society Executive Committee for Criminal Law and Procedure Practice Group. To the best of my recollection, my involvement consisted of participating on one or two committee conference calls. I had to discontinue my participation due to the competing demands on my time from my law practice, teaching schedule, and family obligations.

e. What does your role as member of the Litigation Practice Group entail?

I have never been a member of the Federalist Society Litigation Practice Group. For a discussion of my role on the Executive Committee for Criminal Law and Procedure Practice Group, please see my answer to Question 12(d).

13. 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 difference 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?

During my first interview on June 13, 2017, there may have been discussion about my knowledge of applicable Supreme Court precedents in the area of administrative law. I do not recall being asked about my views on administrative law.

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 is a broad field that encompasses a wide range of legal issues. If confirmed, I would faithfully apply any applicable precedents in this area, including *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994).

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

The Supreme Court has generally instructed that judges may consider legislative history when a statute is ambiguous, but that where a statute is unambiguous, resort to legislative history is not necessary. *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."). If confirmed, I would faithfully apply Supreme Court and other applicable precedent on the use of legislative history and, where appropriate, will carefully consider any arguments that parties may advance using legislative history.

15. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I prepared a draft of these responses on my own. I then shared my draft with attorneys at the Department of Justice's Office of Legal Policy and received their input. All of my answers are my own.

Written Questions for Daniel Bress
Submitted by Senator Patrick Leahy
May 29, 2019

1. You said at your nomination hearing that your legal practice has been heavily based in motions practice. Yet you have not tried a single case in any federal court, nor have you argued an appeal in front of the circuit court for which you are nominated to serve. In addition you have not lived in California in more than a decade, and when you did live in California, it was not for more than a year.

    (a) What experiences can you point to that would give Congress the confidence you would, if confirmed, effectively be able to navigate the complexities of the thousands of cases that come before the Ninth Circuit Court of Appeals?

    I believe that my wide-ranging experience will enable me to navigate the caseload of the Ninth Circuit. I graduated *Order of the Coif* from the University of Virginia School of Law, where I served as Editor-in-Chief of the *Virginia Law Review*. During law school, I worked at the Supreme Court of California for Justice Kathryn M. Werdegar. Upon graduating from law school, I clerked for Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit and Justice Antonin Scalia of the Supreme Court of the United States.

    I then entered private practice, where I have worked on a variety of complex civil litigation matters, first at Munger Tolles & Olson LLP and later at Kirkland & Ellis LLP, where I am an equity partner. I have filed hundreds of briefs and submissions and have appeared in court on numerous occasions on a range of matters, including those involving commercial disputes, class actions, product liability, government fraud, and trade secret misappropriation. In the course of my practice, I oversee large teams of lawyers and have held different leadership roles within my firm. I have also maintained an active *pro bono* practice representing persons of limited means, including persons who are incarcerated and persons sentenced to death. As part of my commitment to *pro bono* work, I have also served on the Advisory Council of Tzedek D.C., a non-profit legal services organization dedicating to assisting persons of limited means in obtaining debt relief.

    In addition to my significant civil litigation and *pro bono* practice, I have been heavily involved in teaching and mentoring. Some of that teaching is done "in-house" at Kirkland & Ellis, where I have for many years developed and led trainings on legal writing and other topics. I have also taught law school courses on five occasions at the University of Virginia School of Law and the Columbus School of Law at Catholic University. Outside of the classroom, I have for many

years served as a mentor through the Leadership Council on Legal Diversity, which pairs practicing attorneys with law students of diverse backgrounds. I have also hosted at the Supreme Court for many years groups of junior high school students from my hometown of Gilroy, California, and have spoken to them about working as a lawyer and clerking at the Supreme Court.

Finally, and in addition to professional recognition I have received during my career, *see* Senate Judicial Questionnaire Question 8, I am honored to have received letters in support of my nomination from colleagues who have known me my entire career, including my partners at Kirkland & Ellis; Neil Eggleston, my law partner and former White House Counsel to President Obama; law clerks who worked for every Justice the Term I clerked for Justice Scalia on the Supreme Court; former law clerks to Judge J. Harvie Wilkinson III; members of the faculty at the University of Virginia School of Law; members of the Managing Board at the *Virginia Law Review*, where I served as Editor-in-Chief; and Ariel Levinson-Waldman, President of Tzedek D.C., the non-profit legal services organization on whose Advisory Council I serve. I am honored by the confidence these colleagues have shown in me to serve as a circuit judge.

2. In a 2005 Virginia Law Review article, you argued that federal agencies possess no inherent power to reconsider their own adjudications in the absence of an express grant of authority in a statute or regulation.

   (a) What role, if any, do you believe federal courts can play in reviewing and ruling on agency decisions to reconsider adjudications in the absence of an express grant of authority in a statute or regulation?

   As my student note discusses, *see Administrative Reconsideration*, 91 Va. L. Rev. 1737 (2005), federal courts can and do review challenges to decisions of administrative agencies that had sought to reconsider a prior final decision in the absence of an express grant of authority to do so. My student note surveyed this area of law and identified particular situations in which federal courts were more or less likely to afford agencies an "inherent" power to reconsider a prior final decision. *See id.* at 1743-69. If I am confirmed, I would be obligated to follow any applicable precedent on the question of whether and when administrative agencies have the power to reconsider their own prior final judgments in the absence of an express grant of authority in a statute or regulation. I would faithfully follow that 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?

The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I would faithfully follow applicable precedent concerning the methods for interpreting statutes.

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?

The independence of the federal judiciary is a central feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in the public arena that may follow.

(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?**

Please see my response to question 4(b).

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?

Under Supreme Court precedent, courts can review decisions by the President, including during times of war or other armed conflict. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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?

As a judicial nominee, I do not think it would be appropriate for me to comment on this abstract and hypothetical scenario about a President's non-compliance with a court order. *See* Code of Conduct of U.S. Judges, Canon 3A(6). If I am confirmed and if such a scenario were to come before me, I would carefully examine the relevant authorities that may bear upon this question.

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?

The Constitution assigns powers over war and foreign affairs to the President and Congress. In evaluating conflicts between the two branches in this area, the Supreme Court has sought guidance from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (citing Justice Jackson's concurrence). If confirmed, I would faithfully apply any applicable precedents, the Constitution, and any statutes that may bear upon the President's exercise of authority, recognizing that under Supreme Court precedent, no person or government official is above the law.

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."

(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?

Please see my response to Question 7(a).

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

Please see my response to Question 7(a).

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

The Supreme Court has long made clear that it is ultimately "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). In evaluating any challenge to Executive action, a court must consider the relevant precedents, constitutional provisions, and any statutory provisions, as applicable, as set forth in my response to Question 7(a) above.

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 held that the Equal Protection Clause applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an "exceedingly persuasive justification" for such gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I would faithfully follow this precedent.

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

    The Voting Rights Act is a historic and landmark law. If confirmed, I will faithfully follow Supreme Court precedent interpreting this Act.

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

    The Constitution provides in Article I, section 9 that "no Person holding any Office or Profit or Trust under" the United States "shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." I have not had occasion to study this Clause, its history, or any applicable precedents that may bear on it. In addition, inasmuch as there is active or impending litigation concerning this Clause, as a judicial nominee it would not be appropriate for me to opine on this topic. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

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

As a general matter, an appellate court considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. The decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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 Thirteenth, Fourteenth, and Fifteenth Amendments reflect a constitutional commitment to counteracting racial discrimination in the wake of the Civil War. Each of these Amendments provides that Congress has the power to enforce them "by appropriate legislation." U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2.

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

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

The decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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

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

The Supreme Court has stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991). It is never appropriate for lower courts to depart from Supreme Court precedent. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de*

Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). With respect to circuit precedent, the Ninth Circuit has explained that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*). Otherwise, "[g]enerally, a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit." *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009).

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.

    The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Canon 3 of the Code of Judicial Conduct for United States Judges. If confirmed, I would carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

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?

Courts play a central role in protecting constitutional rights through the impartial application of the law and fidelity to the rule of law. As a judicial nominee, it would not be appropriate for me to opine generally on abstract legal concepts that may require consideration and application in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

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

    Yes.

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

    I have not researched this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on issues that may require consideration in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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 Constitution confers on the federal government certain enumerated powers. The reach of those powers, and in particular the scope of Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, have been the subject of considerable litigation and debate. The Supreme Court has decided various cases in these areas. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 of the Fourteenth Amendment). If confirmed, I would faithfully follow the Supreme Court's precedents concerning the scope of congressional powers.

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?

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court held, *inter alia*, that the President's Proclamation No. 9645 was lawfully issued under 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." *Id.* at 2409. The Court also held that "plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.* The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to opine on abstract legal concepts that may require consideration and application in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

The Supreme Court has held that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to comment on particular examples that may arise in future cases or that may already be the subject of pending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

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

The Supreme Court has held that "the doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotations omitted). According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* As a judicial nominee, it is not appropriate for me to grade or opine on the decisions of the Supreme Court. If confirmed, I would faithfully apply the Supreme Court's precedents and all other applicable precedents in the area of qualified immunity.

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

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

The Supreme Court has recognized that new technological developments can create serious concerns under the Fourth Amendment. As the Supreme Court has explained, new technologies in the digital era can "risk[] Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018); *see also, e.g.*, *Riley v. California*, 573 U.S. 373, 402 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.") (quotations and citation omitted). As a judicial nominee, it would not be appropriate for me to comment on particular

examples that may arise in future cases or that may already be the subject of pending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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?

    I have not researched this question and do not presently have considered views on it. In addition, as a judicial nominee, it would not be appropriate for me to comment on issues that may arise in future cases or that may already be the subject of pending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

    An independent judiciary depends upon judges being free from political influence. Article III of the Constitution sets forth certain protections to allow for judicial independence. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independent of the political sphere. *See, e.g.*, Code of Conduct of U.S. Judges, Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society."). I believe strongly that an independent judiciary is a central feature of our constitutional system and that an independent judiciary promotes the rule of law.

Senator Dick Durbin
Written Questions for Daniel Bress
May 29, 2019

For questions with subparts, please answer each subpart separately.

Questions for Daniel Bress

1. **How many years have you practiced law, not counting clerkships?**

   I graduated from the University of Virginia School of Law in 2005. Following my clerkships with Judge J. Harvie Wilkinson III on the United States Court of Appeals for the Fourth Circuit and Justice Antonin Scalia of the Supreme Court of the United States, I began working in a law firm in 2007. I have been practicing law in law firms continuously since that time, for approximately twelve years.

2. Question 16(d) of the Senate Judiciary Committee questionnaire asks you to state the number of cases in courts of record that you have tried to verdict, judgement, or final decision.

   Your answer to this question was not clear. You said, "I have been involved in various capacities, including as a legal strategist, in cases that were presented to juries or that involved significant evidentiary proceedings."

   Please answer the original question: how many cases have you tried to verdict, judgment or final decision?

   As indicated in my answer to Question 16(d) of my Senate Questionnaire and during my testimony on May 22, 2019 before the Senate Judiciary Committee, I have not tried cases to verdict, judgment, or final decision, as that has not been the nature of my practice. As explained in my Senate Questionnaire, I have been involved in various capacities, including as a legal strategist, in cases that were presented to juries or that involved significant evidentiary proceedings; post-judgment proceedings and appeals following jury verdicts; and matters that have involved extensive factual and evidentiary work with fact and expert witnesses.

3. **Do you decide what information is posted on your law firm website profile?**

   The information that is included on my law firm website profile is determined by both my law firm and me.

4. **Did you decide to modify your law firm website profile after it was publicly announced on October 11, 2018 that you had been interviewed by Senator Feinstein's judicial selection committee for a 9th Circuit California seat? Please list all the modifications made to your firm website profile after October 11, 2018.**

In the fall of 2018, my law firm was in the process of overhauling its website and the managing partner of my firm's Washington, D.C. office suggested that the firm cross-list me in both the Washington and San Francisco offices, in view of the amount of time I was spending in California and the amount of litigation I was doing there. He explained that for business development purposes, he wanted clients to appreciate this aspect of both my practice and our firm's work in California. I agreed. Like other changes to our firm's website, this change was long overdue. Cross-listing me in both offices most accurately reflects the nature of my practice, which involves significant legal work and time spent in California.

5. At your hearing, senators from states other than California announced that they were satisfied you had sufficient connections to the California legal community. However, the senators from California, who know the California legal community far better, were not satisfied and stated their view that this 9th Circuit California seat should be filled by an attorney who lives and practices in California. **Do you believe that senators from states other than California are better positioned than senators from California to assess whether an attorney has sufficient connections to the California legal community to merit an appointment to a California-based judgeship?**

   The nomination and confirmation of federal judges is a matter committed to the political branches. As a judicial nominee, it would not be appropriate for me to opine on such matters. *See* Code of Conduct of U.S. Judges, Canon 5.

6. In your questionnaire, you list as the second most significant case you have handled a case in which your client is alleged by the Department of Justice to have made defective material for bulletproof vests that, in your words, "put law enforcement officers at risk of death or serious injury." **Please discuss how you became involved in this case and your work on it.**

   In *United States v. Honeywell International Inc.*, Case No. 08-cv-961 (D.D.C.), the United States Department of Justice alleges that Honeywell's "Z Shield" ballistic material unacceptably degraded under conditions of high heat and humidity. Although the federal government has claimed that body armor containing Z Shield "appears to create a risk of death or serious injury as a result of degraded ballistic performance when used in body armor," NIJ Body Armor Standard Advisory Notice #01-2005, Honeywell vigorously contests that allegation. The matter remains in active litigation. I became involved in this case because Honeywell hired my law firm, Kirkland & Ellis LLP, to represent it in this matter, and I was asked to join the team. My work on the case has involved a full range of litigation activity, including extensive briefing, arguing in court, deposing fact and expert witnesses, and preparing fact and expert witnesses for depositions.

7. You have on numerous occasions opposed efforts by parties who are trying to hold corporations accountable through class actions. **In general, do you believe that individuals are able to adequately hold large corporations accountable for wrongdoing through individual litigation or arbitration, as opposed to class actions?**

Federal Rule of Civil Procedure 23 governs when class actions may be certified in federal court, and an extensive body of case law has developed around the various requirements for class certification. There is likewise an extensive body of law concerning the enforceability of arbitration agreements. If I am confirmed, I would faithfully follow the applicable rules and precedents in these areas. Inasmuch as there is active or impending litigation concerning these issues, as a judicial nominee it would not be appropriate for me to opine on this topic. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

8. **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?**

   Judges must base their decisions on the law and not on the identity of the litigants, judges' personal preferences, or any other non-legal factor. That is among the reasons why judges must agree to "administer justice without respect to persons." 28 U.S.C. § 453. Nevertheless, empathy is an important human quality and one that judges may appropriately display while impartially applying the law. For example, judges should treat all litigants with dignity and respect and ensure that all litigants are judged equally under law.

9. You say in your questionnaire that you have been a member of the Federalist Society since 2003.

   a. Why did you join the Federalist Society?

   I joined the Federalist Society in law school because it was the most active student group at the University of Virginia School of Law, in terms of inviting speakers from different backgrounds and viewpoints. I enjoyed attending these talks and debates and learning about different sides of an issue.

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

   The nomination and confirmation of federal judges is a matter committed to the political branches. As a judicial nominee, it would not be appropriate for me to opine on such matters. *See* Code of Conduct of U.S. Judges, Canon 5.

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

   To the best of my recollection, since 2007 or 2008 I believe I have attended some portion of the annual convention most years. I believe there were certain years that I did not attend.

d. On how many occasions have you met or communicated with Leonard Leo of the Federalist Society?

To the best of my recollection, I have spoken to Mr. Leo on 3-4 occasions.

10.

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

The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). But ultimately, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Lower court judges must follow the Supreme Court's precedents regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

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

I have not had occasion to study this Clause, its history, or any applicable precedents that may bear on it. In addition, inasmuch as there is active or impending litigation concerning this Clause, as a judicial nominee it would not be appropriate for me to opine on this topic. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

11.

a. Is waterboarding torture?

I have not had occasion to study this issue closely, but my understanding is that waterboarding would constitute torture when intentionally used "to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1) (defining "torture").

b. Is waterboarding cruel, inhuman and degrading treatment?

I have not had occasion to study this issue closely, but my understanding is that under 42 U.S.C. § 2000dd-2(a)(2), no person in the custody or under the control of the United States government may be subjected to any interrogation technique not authorized in the

Army Field Manual. It is also my understanding that the Army Field Manual does not authorize waterboarding.

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

Please see my responses to Questions 11(a) and 11(b) above.

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

I have not studied this question, but as a judicial nominee, it would also not be appropriate for me to opine on such political matters. *See* Code of Conduct of U.S. Judges, Canon 5.

13.

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

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters. *See* Code of Conduct of U.S. Judges, Canon 5.

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

I am not aware of any such donations in support of my nomination. As a judicial nominee, it would also not be appropriate for me to opine on such political matters. *See* Code of Conduct of U.S. Judges, Canon 5. If confirmed, I will evaluate all actual or potential conflicts under 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other applicable rules or guidelines. I will also, as necessary and appropriate, consult with colleagues and ethics officials within the court system.

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

Please see my responses to Questions 13(a) and 13(b).

14.

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

I have not researched this issue. In addition, as a judicial nominee, it would not be appropriate for me to opine on hypothetical issues that may require consideration in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

Please see my response to Question 14(b).

Nomination of Daniel Bress
to the United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted May 29, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. At the hearing on May 22nd you said that "one's personal views and what the law is are two completely different things. If you are a judge, you are not entitled to rely on your personal religious or moral viewpoints. You are not entitled to decide what you think the law should be. Your job is to decide what the law is, and that is a fundamental distinction."

    a. Can you give an example of a time where you exemplified this – where you followed or argued in favor of a law that was in conflict with or not aligned with your own personal views?

    I have represented on a *pro bono* basis two capital defendants who were convicted of horrific murders and sentenced to death. I have also represented *pro bono* an individual sentenced to life without parole for similarly heinous murders. I represented them because, regardless of my personal views about their crimes or the punishments I thought they might deserve, I believed that in each case, the client had a good-faith legal argument for relief. I also undertook these representations because I believe that lawyers have a responsibility to perform *pro bono* legal work for persons who cannot afford attorneys.

2. You have not been a resident of California for more than one year since you graduated high school. In the hearing on May 22nd, Senator Lee said that you now divide your time between Washington, D.C. and California.

    a. How many days did you spend in California last year?

    I have not kept records of the amount of time I spend in California each year, but I estimate that I have spent over two months in California in the past year, if not more, which is consistent with previous years since I re-located to the Washington, D.C. area in connection with my wife's career. I regularly travel to California for work and family-related reasons and spend extended periods of time there in the winter and summer with my family. Consistent with plans I made well before learning of my nomination, I intend to travel to California in early June, and had not planned to return to Washington until late August or early September. In addition, when I am working in Washington, much of my legal work is still directed to litigation in California.

    b. At the hearing on May 22nd, Senator Lee described your connection to California to be "continuous." How many days have you spent in California in the last five years?

Please see my answer to Question 2(a). Although I have not kept records of the amount of time I spend in California each year, I estimate that on average, I spend over two months there each year. In addition, when I am working in Washington, much of my legal work is still directed to litigation in California.

c. Were it not for this nomination, would you have moved back to California this year?

I have always hoped and intended to move back to California, which is why I never purchased a home in the Washington, D.C. area. The timing of any move would necessarily depend on family considerations and my law practice.

3. You have been a member of the Federalist Society since 2003 and served on the Executive Committee for Criminal Law and Procedure Practice Group from 2009-2010.

a. If confirmed, do you plan to remain an active participant in the Federalist Society?

If confirmed, I may attend events sponsored by the Federalist Society, as well as events sponsored by other organizations, as appropriate.

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.

No.

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 previously, but I reviewed it in connection with the above request.

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.

As a judicial nominee, it would not be appropriate for me to opine on political matters relating to the nomination and confirmation of federal judges. *See* Code of Conduct of U.S. Judges, Canon 5.

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

Please see my response to Question 4(b).

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 of any such advocacy.

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?

Please see my response to Question 4(b).

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 have had no such involvement.

5. Senator Hawley asked you in the hearing on May 22nd if you thought "that separating children in *public* schools based on their race and systematically disfavoring one race of children is acceptable" (emphasis added). You answered no.

a. Do you think that there is any educational setting within which it is appropriate to separate children by race?

I am not aware of any educational setting where this would be appropriate.

b. Have racially separated schools been equal in American history?

No.

6. 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 have found Chief Justice Roberts' umpire metaphor to be a useful shorthand description of the judicial role. Judges must render decisions based on an impartial application of the law and not based on their own personal views. The umpire metaphor fairly captures that.

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

   Although judges should be mindful that their decisions have real consequences for litigants and others, a judge must apply the law regardless of whether he or she prefers the outcome that the law requires. That said, there are certain situations where the applicable law expressly requires consideration of the consequences of a given decision. That is the case, for example, in determining whether to issue an injunction and the form the injunction should take. When the law requires considerations of the likely practical effects of a given ruling, judges must adhere to the law and consider those likely consequences.

7. 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?

   No. I believe this determination is an objective one made under governing legal standards, based on the facts and law.

8. 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 base their decisions on the law and not on the identity of the litigants, the judge's personal preferences, or any other non-legal factor. That is among the reasons why judges must agree to "administer justice without respect to persons." 28 U.S.C. § 453. Nevertheless, empathy is an important human quality and one that

judges may appropriately display while impartially applying the law. For example, judges should treat all litigants with dignity and respect and ensure that all litigants are treated equally under law.

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

A judge must ground his or her decisions in the law and cannot allow personal viewpoints to intrude on that analysis. But a judge's personal life experiences can instill qualities that are desirable in a judge, such as a willingness to hear all sides of a dispute, respect for others, and an understanding that all persons are entitled to equal justice under law.

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?

If confirmed, I am committed to treating all parties equally under law and to according them the dignity and respect that all persons deserve, even if they come from backgrounds different than my own. I believe every litigant should have confidence that our judicial system is based on the impartial application of the law.

9. 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.

10. 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?

As a right specifically delineated in the Bill of Rights, the right to a jury trial "[i]n suits at common law" is a central feature of our Constitution. Juries perform an important role in safeguarding rights.

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

Inasmuch as there is active or impending litigation concerning these issues, as a judicial nominee it would not be appropriate for me to opine on this topic. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

Please see my response to Question 10(b).

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

As a general matter, an appellate court considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. If confirmed, I will faithfully follow any applicable precedent on the question of appellate court review of factual findings.

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

As indicated in my response to Question 11, as a general matter, an appellate court considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. Appellate courts must abide by these standards and any other applicable rules in reviewing such factual findings.

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

The Supreme Court has addressed this question on different occasions. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I would faithfully apply any applicable precedent that bears on the issue of judicial deference to congressional fact-findings.

14. 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.

        If I am confirmed, I will abide by the Code of Conduct for United States Judges and will consider any other applicable ethical guidance, including Advisory Opinion #116. That Opinion requires judges to consider a series

of factors before deciding whether to participate in a program sponsored by a public interest group or other organization engaged in public policy debates. The factors judges should consider include, *inter alia*, the identity of the seminar sponsor, the nature and source of seminar funding, and the subject matter of the seminar. I will consult Advisory Opinion #116 as part of making what the Opinion describes as the "case-by-case" assessment of whether it is appropriate to attend any particular seminar.

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

Please see my response to Question 14(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 14(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 14(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 14(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?

Please see my response to Question 14(b)(i).

Senate Judiciary Committee Hearing on
"Nominations"
Questions for the Record
May 29, 2019
Senator Amy Klobuchar

Questions for Mr. Bress, nominee to be U.S. Circuit Judge for the Ninth Circuit

Many of the cases that come before the Ninth Circuit involve tribal issues, since there are 427 federally recognized tribes within the court's jurisdiction—more than any other federal court of appeals.

- Are you committed to the principles of tribal sovereignty, treaty rights, and the federal trust responsibility?

  Indian tribes have a lengthy and important history in this country and their legal status is set forth and discussed in various statutes and precedents, in addition to certain direct references in the Constitution. The Supreme Court has held that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority," and that "unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (quotations omitted). If confirmed, I will faithfully apply all relevant precedents of the Supreme Court and Ninth Circuit relating to these important tribal issues.

You clerked on the Supreme Court for Justice Scalia, who was a proponent of originalism. In *McCulloch v. Maryland*, Chief Justice Marshall wrote that the Founders intended the Constitution "to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."

- What is your perspective on Chief Justice Marshall's argument in *McCulloch*?

  I believe that the Constitution is an enduring document that must continually be applied to new and changing circumstances and technologies. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, however, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). That is so regardless of whether a given precedent is regarded as "originalist" in approach or not.

Questions for the Record for Daniel Bress
From Senator Mazie K. Hirono

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

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

    No.

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

    No.

2. Many nominees tell the Judiciary Committee that as judges they will simply follow the law. But cases are so infrequently decided by the direct application of legal precedent that at some point, as one nominee told us, judging kicks in.

    Do you acknowledge that there will be times on the bench that a judge does bring personal experience and views to bear on their decisions?

    Although judges come to the bench with their own different life experiences, judges must render decisions based on an impartial application of the law, and not based on their own personal views. That is a fundamental feature of the rule of law.

3. What remedies are available should a President of the United States, or another member of the Executive Branch disregard a ruling of a federal court? I am not asking you to speculate on any possible case that could come before you. I am simply asking you to discuss the possible available remedies.

    As a judicial nominee, I do not think it would be appropriate for me to comment on this abstract and hypothetical scenario about a President's non-compliance with a court order. *See* Code of Conduct of U.S. Judges, Canon 3A(6). If I am confirmed and if such a case were to come before me, I would carefully examine the relevant authorities that may bear upon this question.

4. A recent nominee before the Committee spoke about the importance of training to help judges identify their implicit biases.

    a. Would you agree that training on implicit bias is important for judges to have?

    I am not presently familiar with the training programs that may exist for federal judges on this and other topics, but I agree that judges must guard against implicit

bias and that trainings may be helpful in that regard. If such trainings were offered, I would expect to participate in them.

b. Have you ever taken such training?

Through my law firm, I have participated in trainings that include discussion of implicit bias.

c. If you have not had such training, if confirmed, do you commit to taking training on implicit bias?

Please see my response to Question 4(a).

Daniel Aaron Bress
United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted May 29, 2019

QUESTIONS FROM SENATOR BOOKER

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

   The most significant case I litigated before the Ninth Circuit was *Corber v. Xanodyne Pharmaceuticals*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*) (consolidated with *Romo v. Teva Pharmaceuticals USA, Inc.*, Case No. 13-56310 (9th Cir.)). Under the Class Action Fairness Act (CAFA), a matter may be removed to federal court in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The plaintiffs in this matter had filed various lawsuits in different California state courts consisting of fewer than 100 plaintiffs, but then moved to coordinate the actions "for all purposes" pursuant to California Code of Civil Procedure § 404. The question in the case was whether the § 404 request for coordination "for all purposes" was a request for the cases to be "tried jointly" under CAFA. In a 9-2 *en banc* decision written by Judge Gould, the Ninth Circuit agreed with our position and held that the coordination petition rendered the actions removable to federal court.

2. Please describe your most significant experiences litigating in California, or in any other state contained in the Ninth Circuit, in state or federal court.

   I have been involved in cases at all levels of the court system in California, in both federal and state court, and have worked on more litigation in California than in any other State, by far. I have been involved in cases in the United States Court of Appeals for the Ninth Circuit and in the United States District Courts for the Northern, Central, and Eastern Districts of California. I have also been involved in cases in the Supreme Court of California (where I also previously worked), various California Courts of Appeal, and state trial courts in San Francisco, Alameda County, Santa Clara County, Los Angeles, and Orange County, among others. Some of my most significant litigations in California include the following:

   Corber v. Xanodyne Pharmaceuticals, 771 F.3d 1218 (9th Cir. 2014) (*en banc*) (consolidated with *Romo v. Teva Pharmaceuticals USA, Inc.*, Case No. 13-56310 (9th Cir.)). Under the Class Action Fairness Act (CAFA), a matter may be removed to federal court in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The plaintiffs in this matter had filed various lawsuits in different California state courts consisting of fewer than 100 plaintiffs, but then moved to coordinate the actions "for all purposes" pursuant to California Code of Civil Procedure § 404. The question in the case was whether the § 404 request for coordination "for all purposes" was a request for the cases to be "tried jointly" under CAFA. In a 9-2 *en banc*

decision written by Judge Gould, the Ninth Circuit agreed with our position and held that the coordination petition rendered the actions removable to federal court.

Sumer v. Carrier Corp., Case No. 14-cv-4271 (N.D. Cal.); *Grassi v. International Comfort Products, LLC*, Case No. 15-cv-253 (E.D. Cal.); *Oddo v. Arcoaire Air Conditioning & Heating*, Case No. 15-cv-1985 (C.D. Cal.); *Cormier v. Carrier Corp.*, Case No. 18-cv-7030 (C.D. Cal.): I have represented United Technologies Corporation and its subsidiary, Carrier Corporation, and other entities in various putative federal class actions in the United States District Courts for the Northern, Eastern, and Central Districts of California. These cases have involved varying allegations about claimed defects in home air conditioning units, and typically involve claims for breach of warranty, unfair trade practice, and fraud. My clients prevailed in *Sumer* and *Grassi*, with the courts agreeing, among other things, that Carrier had met and exceeded its warranty obligations. The *Oddo* and *Cormier* matters have been the subject of extensive class certification proceedings that are ongoing. The Court recently denied without prejudice the plaintiffs' motions for class certification.

Ochoa v. Anaheim City School Dist., 11 Cal. App. 5th 209 (2017). I represented *pro bono* a group of parents of students at Palm Lane Elementary School in Anaheim, California, who sought to convert their children's failing public school into a charter school using California's Parent Empowerment Act. *See* Cal. Educ. Code § 53300 *et seq*. That Act, among other things, allows parents to petition for various forms of school change when their children's public school fails to meet certain requirements for school performance. On appeal in the Fourth District Court of Appeal, the Court (Judges O'Leary, Fybel, and Aronson) agreed with the parents that the school district's rejection of the parents' petition to convert Palm Lane into a charter school was arbitrary and capricious and contrary to law. This is the first published decision interpreting California's Parent Empowerment Act.

Depree v. BASF Catalysts LLC, Case No. A140681 (Cal. Ct. App. 1st App. Dist. 2016); *Uribes v. BASF Catalysts LLC*, Case Case No. H043017 (Cal. Ct. App. 6th App. Dist. 2016); *BASF Catalysts LLC v. Superior Court (Heisch)*, Case No. A139820 (Cal. Ct. App. 1st App. Dist. 2013); *Uribes v. BASF Catalysts LLC*, Case No. 112CV220636 (Cal. Super., Santa Clara Cty.); *Manuel v. BASF Catalysts LLC*, Case No. BC 479452 (Cal. Super., Los Angeles Cty.); *Heisch v. Allied Packing & Supply, Inc., et al.*, Case No. RG-12-622472 (Cal. Super., Alameda Cty.); *Unterleitner v. BASF Catalysts LLC, et al.*, Case No. RG15778755 (Cal. Super., Alameda Cty.); and various others. I have represented BASF in numerous cases in the California Courts of Appeal and California state trial courts, in which the plaintiffs allege fraud and spoliation in decades of past asbestos lawsuits. The plaintiffs in these cases contend that Engelhard Corporation, a company BASF acquired, and Engelhard's former outside counsel at Cahill Gordon & Reindel LLP, misled plaintiffs about whether a talc product contained asbestos, and engaged in related document destruction. I have argued in court numerous times in these cases, including motions for summary judgment, motions *in limine*, motions to compel, and motions seeking BASF's privileged documents under the crime-fraud exception to the attorney-client privilege.

In addition to various other matters in California federal and state court on which I have worked, I have also been involved in litigation in other states in the Ninth Circuit,

including the United States District Court for the District of Arizona, the United States District Court for the Western District of Washington, and Washington state court (Pierce County). I also represented the Government of Guam in a petition for writ of *certiorari* to the Supreme Court from a decision of the United States Court of Appeals for the Ninth Circuit. *See Territory of Guam v. Paeste*, 136 S. Ct. 2508 (No. 15-990). That case involved issues unique to Guam and the Organic Act of Guam.

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

   I have prepared various briefs in the federal courts of appeals, but have not argued there. The most difficult appellate argument experience I have had was in *Ochoa v. Anaheim City School Dist.*, 11 Cal. App. 5th 209 (2017). In this case, I represented *pro bono* a group of parents of students at Palm Lane Elementary School in Anaheim, California, who sought to convert their children's failing public school into a charter school using California's Parent Empowerment Act. *See* Cal. Educ. Code § 53300 *et seq*. That Act, among other things, allows parents to petition for various forms of school change when their children's public school fails to meet certain requirements for school performance. The argument was difficult because this was the first appeal to address California's unique Parent Empowerment Act. The Court of Appeal had to address, among other things, the Act's administrative exhaustion requirements, the requirements for a school to be subject to the Act, and various other aspects of the law and its implementing regulations relating to the parent petition and signature process. The oral argument was difficult because all of these matters were questions of first impression under California law, and because it was necessary for our clients to prevail on each of them in order for the judgment below to be affirmed. Ultimately, the Court of Appeal agreed with the parents that the school district's rejection of the parents' petition to convert Palm Lane into a charter school was arbitrary and capricious and contrary to law. This was the first published decision interpreting California's Parent Empowerment Act.

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

   I have prepared many briefs in the federal courts of appeal, but the most difficult brief I wrote was in *Corber v. Xanodyne Pharmaceuticals*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*) (consolidated with *Romo v. Teva Pharmaceuticals USA, Inc.*, Case No. 13-56310 (9th Cir.)). This matter is discussed above in response to Question 1. The brief was difficult because our client had already lost before a three-judge panel of the Ninth Circuit. The Ninth Circuit then granted *en banc* review and requested supplemental briefing. The supplemental briefing, which I led, was difficult because the Ninth Circuit ordered briefs of no more than 4,000 words in a case that involved a complex question of federal removal jurisdiction that turned on the interaction between the federal Class Action Fairness Act and California procedural law for coordinated cases.

5. During the century before President Trump came into office, the Senate had *never*

confirmed a judicial nominee over the objections of *both* home-state Senators, according to the Congressional Research Service.[1] If you're confirmed, you would be part of a major break from that longstanding Senate tradition of respect for the views of home-state Senators through the blue slip process.

a. Do you think the Trump Administration meaningfully consulted with your home-state Senators about your nomination?

The nomination and confirmation of federal judges is a matter committed to the political branches. As a judicial nominee, it would not be appropriate for me to opine on such matters. *See* Code of Conduct of U.S. Judges, Canon 5.

b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

Please see my response to Question 5(a).

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

Although the term "originalism" may have different meaning to different persons, I take it to refer generally to the act of interpreting a text in accordance with its original public meaning, namely, how reasonable persons with knowledge of the law would have interpreted it at the time of its adoption. The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, however, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). That is so regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

The Supreme Court has held the starting point for statutory interpretation is the text of the statute. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, we start, of course, with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (quotations and alterations omitted). The Supreme Court has further explained that if "the statutory text is plain and unambiguous," it must be applied "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). Although the term "textualism" may have different meant to different persons, I take it to

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[1] BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), http://www.crs.gov/Reports/pdf/R44975; MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT 7-22 (2003), https://fas.org/sgp/crs/misc/RL32013.pdf.

refer generally to the primacy of the text in statutory interpretation. Ultimately, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). That is so regardless of whether a given precedent is regarded as "textualist" in approach or not.

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

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

    The Supreme Court has generally instructed that judges may consider legislative history when a statute is ambiguous, but that where a statute is unambiguous, resort to legislative history is not necessary. *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."). If confirmed, I would faithfully apply Supreme Court and other applicable precedent on the use of legislative history and, where appropriate, will carefully consider any arguments that the parties may advance using legislative history.

    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?

    Please see my response to Question 8(a).

9. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

    Judicial restraint is a central feature of the rule of law and reflects the notion that judges must follow the law, rather than make the law. Judges demonstrate judicial restraint by addressing the issues before them through an impartial application of the law, regardless of their personal views.

    a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically

changed the Court's longstanding interpretation of the Second Amendment.[2] Was that decision guided by the principle of judicial restraint?

The decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to opine as to whether the majority decision or a dissent in *Heller* was correct.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[3] Was that decision guided by the principle of judicial restraint?

The decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to opine as to whether the majority decision or dissent in *Citizens United* was correct.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[4] Was that decision guided by the principle of judicial restraint?

The decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court. As a judicial nominee, it would not be appropriate for me to opine as to whether the majority decision or dissent in *Shelby County* was correct.

10. 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.[5] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[6] 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.[7] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[8]

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

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[2] 554 U.S. 570 (2008).
[3] 558 U.S. 310 (2010).
[4] 570 U.S. 529 (2013).
[5] 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.
[6] *Id.*
[7] 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.
[8] *Id.*

I have not studied this issue closely, but am generally aware of statistics like those cited above and believe that, unfortunately, our criminal justice system does reflect racial bias, both implicit and explicit. This should be a serious concern to everyone. Judges must do what they can to guard against the intrusion of racial bias into our justice system.

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

I am generally aware of data, like that cited above, indicating that persons of color are disproportionately represented in our country's prisons.

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

I have not studied this issue specifically, but I generally recall having read articles in newspapers or journals on this topic. I cannot recall the specific materials I have read.

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.[9] Why do you think that is the case?

I have not studied this issue closely, but my understanding is that the reason for these disparities is a matter of ongoing dialogue and debate. Regardless, these disparities should be a serious concern to everyone.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[101] Why do you think that is the case?

Please see my response to Question 10(d).

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

Judges must do what they can to ensure that implicit racial basis does not intrude upon the criminal justice system and the impartial application of the

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[9] 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.

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

law. I support continued study of these issues by the federal judicial system and others, which may allow for a greater understanding of the issues and how best to address them.

11. 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.[11] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[12]

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

       I have not studied this issue sufficiently to be able to offer an informed view on it.

    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.

       Please see my response to Question 11(a).

12. 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.

13. Do you believe that *Brown v. Board of Education*[13] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    As I stated at my Senate Judiciary Committee hearing on May 22, 2019, *Brown v. Board of Education*, 347 U.S. 483 (1954), is perhaps the most seminal decision in American constitutional law. As a judicial nominee, it is generally not appropriate to grade the results or reasoning in Supreme Court decisions, all of which would be binding upon me if I am confirmed. But *Brown*'s core holding is unique and monumental in American law and to the life of this nation, and that core holding is not being contested. I can therefore state that *Brown*'s core holding—that "separate but equal" violates the Equal Protection Clause of the Fourteenth Amendment—is correct.

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[11] 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.

[12] *Id.*

[13] 347 U.S. 483 (1954).

14. Do you believe that *Plessy v. Ferguson*[14] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Please see my response to Question 13. *Plessy v. Ferguson*, 163 U.S. 537 (1896), was wrong on the day it was decided. The Supreme Court's decision in *Brown* vindicated the first Justice Harlan's historic dissent in *Plessy*. *See Plessy*, 163 U.S. at 552-64 (Harlan, J., dissenting).

15. 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.

16. 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."[15] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

As a judicial nominee, it would not be appropriate for me to opine on political comments regarding cases litigated in the Ninth Circuit. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

17. 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."[16] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will faithfully apply the applicable precedents in this area. To the extent this question asks me to opine on a political matter, as a judicial nominee it would not be appropriate for me to do so. *See* Code of Conduct of U.S. Judges, Canon 5.

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[14] 163 U.S. 537 (1896).

[15] 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.

[16] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.