Chairman Patrick Leahy
Questions for the Record
Nomination of Mark Howard Cohen
To Be U.S. District Judge for the Northern District of Georgia
May 20, 2014

1. **Since the time of your representation of the Georgia State Board of Elections in the Georgia photo ID voting law litigation, several photo ID voting laws have been struck down by state or federal courts under various constitutional or statutory provisions. Specifically, courts that heard evidence about the operation of these newly-enacted voting measures invalidated photo ID laws in Texas, Pennsylvania and Wisconsin, among others.**

   (a) In light of these rulings, do you acknowledge that certain contemporary photo ID voting laws can abridge, deny or interfere with the right to vote in violation of the law as various courts have held?

   Response: Yes. The judicial determination of whether a photo ID voting law unconstitutionally denies or interferes with the right to vote is a fact-intensive inquiry. Based upon the specific facts presented in several cases, some courts have upheld their particular state's photo ID laws but other courts have held their photo ID laws violated either federal or state constitutional provisions.

   (b) During your hearing you testified, in essence, that different outcomes in photo ID voting cases can be explained by virtue of the State, statute and differing fact circumstances at issue. In both the state court case in Pennsylvania and the federal court case in Wisconsin identify, with specificity, the legal and factual bases that led to the invalidation of the laws there at issue <u>and</u> explain how the law and facts in those cases differed from the law and facts at issue in the Georgia photo ID voting case that you litigated?

   Response: In *Applewhite v. Commonwealth*, No. 330 M.D. 2012 (Pa. Commw. Ct. Jan. 17, 2014), the Commonwealth Court of Pennsylvania concluded that the Pennsylvania photo ID law violated provisions of the Pennsylvania Constitution. In *Frank v. Walker*, No. 11-CV-01128, 2014 U.S. Dist. LEXIS 59344 (E.D. Wis. Apr. 29, 2014), the court concluded that the Wisconsin photo ID law violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. Included as factual bases for those decisions was credible expert testimony concerning the number of persons who lacked a photo ID and the negative impact those states' photo ID laws had on the right to vote, as well as other evidence that supported those plaintiffs' claims. In contrast, in upholding Georgia's photo ID law against a Fourteenth Amendment challenge, the federal courts found that the proffered expert testimony failed to satisfy the relevancy and reliability requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *see Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1370-71 (N.D. Ga. 2007), the data matches relied upon by plaintiffs to establish the number of persons who lacked a valid photo ID were "incomplete and unreliable" and "contain[ed] inaccuracies," and plaintiffs "failed to

identify a single individual who would be unable to vote because of the Georgia statute . . . ." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). In addition, unlike the heightened strict scrutiny standard used by the Pennsylvania state court in *Applewhite* in applying provisions of the Pennsylvania Constitution, the Georgia Supreme Court used the more flexible standard of *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) in applying provisions of the Georgia Constitution. *See Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 720, 728-29, 707 S.E.2d 67, 74-75 (2011).

2. **What are your views of the legal analysis in *Frank v. Walker,* the Wisconsin federal photo ID opinion?**

   Response: The legal analysis in *Frank v. Walker* is supported by the court's citation of the evidence as presented by the plaintiffs in that case.

3. **Was Georgia's photo ID law, as originally passed in 2005, constitutional? If so, why was Georgia's 2005 photo ID law enjoined by a federal court in 2005; and, why, in your view, did the Georgia legislature then amend the law in 2006 to provide an alternative to the financial burdens that the 2005 law imposed upon some voters seeking to obtain acceptable forms of photo ID?**

   Response: The U.S. District Court for the Northern District of Georgia enjoined the implementation of the Georgia photo ID law as originally passed in 2005 because the plaintiffs showed a substantial likelihood of succeeding on the merits of their claims that the law unduly burdened the right to vote in violation of the Fourteenth Amendment and constituted a poll tax in violation of the Twenty-Fourth Amendment. *See Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366, 1370 (N.D. Ga. 2005). I was not involved in the enactment of any of the photo ID legislation – neither the original 2005 photo ID law nor the 2006 amendment to that law by the Georgia General Assembly – so I do not know the specific reasons why the state legislature amended the 2005 law. (Unlike the United States Congress, the Georgia legislature has no reported legislative history.) A discussion of the provisions of the 2006 amendment is contained in *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1305-08 (N.D. Ga. 2006), and *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1343-46 (N.D. Ga. 2007).

4. **During your hearing, you mentioned the Supreme Court's ruling in *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008).**

   (a) Describe your role in Georgia Secretary of State, Karen Handel's decision to file an amicus brief in *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008) where you appeared as counsel of record.

   Response: The Georgia Secretary of State is a state constitutional officer who is required by Georgia law to be represented in court by the Attorney General of Georgia. After the Supreme Court granted certiorari in the *Crawford* case, the Georgia Secretary of State requested that the Attorney General of Georgia file an

amicus curiae brief in support of the respondents. Because I had been previously appointed by Georgia Attorney General Thurbert Baker to represent the Secretary of State in Georgia's photo ID litigation, Attorney General Baker directed me to prepare and file the *amicus* brief.

(b) What guidance, if any, does the ruling in *Crawford* case provide regarding photo ID cases brought under an "as applied" theory?

Response: *Crawford* concerned a facial challenge to Indiana's photo ID law. The opinion does not involve an analysis of how an "as applied" challenge to a similar law would be undertaken.

5. **What factors are relevant to consider under a Section 2 of the Voting Rights Act challenge to a photo ID measure?**

Response: Based upon *Chisom v. Roemer*, 501 U.S. 380, 394 (1991), plaintiffs can establish a Section 2 violation by "demonstrating that a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race," and proof of discriminatory intent is not required.

6. **Under the *Burdick* v. *Takushi*, 504 U.S. 428 (1992), balancing test, how much weight should be accorded to an asserted governmental interest that is largely or completely unsupported by evidence when balanced against voters' interests in avoiding new burdens on their right to vote which are supported by evidence?**

Response: The Supreme Court in *Burdick* and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), set forth a balancing test to determine the level of scrutiny to apply in evaluating a constitutional challenge to a state voting law. That balancing test weighs (1) "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against (2) "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789, *quoted in Burdick*, 504 U.S. at 434. In applying this balancing test, a court must consider both "the legitimacy and strength of each of [the State's] interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789, *quoted in Burdick*, 504 U.S. at 434. The interests must be "sufficiently weighty to justify the limitation." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), *quoted in Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008). Voting laws which impose a "severe" burden on the right to vote must be "narrowly drawn to advance a state interest of compelling importance," *Burdick*, 504 U.S. at 434, but "reasonable, nondiscriminatory restrictions" which impose a minimal burden may be warranted by "the State's important regulatory interests," *id*. (quoting *Anderson*, 460 U.S. at 788). This is an inquiry dependent on the circumstances of each case. *See Anderson*, 460 U.S. at 789-90 (stating that "[t]he results of this evaluation will not be automatic"). As the Supreme Court has explained, "only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id*. at 789.

7. **In his Senate confirmation testimony then-Judge John Roberts testified that "…I have no basis for viewing [Section 2 of the Voting Rights Act] as constitutionally suspect and I don't." Do you agree with this view that the now-Chief Justice Roberts expressed at the time of his Supreme Court confirmation hearing?**

   Response: I am uncertain of the context of Chief Justice Roberts' statement but, if I am confirmed as a district judge, I would be bound by and would follow Supreme Court and Eleventh Circuit precedent which has applied Section 2 of the Voting Rights Act in consideration of a number of voting practices and procedures.

8. **As lead counsel in the Georgia photo ID appeal you defended the argument that you advanced in the lower court that the NAACP, and individual minority voters in Georgia, did not have legal standing to challenge the state's photo ID law in court. Had your argument prevailed, contrary to precedent and the long history of the fight for voting rights in Georgia, access to justice in a core area of constitutional rights would have been closed for organizations and individuals that defend voting rights. The Eleventh Circuit rejected your position.**

   (a) How do you square the arguments that you advanced in that case both with the role that civil rights plaintiffs and intervenors have played over many decades enforcing voting rights in the face of discriminatory laws passed by legislatures, and with the Supreme Court and other court precedents on which the Court relied in rejecting your position?

   Response: When Attorney General Thurbert Baker appointed me to represent the state defendants in the photo ID cases, I was instructed to assert all potential defenses. At the time responsive pleadings were filed, plaintiffs' lack of standing was raised as a viable defense. In its order upholding Georgia's photo ID law, the U.S. District Court for the Northern District of Georgia sustained this defense, finding "that Plaintiffs have failed to prove, by a preponderance of the evidence, that they have standing to pursue this action." *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1374 (N.D. Ga. 2007). On appeal, the Eleventh Circuit concluded that the district court erred in its standing ruling but not in its ruling on the merits. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1349-52 (11th Cir. 2009). If confirmed as a district judge, I would be bound by and would apply the decisions of both the Supreme Court and the Eleventh Circuit with respect to standing.

   (b) Do you accept the analysis of the Court of Appeals for the Eleventh Circuit on its standing ruling rejecting your argument in the Georgia photo ID voting case? If so, why? If not, why?

   Response: Yes. The analysis is binding precedent and, if confirmed as a district judge, I would be bound by and would apply the decisions of the Eleventh Circuit and the Supreme Court with respect to standing.

(c) Do you recognize the role that non-governmental actors play under the nation's civil rights laws as "private attorneys general," and, if confirmed, would you respect the laws and precedents that keep the courthouse door open to parties seeking to vindicate civil and constitutional rights?

Response: Yes. I respect and would apply existing law and the precedents of the Supreme Court and the Eleventh Circuit Court of Appeals regarding standing or any other issue that would come before me.

9. **In the past several years, the Supreme Court struck down a number of federal statutes most notably several designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 521 U.S. 507 (1997), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), *Board of Trustees v. Garrett*, 531 U.S. 356 (1999), and *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012). The Supreme Court also struck down statutes as falling outside the authority granted to Congress by the Commerce Clause in the case of *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000). Similarly, a majority of the justices of the Court determined that core provisions of the Affordable Care Act were beyond the scope of the Commerce and Spending Clauses in *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012), and upheld the individual mandate under the taxing power. The Court struck down other federal statutes as violations of the 10th Amendment or the 11th Amendment, and part of a landmark Voting Rights Act, without articulating any clear basis for its unconstitutionality in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). These cases rely upon an expansive view of state's rights, and have been described as shifting powers to state governments as congressional authority is diminished.**

(a) What is your view of these decisions? In your opinion, do they constitute "judicial activism"?

Response: If I am confirmed as a district judge, I would be bound to apply as precedent the decisions of the Supreme Court and the Eleventh Circuit Court of Appeals on these and other constitutional issues regardless of my personal views of these decisions.

(b) What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, under Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment?

Response: The Supreme Court has held that the Commerce Clause authorizes the regulation of three categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons of things in interstate commerce"; and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *Lopez* and *United States v. Morrison*, 529 U.S. 598, 613 (2000), the Supreme Court articulated

limitations to the reach of the Commerce Clause to certain non-economic activities. *See also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.").

Section 5 of the Fourteenth Amendment states that Congress shall have power to enforce by appropriate legislation "the constitutional guarantee that no State shall deprive any person of 'life, liberty or property, without due process of law,' nor deny any person 'equal protection of the laws.'" *Morrison*, 529 U.S. at 619 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997)). Section 5 includes authority to "prohibit conduct which is not itself unconstitutional and [to] intrude into 'legislative spheres of autonomy previously reserved to the States.'" *Id*. (quoting *City of Boerne*, 521 U.S. at 518); *see also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003). This "broad" congressional enforcement power, however, "is not unlimited." *Id*. (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128); *see also Tennessee v. Lane*, 541 U.S. 509, 518 (2004). Section 5 "legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *City of Boerne*, 521 U.S. at 520).

"The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and [Section 2 of that Amendment] gives Congress the power to enforce that command." *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013); *see Rice v. Cayetano*, 528 U.S. 495, 511-12 (2000). "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment," *Garrett*, 531 U.S. at 373 n.8. Accordingly, the analysis of the scope of congressional authority under Section 2 of the Fifteenth Amendment is similar to the analysis under Section 5 of the Fourteenth Amendment. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490 (1989) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

If confirmed as a district judge, I would follow Supreme Court and Eleventh Circuit precedent in deciding issues concerning the extent of congressional authority under the Commerce Clause, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment.

Senator Grassley
Questions for the Record

Mark Howard Cohen
Nominee: U.S. District Judge for the Northern District of Georgia

1. **You were on the Northern District of Georgia Magistrate Judge Selection Panels for several years. What qualities did you look for when you considered potential judges and do you possess those qualities?**

   Response: The qualities that I looked for in interviewing candidates for a position as a United States Magistrate were an appropriate judicial temperament, a commitment to adhere to the rule of law and precedent, and a history of hard work and respect for both litigants and counsel. I believe that I possess those qualities.

2. **According to your questionnaire, the entirety of your legal practice has been in civil matters.**

   a. **What steps have you taken and do you plan to take to get up to speed in criminal matters?**

      Response: I clerked for a United States Magistrate for the Northern District of Georgia for two years at the beginning of my legal career, but have not had much exposure to federal criminal law or procedure since that time. After my nomination, I began to familiarize myself with the United States Sentencing Guidelines which, although no longer mandatory, still help to ensure consistency and uniformity in sentencing. I also have reviewed the Federal Rules of Criminal Procedure and the materials relating to adjudicating criminal matters that have been provided to me by the Federal Judicial Center. Finally, I have contacted several active District Court judges and observed various public criminal proceedings in an effort to get "up to speed" and will continue to utilize these jurists as a resource through my confirmation proceedings.

   b. **What do you believe is the purpose of sentencing?**

      Response: There are several potential purposes in issuing a sentence in a criminal matter. First is to punish the defendant for the specific act committed and provide an incentive to obey the law in the future. Second is deterrence, which is to discourage the defendant or other members of society from committing the same act. Third is to protect the public (if the sentence includes incarceration) from the danger of exposure to the defendant for a period of time. Fourth is rehabilitation of the offender to assist him or her in the transition back into society.

3. **What is the most important attribute of a judge, and do you possess it?**

Response: The most important attribute of a judge is the ability to hear and decide cases based on applicable law and precedent and with complete impartiality. I believe that I possess this attribute.

4. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should treat each person who appears before the Court with respect and civility. A judge also should be open-minded, prepared to listen, and patient. I believe that I possess those qualities.

5. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed as a district judge, I will faithfully apply the legal precedents of the Supreme Court and the Eleventh Circuit Court of Appeals to all cases which come before me regardless of whether I agree or disagree with those precedents.

6. Every nominee who comes before this Committee assures me that he or she will follow all applicable precedent and give them full force and effect, regardless of whether he or she personally agrees or disagrees with that precedent. With this in mind, I have several questions regarding your commitment to the precedent established in *United States v. Windsor*. Please take any time you need to familiarize yourself with the case before providing your answers. Please provide separate answers to each subpart.

a. In the penultimate sentence of the Court's opinion, Justice Kennedy wrote, "This opinion and its holding are confined to those lawful marriages."[1]

i. Do you understand this statement to be part of the holding in *Windsor*? If not, please explain.

Response: Yes, I understand this statement and the majority opinion to be binding precedent.

ii. What is your understanding of the set of marriages to which Justice Kennedy refers when he writes "lawful marriages"?

Response: In *Windsor*, Justice Kennedy's use of the term "lawful marriages" refers to "marriages made lawful by the State." 133 S. Ct. 2675, 2695 (2013).

[1] *United States v. Windsor*, 133 S.Ct. 2675 at 2696.

iii. Is it your understanding that this holding and precedent is limited only to those circumstances in which states have legalized or permitted same-sex marriage?

Response: Yes. *See Windsor*, 133 S. Ct. at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. . . . The federal statue is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. . . . This opinion and its holding are confined to those lawful marriages.").

iv. Are you committed to upholding this precedent?

Response: Yes, as well as any other relevant precedent of the Supreme Court and the Eleventh Circuit Court of Appeals.

b. Throughout the Majority opinion, Justice Kennedy went to great lengths to recite the history and precedent establishing the authority of the separate States to regulate marriage. For instance, near the beginning, he wrote, "By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."[2]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes, along with all other portions of the *Windsor* majority opinion.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes, along with all other portions of the *Windsor* majority opinion.

c. Justice Kennedy also wrote, "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens."[3]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes, along with all other portions of the *Windsor* majority opinion.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes, along with all other portions of the *Windsor* majority opinion.

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[2] *Id.* 2689-2690.
[3] *Id.* 2691.

d. Justice Kennedy wrote, "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[4]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes, along with all other portions of the *Windsor* majority opinion.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes, along with all other portions of the *Windsor* majority opinion.

e. Justice Kennedy wrote, "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'"[5]

i. Do you understand this portion of the Court's opinion to be binding Supreme Court precedent entitled to full force and effect by the lower courts? If not, please explain.

Response: Yes, along with all other portions of the *Windsor* majority opinion.

ii. Will you commit to give this portion of the Court's opinion full force and effect?

Response: Yes, along with all other portions of the *Windsor* majority opinion.

7. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: In deciding cases of first impression, I would first look to the text of the applicable constitutional provision, statute, or regulation. If the text is clear and unambiguous, I would decide the case based on the plain meaning of the text. If the text is ambiguous, I would look to the rules of statutory construction established by the Supreme Court and the Eleventh Circuit to assist in interpreting the text. Although I recognize that decisions from other circuits are not binding, I also would consider as persuasive authority those precedents from other circuits that have interpreted the same or similar texts. If these sources still did not resolve the issue, and in limited circumstances, I would examine the legislative intent of the provision as may be exemplified by its legislative history.

[4] *Id.* (internal citations omitted).
[5] *Id.* (internal citations omitted).

8. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: A district judge is bound by the precedent of the Supreme Court and the Court of Appeals in his or her circuit. I would apply any binding Supreme Court or Eleventh Circuit precedent without regard to any personal belief.

9. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Statutes enacted by Congress have the presumption of constitutionality, and courts must exercise judicial restraint prior to declaring a statute unconstitutional. When reviewing a statute enacted by Congress, courts should avoid constitutional issues, if possible, and endeavor to interpret the statute in a manner that upholds its constitutionality. If the court must further address the constitutional issue, it should strike down a statute only if it is clearly shown that Congress has exceeded its authority under the Constitution or acted contrary to a provision of the Constitution.

10. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: No, unless required to do so by the Supreme Court.

11. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: A judge's ruling should never be affected by political ideology or motivation. If confirmed as a district judge, I will be committed to rendering impartial decisions based upon an application of the rule of law to the particular facts of the cases before me. This is evidenced by those times in my career when I acted either as an administrative law judge or special master and rendered decisions on such an impartial basis.

12. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: I have been a civil litigator for more than 30 years, during which time I have represented individuals, government agencies, corporations, and small businesses. Throughout my career, I have zealously represented my clients' interests within the bounds of the law without regard to my personal beliefs. I have endeavored to maintain the highest ethical standard and to treat people with fairness and respect. If confirmed as a district judge, I pledge to decide cases based upon an impartial application of the law, after considering with an open mind the arguments of all parties before the court. I will treat all

parties before me with fairness, respect, civility, and patience in accordance with my oath of office.

13. If confirmed, how do you intend to manage your caseload?

Response: In my experience as a practicing litigator, I have learned that active management of cases by district judges promotes their fair and timely resolution. If confirmed as a district judge, in accordance with the Federal Rules of Criminal and Civil Procedure as well as the Local Rules of the Northern District of Georgia, I would establish scheduling orders with firm discovery deadlines and trial dates. With the assistance of the staff of my chambers and the Clerk's office, I would consider motions and discovery disputes promptly and convene status conferences to ensure that cases move forward expeditiously. If appropriate, I also would engage the assistance of magistrate judges and encourage settlement and dispute resolution through mediation.

14. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response: Yes. The parties always should have the opportunity to discuss with the court the proper pace and manner in which the litigation should proceed. The court, however, must ensure that the case proceeds in a fair and timely manner giving consideration to the relevant facts and circumstances of the individual case. Trial judges have a number of tools available to them to control the pace of litigation, including issuing scheduling orders, convening regular status conferences, and establishing firm trial dates. I also would endeavor to decide motions promptly and efficiently resolve discovery disputes.

15. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed, I intend to resolve legal issues based on applicable constitutional and statutory provisions, in conjunction with Supreme Court and Eleventh Circuit precedent. I am fortunate to have had substantial litigation experience in the Northern District of Georgia. However, aside from my clerkship with a United States Magistrate Judge, I have not had much experience in federal criminal matters. I will fully familiarize myself with the United States Sentencing Guidelines and thoroughly avail myself of the substantial experience of my colleagues on the district court and the material and training provided by the Federal Judicial Center to assist me in making as smooth a transition as possible.

16. According to the website of American Association for Justice (AAJ), it has established a Judicial Task Force, with the stated goals including the following: "To increase the number of pro-civil justice federal judges, increase the level of professional diversity of federal judicial nominees, identify nominees that may have an anti-civil justice

bias, increase the number of trial lawyers serving on individual Senator's judicial selection committees".

a. Have you had any contact with the AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ regarding your nomination? If yes, please detail what individuals you had contact with, the dates of the contacts, and the subject matter of the communications.

Response: No.

b. Are you aware of any endorsements or promised endorsements by AAJ, the AAJ Judicial Task Force, or any individual or group associated with AAJ made to the White House or the Department of Justice regarding your nomination? If yes, please detail what individuals or groups made the endorsements, when the endorsements were made, and to whom the endorsements were made.

Response: No.

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

Response: I received these questions via email on May 20, 2014. I personally drafted responses and provided them to representatives of the Department of Justice, Office of Legal Policy, on May 21, 2014 for review. After receiving comments and putting my responses in final form, I authorized the Department of Justice to submit my responses to the Senate Judiciary Committee on my behalf.

18. Do these answers reflect your true and personal views?

Response: Yes.

Questions for the Record
Senator Ted Cruz

Mark Howard Cohen
Nominee, United States District Court for the Northern District of Georgia

Describe how you would characterize your judicial philosophy, and identify which U.S. Supreme Court Justice's judicial philosophy from the Warren, Burger, or Rehnquist Courts is most analogous with yours.

Response: My judicial philosophy would be to handle each case with an impartial and unbiased mind. A judge should be prepared, should treat all parties with respect and patience, and should give serious consideration to the legal arguments of all parties. A district judge must apply the facts to the law as written and follow binding precedent. I have not studied philosophies of the justices of the Warren, Burger, or Rehnquist courts, but I presume that all of them embraced the practices and philosophy that I have described.

Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, or some other form)?

Response: If confirmed as a district judge, I would follow the precedent of the Supreme Court of the United States and the United States Court of Appeals for the Eleventh Circuit, including the analysis in cases such as *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Court considered the original public meaning of the text of the Second Amendment to the Constitution.

If a decision is precedent today while you're going through the confirmation process, under what circumstance would you overrule that precedent as a judge?

Response: If confirmed as a district judge, I would not overrule existing precedent under any circumstance. I would be bound by the precedent of the Supreme Court and the Eleventh Circuit.

Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 552 (1985).

Response: If confirmed as a district judge, I would be bound by the Supreme Court's decision in *Garcia* and subsequent decisions which identify constitutional limitations on congressional power. I would apply the holdings in those cases without regard to whether I personally agree or disagree with these decisions.

Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has held that the Commerce Clause authorizes the regulation of three categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3)

"activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *Lopez* and *United States v. Morrison*, 529 U.S. 598, 613 (2000), the Supreme Court articulated limitations to the reach of the Commerce Clause to certain non-economic activities. *See also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."). If confirmed as a district judge, I would follow Supreme Court and Eleventh Circuit precedent in deciding issues concerning the extent of congressional authority under the Commerce Clause.

What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The President's ability to issue executive orders or take executive action is limited by the authority granted to him in the Constitution or by an act of Congress. *Medellin v. Texas*, 552 U.S. 491, 524 (2008). The applicable analysis for a court to determine whether executive action exceeds presidential authority is set out in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952). If confirmed as a district judge, I would follow Supreme Court and Eleventh Circuit precedent in deciding any challenges to executive action.

When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: In *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), the Supreme Court held that fundamental rights include "the specific freedoms protected by the Bill of Rights" and "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and which are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" (internal citations omitted). If confirmed as a district judge, I would follow Supreme Court and Eleventh Circuit precedent in deciding issues concerning fundamental rights.

When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has identified the classifications that are subject to heightened scrutiny under the Equal Protection Clause. They include race, alienage, and national origin (which are subject to strict scrutiny) and gender and illegitimacy (which are subject to intermediate scrutiny). *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). If confirmed as a district judge, I would follow Supreme Court and Eleventh Circuit precedent with respect to the evaluation of classifications and levels of scrutiny for purposes of the Equal Protection Clause, as in all other cases.

Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Response: I do not have sufficient information or expertise to have any personal expectation on this issue, and, even if I had one, it would play no role in any judicial decision. If confirmed as a district judge, I would follow the holding of *Grutter*, the Supreme Court's recent decision in *Fisher v.*

University of Texas at Austin, 133 S. Ct. 2411 (2013), and any other Supreme Court or Eleventh Circuit precedent concerning the use of race-conscious policies in public higher education.