Nomination of Clifton Corker to the U.S. District Court for the Eastern District of Tennessee
Questions for the Record
Submitted December 5, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. In October 1987, you wrote a letter supporting then-Supreme Court nominee Robert Bork, stating that "Bork's views on women's rights, dealing with the equal protection clause, are based on sound judgment." You argued that Bork was correct in his view that the Equal Protection Clause should not be applied to women because "it is possible to find reasonable differences between genders, simply because of the obvious physical differences. In the case of gender, Bork has said that it will depend on the issue. Combat is an example of an instance where this is applicable. Women's rights will not suffer at all."

   a. Please explain your understanding of whether and how the Equal Protection Clause applies to women.

   My understanding is the Equal Protection Clause applies to gender and I would follow applicable Supreme Court precedent, including *United States v. Virginia*, 518 U.S. 515 (1996) on this issue. I will note that the question states that I argued that the Equal Protection Clause should not be applied to women. That is not a fair reading of what I wrote back in 1987. That notwithstanding, I was addressing the Equal Protection Clause at a time when I had not attended law school and had no formal education in the law. Since graduating from JMU, I earned a law degree from the College of William & Mary Law School, clerked with a federal judge, practiced law for over 20 years and have served as a magistrate judge for the past three and a half years. I have personally grown and matured since I wrote that article as has my understanding of the law.

   b. When you wrote that "women's rights [would] not suffer at all" if women were excluded from the protections afforded by the Equal Protection Clause, what did you mean? How would women's right not suffer?

   Please see my response to question 1(a). The question stated that I argued that women should be excluded from protections afforded by the Equal Protection Clause. That is not a fair reading of this letter I wrote in 1987. It appears that I was attempting to address Equal Protection Clause analysis and differences in the standards of review associated with it. This letter was written when I was a teenager when I had not attended law school and had no formal education in the law. Since that time, I went to and graduated from the College of William & Mary Law School, clerked for Judge Cynthia Kinser, practiced law for over 21 years, and have for the last three and a half years, served as a United States Magistrate Judge. I would fully follow Supreme Court precedent on this issue.

2. In this same letter, you defended Judge Bork's view that "married couples challenging a ban on contraceptives had no greater rights than utility companies that want to escape smoke pollution laws." You defended Bork's statement by arguing that Bork "is essentially saying that breaking the law behind closed doors is not constitutionally protected."

    a. In *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972), the Supreme Court held that states may not ban contraceptives because doing so would violate the constitutional right to privacy. These cases were decided more than a decade before you wrote this letter. At that time, how was a married couple's use of contraceptives "behind closed doors" not constitutionally protected?

    I wrote this letter over 30 years ago. Looking back on this article from my position now, it appears that as a teenager I did not fully appreciate the import of Judge Bork's statement. A married couple's use of contraceptives in private is constitutionally protected as the Supreme Court has held in *Griswold*. As I have demonstrated as a magistrate judge, if confirmed as a district court judge, I would continue to faithfully uphold and apply Supreme Court and Sixth Circuit precedent.

    b. Do you agree with the result in *Griswold* and *Eisenstadt*, that states may not ban contraceptives?

    Both *Griswold* and *Eisenstadt* are landmark Supreme Court precedents and are the law of the land. I would faithfully follow the holdings in both cases if I were fortunate enough to be confirmed. As a magistrate judge and a judicial nominee, it would be inappropriate for me to state whether I agree or disagree with Supreme Court decisions. I will continue to faithfully apply all binding precedent to the cases that may appear before me, including *Griswold* and *Eisenstadt*.

    c. Do you agree with the reasoning in those cases, that states may not ban contraceptives because of a constitutional right to privacy?

    Please see my response to question 2(b).

3. As an undergraduate at James Madison University, you were a member and president of an on-campus organization called Students for America. According to JMU's college newspaper, Students for America held a "raucous mock funeral for aborted fetuses" and was described by other students on campus as a "Neo-Nazi organization" and "frightening."

    a. Did you participate in a mock funeral for aborted fetuses?

    I do not have any recollection of being a participant in this event. It is my understanding that the national field director for the organization came to campus and organized the event with another student board member of the organization.

b. Were you involved in any discussions about the mock funeral either beforehand or afterward? If so, what were those discussions?

Please see my answer to 3(a).

c. Why did you join and become president of an organization viewed by other students as "Neo-Nazi" and "frightening"?

From my recollection, Students for America was a conservative organization that would address contemporary issues of the day on campus. It was neither "Neo-Nazi" nor "frightening." I joined the group as a forum to address contemporary issues facing our country back in the late 1980s. For example, I specifically recall working with United Campuses to Prevent Nuclear War (UCAM) to organize a debate over the efficacy of a nuclear defense program. We brought in nationally recognized speakers on both sides of the issue to debate its merits before the student body.

4. 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 not appropriate for lower courts to depart from Supreme Court precedent. The Supreme Court has made clear "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997); *see also Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

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

Supreme Court precedent is absolutely binding on the district court. Once a district judge determines the Supreme Court precedent is applicable, the precedent must be followed.

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

As a magistrate judge and a judicial nominee, it would be inappropriate for me to comment on the circumstances under which the Supreme Court should overturn its own precedent. That is exclusively the decision of the Supreme Court. *See State Oil*, 522 U.S. at 20; *Rodriguez de Quijas*, 490 U.S. at 484.

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

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

Yes. *Roe v. Wade* is binding Supreme Court precedent and binding on all lower courts.

b. Is it settled law?

Yes.

6. 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. From the perspective of a district court, all Supreme Court precedent is settled law, which includes the holding in *Obergefell v. Hodges*. If confirmed, I would faithfully apply it.

7. 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 Supreme Court's decision in *District of Columbia v. Heller* is binding precedent, and I would faithfully follow it if I were fortunate enough to be confirmed to the district court. As a magistrate judge and judicial nominee, it would not be appropriate for me to offer any personal view on any Supreme Court opinion, including any dissenting opinion of a Justice. *See* Canon 3(A)(6) of the Code of Conduct of United States Judges.

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

In *Heller*, the Supreme Court noted that "Like most rights, the right secured by the Second Amendment is not unlimited … Although 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). The Court "also recognize[d] another important limitation on the right to keep and carry arms" – namely "that the sorts of weapons protected were those in common use at the time." *Id.* at 627 (internal quotation marks omitted).

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

The majority and dissenting opinions in *Heller* discussed and debated the scope and applicability of the Supreme Court's prior decisions interpreting the Second Amendment. *Compare Heller*, 554 U.S. at 619-26 (majority op.), *with id.* at 672-79 (Stevens, J., dissenting). As a nominee to a lower federal court, it would be inappropriate to provide my personal views about which opinion correctly interpreted Supreme Court precedent. *See* Canon 3(A)(6) of the Code of Conduct of United States Judges. I am obliged to follow Supreme Court precedent.

8. 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?

As a sitting magistrate judge and judicial nominee, it would be inappropriate for me to comment on whether I agree with any Supreme Court decision, including *Citizens United*, or to offer opinions on how that decision may be interpreted or applied. In addition, this issue is the subject of pending or impending litigation and therefore it would be inappropriate for me to comment on this issue under the Canons of Conduct for United States Judges. If confirmed, I will faithfully apply *Citizens United* and all Supreme Court precedent.

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

Please see my response to question 8(a).

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

Please see my response to question 8(a).

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

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

As noted on Question 26(a) of the Senate Judiciary Questionnaire, I was interviewed by attorneys from the White House and the Department of Justice in June 2018. I do not believe that any issues related to administrative law were discussed.

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"?

I do not have a generalized "view on administrative law." That is an extensive area of the law and, if confirmed, I would faithfully apply all Supreme Court and Sixth Circuit precedent to any issues pertaining to administrative law.

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

In the Sixth Circuit, "[o]nly if the statute is inescapably ambiguous should a court look to other persuasive authority—such as legislative history—in an attempt to discern legislative meaning." *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 392 (6th Cir.), *cert. denied sub nom. Direccion Gen. de Fabricaciones Militares v. Rote*, 137 S. Ct. 199, 196 L. Ed. 2d 129 (2016) (citation and internal quotation marks omitted). I will follow Sixth Circuit precedent in the consideration of legislative history.

11. 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.

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

I drafted the answers to each of these questions. I then solicited feedback on my answers from members of the Office of Legal Policy at the United States Department of Justice. I then revised my answers considering that feedback. My answers to each question are my own.

Senator Dick Durbin
Written Questions for Clifton Corker
December 5, 2018

For questions with subparts, please answer each subpart separately.

Questions for Clifton Corker

1. While you were in college at James Madison University, you reportedly were president of a student organization called the Students For America. The JMU school newspaper, *The Breeze,* described this group in 1988 as opposed to "all special privileges for homosexuals and minorities."

    a. **Please explain what this organization was.**

    From my recollection, Students for America was a conservative organization that would address contemporary political issues of the day back in 1980s on campus.

    b. **Please explain your role in this organization.**

    I served as the local president from approximately 1988 to 1989. In that capacity, I recall working with United Campuses to Prevent Nuclear War (UCAM) to organize a debate over the efficacy of a nuclear defense program. We brought in nationally recognized speakers on both sides of the issue to debate its merits before the student body.

    c. **Did this organization oppose "special privileges for homosexuals and minorities," as was reported in the school paper?**

    I do not recall whether the organization opposed "special privileges" or not. Since graduating from JMU, I earned a law degree from the College of William & Mary Law School, clerked with a federal judge, practiced law for over 20 years and have served as a magistrate judge for the past three and a half years. I have personally grown and matured and so has my understanding of the law. As a magistrate judge, personal or policy views have not entered my judicial analysis. If I am fortunate enough to be confirmed as a district court judge, I will continue to "administer justice without respect to persons, and do equal right" to all parties before me. 28 U.S.C. § 453.

2. In March 1988 you wrote a letter-to-the-editor in your college newspaper entitled "Evil liberal spirit returns." In this letter you wrote "that evil spirit of liberalism is beginning again to ooze out of the hearts and minds of those it holds captive, seeking to add more to its chains of slavery."

    a. **Please explain what you meant by this statement.**

I wrote that letter to the editor of my school paper over 30 years ago. I did not choose the title of the editorial, the editors did. The point of the letter was that we should not be blind to risks abroad, specifically the Soviet Union. This was in 1988, at a time when the cold war was still raging. In high school, I had visited East Berlin and saw the remarkable contrast between its economy and the poverty of that city and the prosperity of West Berlin. I wanted to note that distinction in the letter.

b. **Do you still hold these views?**

Please see my response to question 2(a). The view that I expressed in the 1988 letter to the editor was that we should not be blind to risks abroad, that there are foreign interests of which we should be mindful. The world has changed since then. The wall has come down and the Soviet Union has fallen apart. My views were specific to that time period.

3. In January 1989 you wrote an op-ed in your college newspaper in which you stated the following:

> The enemy is not Oliver North! The enemy is the U.S. Congress. They are wasting countless millions of taxpayer dollars in an effort to determine who will control U.S. foreign policy, even though the Constitution states the president shall handle that sphere for our government.

Please explain what role you believe the Constitution assigns to Congress when it comes to U.S. foreign policy.

Article I, Section 8, Clause 11 of the U.S. Constitution grants to Congress the power to declare war. Article II, Section 2, requires the Senate to approve treaties signed by the President by a two-thirds vote.

1.

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

It is my understanding that judges should adhere to interpretation of the Constitution that the Supreme Court has assigned to it when applying those provisions today. It is rare for a district court to consider a case of "first impression" in the sense that the Supreme Court has not addressed the issue that bears on the question at issue in the case.

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.

Please see my answer to question 1(a).

2.

a. **Is waterboarding torture?**

I have never studied this issue nor have I had an occasion to address it in the 21 years I have been in private practice or the three and a half years I have served as magistrate judge. It is my understanding that something would constitute torture where it is intentionally used "to inflict severe physical or mental pain or suffering" upon a detainee. 18 U.S.C. § 2340(1).

b. **Is waterboarding cruel, inhuman and degrading treatment?**

Please see my answer to question 2(a).

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

Please see my answer to question 2(a).

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

I have no personal knowledge about the answer to that question. Furthermore, it would be inappropriate under the judicial canons for me to comment. *See* Code of Conduct for United States Judges, Canon 5.

4. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions?**

I believe that judicial nominees should answer questions to the best of their ability within the confines imposed by the Code of Conduct for United States Judges and any other restrictions that govern their ability to respond to questions.

5.

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 that any groups or individuals have made any donations to any organizations in support of my nomination. Because this question addresses a political issue, it would be inappropriate for me to offer any personal opinion. *See* Canon 5 of the Code of Conduct for United States Judges.

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?**

As a sitting magistrate judge, I follow the recusal requirements set forth in Canon 3 of the Code of Conduct for United States Judges, 28 U.S.C. § 455, and in the guidance of the Administrative Office of the United States Courts. If confirmed as a district judge, I will continue to follow those requirements. To the extent this question raises a political issue regarding donations, it would be inappropriate for me to make any comment or offer any personal opinions. *See* Canon 5 of the Code of Conduct for United States Judges.

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

Please see my answer to questions 5(a) and 5(b).

7.

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

I have not researched this issue. Because this question raises issues that may be addressed in impending litigation, it would be inappropriate for me, as a magistrate judge and a judicial nominee, to offer opinions on this issue. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

Please see my answer to question 7(a).

Nomination of Clifton L. Corker, to be United States District Court Judge for the Eastern District of Tennessee
Questions for the Record
Submitted December 5, 2018

QUESTIONS FROM SENATOR COONS

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

   I would follow the factors outlined by the Supreme Court in cases such as *Washington v. Glucksberg,* 521 U.S. 702 (1997), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S.CT. 2584 (2015), and any applicable Sixth Circuit precedent.

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

      Yes.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Yes. I would be guided by the Sixth Circuit and Supreme Court precedent in what sources I would consult to determine whether a right is deeply rooted in the nation's history and tradition.

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals?

      Yes. If the right has previously been recognized by the Supreme Court or the Sixth Circuit, then I would be bound to follow that precedent and enforce it if applicable to any dispute that may come before me. I would also consider precedent from a court of appeals persuasive authority to the extent that the Sixth Circuit has not addressed the issue.

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

      Yes.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. It would be my judicial obligation, if I were fortunate enough to be confirmed as a District Judge for the Eastern District of Tennessee, to apply both *Casey* and *Lawrence* to any case to which they would be applicable.

f. What other factors would you consider?

I would consider any other binding precedent from the United States Supreme Court or the Sixth Circuit Court of Appeals.

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

The Fourteenth Amendment applies to both race and gender. *See*, *e.g., United States v. Virginia*, 518 U.S. 515 (1996).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

I have not had the occasion to study the question of whether the Fourteenth Amendment was limited to addressing racial inequality. However, the United States Supreme Court has applied the Equal Protection Clause of the Fourteenth Amendment to gender classifications in *United States v. Virginia*, 518 U.S. 515 (1996). That is binding precedent on that issue and I would faithfully follow that precedent, and any other binding precedent on the issue.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in United States v. Virginia, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I simply do not know why that case was not litigated earlier.

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

Yes. The Supreme Court has repeatedly recognized this principle. *See, e.g., Obergefell v. Hodges,* 135 S.Ct. 2584, 2607 (2015); *United States v. Windsor,* 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

The Supreme Court has not yet addressed whether the Fourteenth Amendment requires states to treat transgender people the same of those who are not. Thus, the issue may be the subject of pending or impending litigation and therefore it would be inappropriate for

me, as a sitting magistrate judge and a judicial nominee, to offer any opinion on this issue. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

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

   Yes. The Supreme Court has repeatedly recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). I would faithfully apply that precedent to any case to which it would be applicable if I were fortunate enough to be confirmed.

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

      Yes. The Supreme Court has repeatedly recognized this right in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1972), and *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016).

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

      Yes. The Supreme Court has recognized that right in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

      Please see my answers to questions 3(a) and (b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

      Lower court judges in the Sixth Circuit should consider such evidence when it is appropriate under Supreme Court precedent or when required under the precedent of the Sixth Circuit. The Supreme Court has

considered, at times, the changing understanding of our society. *See, e.g., Obergefell,* 135 S.Ct. 2584; *Riley v. California*, 134 S.Ct. 2473 (2014); *United States v. Virginia*, 518 U.S. 515.

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

Scientific and sociological evidence is often proffered, usually through expert testimony, to prove an element of a party's case or to rebut the expert testimony of the opposing side. There is a significant body of law and commentary relating to the admissibility of such evidence. *See, e.g.,* Fed.R.Evid. 702; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993). If I were fortunate enough to be confirmed, I would follow all laws enacted by Congress and precedents of the Supreme Court and the Sixth Circuit concerning the role of such evidence in my judicial analysis.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

As a magistrate judge and a judicial nominee, it would be inappropriate for me to state whether I agree or disagree with Supreme Court decisions. My judicial obligation is to faithfully apply all binding precedent to the cases that may appear before me. *Obergefell* is binding Supreme Court precedent and I would faithfully apply it as a District Court Judge if I am fortunate enough to be confirmed. Moreover, the extent of *Obergefell*'s application in other contexts is the subject of pending or impending litigation and therefore it would be inappropriate for me to answer this question. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

Please see my response to question 5(a).

6. Some jurists embrace an "originalist" interpretation of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you

consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Part of my judicial obligation is to ensure that *Brown* is enforced regardless of the academic debate about whether it is consistent with originalism or not. I understand that there is interesting scholarly commentary on the issue, but that debate has no effect on the binding force of *Brown* as Supreme Court precedent. If confirmed as a district judge, I would continue to faithfully apply *Brown*.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Dec. 4, 2018).

While it is true that those terms are not self-defining, the Supreme Court has given meaning, in large respects, to those terms. *See, e.g., Texas v. Johnson,* 491 U.S. 397 (1989) (protecting burning the flag as a form of protected symbolic speech); *United States v. Virginia*, 518 U.S. 515 (1996) (striking down the male-only admission policy at the Virginia Military Institution on grounds that it violated the Equal Protection Clause of the Fourteenth Amendment); *United States v. Windsor*, 570 U.S. 744 (2013) (finding unconstitutional part of the Defense of Marriage Act that defined marriage as only between one man and one woman). While this is an interesting academic debate, if I were fortunate enough to be confirmed as a district judge, I would follow all applicable decisions of the U.S. Supreme Court and the Sixth Circuit on the meaning of these constitutional provisions.

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

In some cases, the Supreme Court has looked to the original public meaning to decide a case and in other cases, it has not. My obligation is to faithfully follow Supreme Court precedent, regardless of the approach utilized by the Supreme Court.

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my answer to question 6(c).

e. What sources would you employ to discern the contours of a constitutional provision?

If I were fortunate enough to be confirmed as a district judge, I would look to binding Supreme Court precedent and Sixth Circuit precedent. If those precedents do not address the particular issue, then I would consider persuasive opinions of other circuit and district courts, scholarly commentary, and the text and context of the relevant constitutional provision.

7. Has a court ever made a determination that your representation was legally deficient, in your representation of Calvin Iberson or any other party?

The district court granted defendant Calvin Iberson a delayed appeal. *See United States v. Iberson*, 705 F. Supp. 2d 504 (W.D. Va. 2010). In the 21 years of practicing law, including handling death penalty cases and complicated federal conspiracy criminal cases, this is the only case in which a judge has found I provided ineffective assistance of counsel.

a. If so, please explain the nature and circumstances surrounding this determination.

Mr. Iberson was charged with possession with the intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and possession of a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g). He faced a mandatory term of imprisonment of 10 years. The evidence against Mr. Iberson was overwhelming so my focus was to mitigate his sentence. The Government sought to enhance his sentence to a mandatory 20 years based on his prior felony drug conviction. I objected, arguing that the prior felony drug conviction did not meet the federal statutory definition for enhancement purposes. The district court found that my objection was "without merit" based on his understanding of Fourth Circuit precedent, which meant that Mr. Iberson was facing a 20 year sentence.

I then reviewed that ruling with Mr. Iberson and addressed his appeal options, which included a discussion of whether he was likely to succeed on appeal considering Fourth Circuit precedent. After that discussion, Mr. Iberson agreed to enter into a negotiated plea agreement in which he agreed to provide substantial assistance to the Government in its prosecution of others and to forgo any further appeal. If Mr. Iberson provided that substantial assistance, the court could sentence him to a period less than that required by the mandatory minimums set forth by statute. See 18 U.S.C. § 3553(e) ("the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation and prosecution of another person who has committed an offense"). I believe I testified at the evidentiary hearing that Mr. Iberson could provide that assistance. I also did not consider the appellate waiver a significant concession considering the unfavorable Fourth Circuit precedent and that appeal waivers were standard provisions in plea agreements. After the district court accepted the plea, including Mr. Iberson's appellate waiver, Mr. Iberson attempted to provide substantial assistance to the Government. He failed in that regard. The AUSA declined to file a motion that would have permitted the district court to sentence Mr. Iberson to something less than the 20-year mandatory minimum as mandated 21 U.S.C. § 841(b)(1)(A).

Mr. Iberson then filed a motion pursuant to 28 U.S.C. § 2255, alleging that he had specifically instructed me to file an appeal and that I had disregarded his instruction. He later amended his petition to also include the allegation that I failed to adequately discuss with him the benefits of waiving his appellate rights. The

district court found that I had not disregarded any instruction by Mr. Iberson to file an appeal. However, he found that I had not adequately discussed with Mr. Iberson the advantages and disadvantages of agreeing to an appellate waiver. The district court found that, although I had discussed with Mr. Iberson whether he would succeed if he appealed the ruling to the Fourth Circuit, "[a]dvice regarding an appeal's chances for success is not the equivalent of discussing the advantages and disadvantages of appeal …." *United States v. Iberson*, 705 F. Supp. 2d 504, 512 (W.D. Va. 2010). The district court found that rather than entering a plea agreement, as was customary, I should have advised Mr. Iberson to plead "straight up" to the charges. He also found that I should have discussed with Mr. Iberson "the minimal benefit the Plea Agreement provided." *Id.* In this instance, I should not have recommended the appellate waiver. The effect of the court's ruling was to excise the appellate waiver from the plea agreement and permit Mr. Iberson to file a delayed appeal.

b. If so, please explain what, if anything, you learned from the experience.

Please see my response to question 7(a). I learned that, in this instance, I should not have recommended the appellate waiver.

8. In a 1989 article in the James Madison University newspaper, you wrote a column that encouraged the university to resist demands to divest funds from South Africa to protest apartheid, writing that "[s]anctions are neither helping blacks nor aiding in the abolishment of apartheid."

a. Please explain what this passage means.

At that time, I recall there was universal consensus that apartheid should end. The debate was how best to end it. President Reagan encouraged investment as a means to not only end apartheid but also to help those who were most in need. I wrote that article almost 30 years ago to encourage JMU to take steps that I believed at that time would help end the terrible political system of apartheid in South Africa.

b. Do you still agree with the views that you expressed in this article?

I do not have an opinion today as to whether President Reagan's approach to ending apartheid was, in fact, the best approach.

c. Do you disavow any of the opinions expressed in this article?

Please see my answer to question 8(b). My opinion in the article was that apartheid in South Africa was horrific and should have ended. Since graduating from JMU, I earned a law degree from the College of William & Mary Law School, clerked with a federal judge, practiced law for over 20 years and have served as a magistrate judge for the past three and a half years. I have personally grown and matured since I wrote that article as has my understanding of the law. Notwithstanding that, since I began serving as a magistrate judge, my personal views have not entered my judicial analysis. If fortunate

enough to be confirmed as a district court judge, I will continue to decide cases faithfully and impartially.

9. In a 1988 letter to the editor submitted to the James Madison University newspaper entitled, "Evil liberal spirit returns," you wrote, "that evil spirit of liberalism is beginning again to ooze out of the hearts and minds of those it holds captive, seeking to add more to its chains of slavery." The article concludes by describing "what happens to otherwise normal people when that thing [liberal thought] gets them," continuing, "[t]hey lose their proclivity toward rationality . . . [a]nd, just like it was in *Of Mice and Men*, as we are caught in the ecstasy of the flower, seeing a beautiful, peaceful future, someone is standing behind us with a loaded pistol to our head. The hammer is falling and we're oblivious to what is about to happen."

   a. Please explain what this passage means.

      I wrote that letter to the editor of my school paper over 30 years ago. I did not choose the title of the editorial, the editors did. The point of the letter, which was heavy on hyperbole, was that we should not be blind to risks abroad, specifically the Soviet Union. This was in 1988, at a time when the cold war was still raging. My views were in part based on my visit to East Berlin when I was in high school. I had seen the remarkable contrast between East Berlin's economy and the poverty of that city and the prosperity of West Berlin. I wanted to note that distinction in the letter.

   b. Do you still agree with the views that you expressed in this article?

      The view that I expressed in the 1988 letter to the editor was that we should not be blind to risks abroad, that there were foreign interests that we should be mindful of. The world has changed since then. The wall has come down and the Soviet Union has fallen apart. My views were specific to that time period.

   c. Do you disavow any of the opinions expressed in this article?

      I have personally grown and matured since I wrote that article as has my understanding of the law.

10. In a 1987 letter to the editor submitted to the James Madison University newspaper, you noted that "Bork's views on women's rights, dealing with the equal protection clause, are based on sound judgment." Do you share Judge Bork's disagreement with the right to privacy that formed the basis of *Roe v. Wade*?

    I wrote that article when I was a teenager and had not gone to law school. Since that time, I have graduated from the College of William & Mary Law School, clerked with a federal judge, practiced law for over 20 years, and served as a magistrate judge for the past three and a half years. My obligation as a magistrate judge, and if I am fortunate to be confirmed, as a district judge, is to follow binding Supreme Court precedent. *Roe v. Wade* is binding Supreme Court precedent which I will apply faithfully where applicable. As I testified at the

hearing, Bork's views are not only not relevant to how I decide cases but also have been rejected by the Supreme Court.

11. In this 1987 letter to the editor, you went on to state that the "application of the [Equal Protection] [C]lause is wrong because it is impossible to find reasonable differences among races on which to base any discrimination. However, it is possible to find reasonable differences between genders, simply because of the obvious physical differences. In the case of gender, Bork has said that it will depend on the issue. Combat is an example of an instance where this is applicable. Women's rights will not suffer at all."

    a. Please explain what this passage means.

    This letter was written when I was a teenager and I do not recall the specific point of the article. It appears that I was attempting to address Equal Protection Clause analysis and differences in standards of review associated with it. Since that time, I went to and graduated from the College of William & Mary Law School, clerked for Judge Cynthia Kinser, practiced law for over 21 years, and have for the last three and a half years, served as a magistrate judge. If fortunate enough to be confirmed as a district court judge, I will continue to decide cases faithfully and impartially.

    b. Do you still agree with the views that you expressed in this article?

    As I testified at the hearing, women should be permitted to serve in combat if that is their choice. Otherwise, it would be inappropriate for me to offer an opinion on a political issue under Canon 5 of the Code of Judicial Conduct for United States Judges.

    c. Do you disavow any of the opinions expressed in this article?

    Please see my answer to questions 11(a) and (b).

12. In this same 1987 letter to the editor, you expressed support for Judge Bork's statement that "[m]arried couples challenging a ban on contraceptives had no greater rights than utility companies that want to escape smoke pollution laws," and you noted that "breaking the law behind closed doors is not constitutionally protected."

    a. Please explain what this passage means.

    I wrote this letter over 30 years ago. Looking back on this article from my position now, it appears that as a teenager without having the benefit of having attended law school and studied this issue, I did not fully appreciate the import of Judge Bork's statement. The Supreme Court has clearly held that couples have a constitutional right to use contraceptives. Bork's views have been rejected by the Supreme Court. *See, e.g., Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

b. Do you still agree with the views that you expressed in this article?

Please see my response to question 12(a).

c. Do you disavow any of the opinions expressed in this article?

Please see my answer to 12(a).

Questions for the Record for Clifton L. Corker
From Senator Mazie K. Hirono

1. As a student at James Madison University, you were the president of Students for America— a controversial, right-wing organization described by some James Madison students as a "Neo-Nazi organization," "[o]bnoxious," "[r]ude," and "[i]nsenstive." The group opposed abortion and all "special privileges" for minorities and the LGBTQ community.

   a. Why did you join and seek the presidency of an organization described as a "Neo- Nazi organization," "[o]bnoxious," "[r]ude," and "[i]nsenstive"?

   With all due respect, while I was involved with SFA, it was not a "Neo-nazi organization." To describe it as such is factually inaccurate. While it has been over 30 years ago, at JMU, I recall SFA being a conservative organization that would address contemporary issues of the day. For example, I specifically recall working with United Campuses to Prevent Nuclear War (UCAM) to organize a debate over the efficacy of a nuclear defense program. We brought in nationally recognized speakers on both sides of the issue to debate the merits of the issue before the student body.

   b. What special privileges are provided to minorities and the LGBTQ community?

   Members of the gay and lesbian community should be afforded the same dignity and respect under the law as everyone else. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). For over the 20 years I practiced law and since taking the bench, I have endeavored to treat everyone with dignity and respect regardless of their sexual orientation.

   c. Do you believe laws protecting or benefitting minorities and the LGBTQ community are improper?

   No. Please see my answer to question 1(b).

   d. **Have your views changed since you were president of this organization? If so, please explain how your views have changed.**

   Since graduating from JMU, I earned a law degree from the College of William & Mary Law School, clerked with a federal judge, practiced law for over 20 years and have served as a magistrate judge for the past three and a half years. I have personally grown and matured since I wrote that article as has my understanding of the law. Notwithstanding that, since I began serving as a magistrate judge, my personal views have not entered my judicial analysis. I am obliged to follow all Supreme Court precedent and that of the Sixth Circuit and it would be inappropriate under the Canons of Conduct for United States Judges for me to discuss my personal views on any topic or how my personal views have changed over the years.

2. As an undergraduate student, you wrote a letter to the editor supporting the nomination of then-Judge Robert Bork to be an Associate Justice on the Supreme Court. In it, you

defended Bork's views that women are not protected by the Equal Protection Clause of the 14th Amendment. You suggested that sex discrimination is permissible because "it is possible to find reasonable differences between genders, simply because of the obvious physical differences." You specifically mentioned combat as an area where sex discrimination may be appropriate due to these supposed "obvious physical differences."

a. Do you believe the Equal Protection Clause of the 14th Amendment applies to women?

Yes. While the prelude to the question mischaracterizes the import of the letter to the editor that I wrote in 1987 when I was a teenager, the Supreme Court has specifically held that the Equal Protection Clause applies to women. *See*, *e.g., United States v. Virginia*, 518 U.S. 515 (1996). I would follow Supreme Court precedent interpreting the Fourteenth Amendment, including *United States v. Virginia*, and any other binding precedent on the issue.

b. **What "obvious physical differences" prevent women from serving in combat?**

The letter was written in 1987 when I was a teenager. As I testified at the hearing, women have the right to serve in combat if they choose to do so.

3. You also defended Bork's extreme views on the right to privacy. You equated a married couple's use of contraception with an individual smoking pot in private. With regard to married couples challenging bans on contraception, you said "breaking the law behind closed doors is not constitutionally protected simply because the breech in law was done privately. I don't have a right to smoke pot even though I hide when I do." The Supreme Court recognized a constitutional right to contraception in the 1965 case Griswold v. Connecticut— 22 years before your letter to the editor.

a. Do you agree that there is a constitutional right to contraception?

Yes. The Supreme Court has repeatedly recognized that right. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

b. Do you agree that there is a constitutional right to privacy?

Yes. The Supreme Court has recognized a right to privacy in many different contexts. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003). I will follow all binding Supreme Court precedent regarding this issue.

c. **Do you still consider the constitutional right to contraception to be equivalent to smoking pot in private? If not, what changed your opinion?**

I do not believe that was the import of the article. That said, looking back on this article from my position now, it appears that as a teenager without having the benefit of having attended law school and studying this issue, I did not fully appreciate the import of Judge Bork's statement. The Supreme Court has clearly held that couples have a constitutional right to use contraceptives. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Bork's views have been rejected by the Supreme Court.

4. In 2007, you represented Calvin Iberson, who pleaded guilty to a drug possession charge in

exchange for dismissal of a gun possession charge, and was sentenced to 20 years in prison. Mr. Iberson later claimed that your representation was ineffective and the district court agreed. The district court found that you (1) failed to discuss the advantages and disadvantages of Mr. Iberson waiving his right to appeal; (2) failed to advise Mr. Iberson of the advantages of simply pleading guilty to both counts; and (3) failed to explain to Mr. Iberson the minimal benefits of entering in the plea agreement.

a. Do you agree with the district court that your representation of Mr. Iberson was deficient?

Mr. Iberson was charged with possession with the intent to distribute 50 grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and possession of a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g). He faced a mandatory term of imprisonment of 10 years. The evidence against Mr. Iberson was overwhelming so my focus was to mitigate his sentence. The Government sought to enhance his sentence to a mandatory 20 years based on his prior felony drug conviction. I objected, arguing that the prior felony drug conviction did not meet the federal statutory definition for enhancement purposes. The district court found that my objection was "without merit" based on his understanding of Fourth Circuit precedent, which meant that Mr. Iberson was facing a 20 year sentence.

I then reviewed that ruling with Mr. Iberson and addressed his appeal options, which included a discussion of whether he was likely to succeed on appeal considering Fourth Circuit precedent. After that discussion, Mr. Iberson agreed to enter into a negotiated plea agreement in which he agreed to provide substantial assistance to the Government in its prosecution of others and to forgo any further appeal. If Mr. Iberson provided that substantial assistance, the court could sentence him to a period less than that required by the mandatory minimums set forth by statute. See 18 U.S.C. § 3553(e) ("the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation and prosecution of another person who has committed an offense"). I believe I testified at the evidentiary hearing that Mr. Iberson could provide that assistance. I also did not consider the appellate waiver a significant concession considering the unfavorable Fourth Circuit precedent and that appeal waivers were standard provisions in plea agreements. After the district court accepted the plea, including Mr. Iberson's appellate waiver, Mr. Iberson attempted to provide substantial assistance to the Government. He failed in that regard. The AUSA declined to file a motion that would have permitted the district court to sentence Mr. Iberson to something less than the 20-year mandatory minimum as mandated 21 U.S.C. § 841(b)(1)(A).

Mr. Iberson then filed a motion pursuant to 28 U.S.C. § 2255, alleging that he had specifically instructed me to file an appeal and that I had disregarded his instruction. He later amended his petition to also include the allegation that I failed to adequately discuss with him the benefits of waiving his appellate rights. The district court found that I had not disregarded any instruction by Mr. Iberson to file an appeal. However, he found that I had not adequately discussed with Mr. Iberson the advantages and disadvantages of agreeing to an appellate waiver. The district court found that, although I had discussed with Mr. Iberson whether he would succeed if he appealed the ruling to the Fourth Circuit, "[a]dvice regarding an appeal's chances for success

is not the equivalent of discussing the advantages and disadvantages of appeal …." *United States v. Iberson*, 705 F. Supp. 2d 504, 512 (W.D. Va. 2010). The district court found that rather than entering a plea agreement, as was customary, I should have advised Mr. Iberson to plead "straight up" to the charges. He also found that I should have discussed with Mr. Iberson "the minimal benefit the Plea Agreement provided." *Id.* In this instance, I should not have recommended the appellate waiver. The effect of the court's ruling was to excise the appellate waiver from the plea agreement and permit Mr. Iberson to file a delayed appeal.

b. Looking back, what, if anything, would you have done differently in your representation of Mr. Iberson?

Please see my answer to question 4(a).

5. In your Senate Judiciary Questionnaire, you described your pro bono work prior to becoming a magistrate judge as "represent[ing] indigent criminal defendants at a rate much lower than [your] standard hourly rate" and representing indigent criminal defendants by appointment.

a. Were you paid for your work representing indigent criminal defendants when appointed by the court?

Yes. For state appointed cases, I was paid $40.00 per hour for out of court work and $50.00 per hour for in-court work. The fees, however, were subject to a cap. The federal reimbursement rate varied throughout my time accepting court-appointed cases. Those fees varied per hour, but were also subject to a cap.

b. What legal work, if any, have you provided to help the disadvantaged without charging a fee?

I accepted case referrals from Legal Aid when I started my law practice. Some of those cases were subject to payment, others were not. I also served on the board of Second Harvest Food Bank for Northeast Tennessee for over six years. I provided pro bono legal services for that organization during my tenure as a board member and represented it in a complex construction case involving the general contractor and the work he performed in constructing the warehouse used to store food for distribution in the area. I also represented pro bono a school bus driver who was charged with 39 counts of reckless aggravated assault. Her attorney died and she was left with no funds to hire new counsel. Throughout my 20 years of practice, I have represented the disadvantaged without charging a fee on many occasions. However, I never thought that I should keep a record of those I helped so I cannot provide you an exhaustive list.

Nomination of Clifton L. Corker
United States District Court for the Eastern District of Tennessee
Questions for the Record
Submitted December 5, 2018

QUESTIONS FROM SENATOR BOOKER

1. When you were in private practice as a solo practitioner from 1996 to 2015, you had significant experiences as a criminal defense attorney, including as court-appointed counsel for defendants charged with serious felony offenses.[1]

    a. What was the most challenging experience you had in criminal defense matter during your time in private practice?

    The most challenging experience in my 20-year career in representing criminal defendants has been my representation of defendants who were facing the death penalty. These cases are the most challenging because they strike a nerve in the community, are always violent cases, and are the most serious crimes that can be committed. The individuals who commit these crimes also have typically suffered tragedy in their childhood that dramatically affected the direction of their life and have a multitude of other challenges such as intellectual disabilities or mental illnesses. These considerations make negotiating a resolution challenging.

    b. How have your criminal defense experiences informed your work as a federal magistrate judge since 2015?

    I believe my experience as a criminal defense attorney has made me not only a more effective but also a more understanding federal magistrate judge. I spent over twenty years advising clients of their rights and ensuring that every one of my clients had a fair trial with competent representation. I have represented individuals from all walks of life, as diverse in their socio-economic backgrounds as in their race, religious faith, and sexual orientation. I appreciated their differences and treated them all with dignity and respect as fellow human beings. I have also seen the enormous power the state can exercise over individuals.

    As a magistrate judge, it is my duty to uphold the law and not further any personal agenda. While I do not divorce myself from my own personal life experiences, I do not carry any agenda into the courtroom. The courtroom is a sacred place where I am called upon to exercise independent judgment. My experience in criminal defense work has given me an appreciation for the importance of an independent judiciary to assure parties that the power the state exercises is done in accordance with the law. I take that responsibility very seriously.

    c. If you are confirmed, how will your criminal defense experiences inform your work as a federal district judge?

I hope to take my life experiences with me as noted in my answer to question 1(b).

2. 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.[2] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[3] 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.[4] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[5]

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

      Yes. It is important to be sensitive to the existence of racial bias in our criminal justice system. I know, as a criminal defense attorney, there were occasions when I represented a defendant who was the only African-American in the courtroom. I addressed that issue with the jury to assure that my client received a fair trial.

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

      Yes. The statistics suggest that people of color make up a higher percentage of incarcerated individuals than they do of the population generally.

   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.

      Prior to my nomination, I have not studied this issue of implicit racial bias in our criminal justice system.

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[1] SJQ at 40-41.
[2] 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.
[3] *Id.*
[4] 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.
[5] *Id.*

3. 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.[6] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[7]

    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 or performed any independent research in this area. I am unfamiliar with the statistics cited in the question. I have not come to any conclusion as to the connection between or relationship to incarceration rates and crime rates.

    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 answer to question 2(a) above.

4. 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.

5. Do you believe that *Brown v. Board of Education*[8] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Brown was a landmark Supreme Court decision and is binding precedent. I would faithfully apply *Brown* if I am fortunate enough to be confirmed to the district court. As a United States Magistrate Judge and a judicial nominee, it would be inappropriate for me to discuss my personal views on any Supreme Court opinion. *See* Code of Conduct for United States Judges, Canon 3(A)(6); see also Testimony of Elena Kagan Before the Senate Judiciary Committee, June 29, 2010 ("I think that it wouldn't be appropriate for me to talk about what I think about past cases – you know, to grade cases ….").

6. Do you believe that *Plessy v. Ferguson*[9] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Please see answer to question 5 above. The United States Supreme Court found that *Plessy* was wrongly decided and reversed that decision in *Brown*. I would faithfully apply *Brown*, and all binding Supreme Court and Sixth Circuit precedents, as I have done since serving as a magistrate judge.

7. 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?

I have met with attorneys from the Department of Justice, who gave advice concerning my hearing and what questions might be posed to me. All answers I have given to the questions are my own.

8. 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."[10] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

   Because the scope of constitutional rights for immigrants is pending and impending in judicial proceedings, Cannon 3(a)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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[6] 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.
[7] *Id.*
[8] 347 U.S. 483 (1954).
[9] 163 U.S. 537 (1896).
[10] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted December 5, 2018
For the Nominations of

Clifton L. Corker, to the U.S. District Court for the Eastern District of Tennessee

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

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

    The most difficult job a district judge must do is sentencing. For that reason, it is important that a district judge has all the information to make an individualized decision regarding the appropriate sentence for each defendant. To achieve this, I would direct a probation officer to complete a Presentence Report that provides a detailed history of the defendant and calculates the advisory sentencing guideline range. I would ensure the defendant has had an opportunity to review that report and make any objections to any aspect of the report, including the officer's calculation of the advisory guideline range. I would also direct both the United States Attorney's Office and the defendant to provide sentencing memorandums addressing the various sentencing factors outlined in 18 U.S.C. § 3553 and propose what they consider to be a sentence consistent with those factors. I would consider the presentence report, the § 3553 factors, the arguments of counsel, the allocution of the defendant, any statements by the defendant's family and friends, and any victim impact statements. All of these are relevant factors to consider to determine what is "sufficient, but not greater than necessary, to comply" with the purposes of the federal sentencing act. *See* 18 U.S.C. § 3553(a).

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

    I have handled federal criminal cases since 1995 and have served as a magistrate judge for the past three and a half years. I would draw on my experience over these years and consider the factors I identified in my response to question 1(a), to reach a fair, proportional, appropriate, and lawful sentence that furthers the goals of sentencing that are identified by Congress in 18 U.S.C. § 3553(a).

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

    The United States Sentencing Guidelines are advisory and not mandatory. *See, e.g., United States v. Booker*, 543 U.S. 220, 246 (2005). Part K of Chapter 5 of the Sentencing Guidelines lists several circumstances under which the Guidelines permit a district court to depart from the advisory Guideline range. A district judge may also, consistent with the factors outlined in 18 U.S.C. § 3553(a), vary either up or down from the advisory Guideline range to reach a sentence

consistent with the purposes of federal sentencing.

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

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

Whether and to what extent mandatory minimums provide deterrence is a political and policy question reserved to the political branches of the Government. Under the Canons, it would be inappropriate of me to comment on such matters. If confirmed, I would follow all relevant Supreme Court and Sixth Circuit precedent regarding criminal sentencing and would endeavor to reach a sentence in each case that is consistent with the purposes of federal sentencing.

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

Please see my response to question 1(d)(i).

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

Please see my response to question 1(d)(i).

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

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

If I were fortunate enough to be confirmed, I would apply any applicable mandatory minimum sentence as required by law, but I would identify the injustice in my opinion, as appropriate.

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

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," New York Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

With few exceptions, the Executive Branch has the exclusive authority to decide who and what to charge. However, frank and honest discussions between the judiciary and the U.S. Attorney's Office is not inappropriate when the circumstances justify such discussions.

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

   The clemency power is one that our Constitution reserves to the Executive Branch. A judge may, under the appropriate circumstances, state on the record that he or she would not have imposed a certain sentence but for a statutory requirement to do so. If an Executive Branch official later decides that the case merits clemency consideration, that official will then have the benefit of the court's position on the reasonableness of the sentence imposed.

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

   Yes.

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

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

      Yes.

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

      Yes. The statistics suggest that there are racial disparities in our criminal justice system. I have represented African-Americans in the criminal justice system for over 20 years. On some occasions, my client was the only African-American in the courtroom. I am sensitive to that issue.

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

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

      Yes.

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

If confirmed, I would ensure that qualified minorities and women are given serious consideration for all positions that I am in a position to fill.