

**Nomination of Katherine Crytzer to the United States District Court for the  
Eastern District of Tennessee  
Questions for the Record  
Submitted November 25, 2020**

**QUESTIONS FROM SENATOR FEINSTEIN**

- 1) Earlier this year, President Trump nominated you to be the Inspector General (IG) of the Tennessee Valley Authority (TVA). During your confirmation process, Senator Carper — the ranking member of the Environment and Public Works Committee — criticized you for failing to show any independence from the Trump White House. Senator Carper stated that you “would not state that it is wrong for a President to tweet accusations of bias or incompetence at Inspectors General who dare to criticize the administration.” (Sen. Carper remarks at markup of Senate EPW Committee, July 2020) In an interview for your college alumni magazine, you talked about how honored you were to be “in the room with President Trump” at one point. (*Class Notes*, Middle Tennessee State University Magazine, Winter 2020, Vol. 24, No. 2)

**Will you commit to recusing yourself from any matter that comes before you involving President Trump or his family?**

If I am fortunate enough to be confirmed, I commit to evaluating any potential conflicts of interest, or relationship that could give rise to appearance of a conflict, on a case by case basis, applying the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges. In considering those rules, I would further consult any judicial decisions or Judicial Conference opinions applying the rules to particular cases or circumstances, as appropriate.

- 2) A profile of you in your college alumni magazine stated that you had an “influential role” in selecting the Trump Administration’s judicial nominees. (*Class Notes*, Middle Tennessee State University Magazine, Winter 2020, Vol. 24, No. 2)

**Did you ever advise or suggest in any way that a judicial nominee should not answer questions about whether *Brown v. Board of Education* was correctly decided?**

My primary role at the Office of Legal Policy was not to prepare nominees for Senate Judiciary Committee hearings, however each judicial nominee decides for herself or himself how to answer any question presented.

- 3) Public records indicate that you played a role in the Justice Department’s Religious Liberty Task Force, which was created by former Attorney General Jeff Sessions in 2018.

**What did your work on this task force entail?**

Throughout my time at the Office of Legal Policy, I have maintained a policy portfolio, which includes issues related to religious liberty. In July 2018, the Attorney General announced the

creation of the Department of Justice’s Religious Liberty Task Force and designated the Assistant Attorney General for the Office of Legal Policy to serve as the Vice Chair for Policy. In this context, I have provided legal and policy advice to the Assistant Attorney General and Department of Justice leadership related to religious liberty.

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 a lower court to depart from applicable Supreme Court precedent.

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

A federal district court judge must fully and faithfully follow applicable Supreme Court precedent. A district court judge would be in a position to author a concurrence or dissent if the judge is sitting by designation on a court of appeals or on a specially constituted three-judge panel of the district. It can be appropriate for a district court judge to observe potential challenges, conflicts, or inconsistencies in Supreme Court jurisprudence while applying Supreme Court precedent, but the district court judge must fully and faithfully apply Supreme Court precedent.

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

As the Supreme Court has stated, “[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). Federal Rules of Civil Procedure 59(e) and 60 provide the standards under which a district court judge may reconsider a prior ruling in a civil proceeding. The Federal Rules of Criminal Procedure also provide standards under which a district court judge may amend, vacate, or correct a sentence or judgment in a criminal proceeding.

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

The question of when it is appropriate for the Supreme Court to overturn its own precedent is a question of *stare decisis* solely within the purview of the Supreme Court. In *Ramos v. Louisiana*, the Supreme Court recently identified various factors it considers “[w]hen it revisits a precedent”: “this Court has traditionally considered ‘the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.’” 140 S. Ct. 1390, 1405 (2020) (citation omitted).

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 text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016)).

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

*Roe v. Wade*, 410 U.S. 113 (1973) is Supreme Court precedent. If confirmed, I will fully and faithfully apply all applicable Supreme Court precedent.

**b) Is it settled law?**

District court judges are bound by all applicable Supreme Court precedent, including *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992). If confirmed, I will fully and faithfully apply *Roe* and *Casey*.

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?**

District court judges are bound by all applicable Supreme Court precedent, including *Obergefell v. Hodges*, 576 U.S. 644 (2015). If confirmed, I will fully and faithfully apply *Obergefell*.

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?**

As a judicial nominee, it would be inappropriate for me to opine on the correctness or legal reasoning of an opinion, concurrence, or dissent authored by a Justice of the Supreme Court. See Code of Conduct for United States Judges, Canons 2A, 3A(6). If I am fortunate

enough to be confirmed as a district court judge, I would be bound by the majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

In *Heller*, the majority opinion stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

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

In *Heller*, the majority “conclude[d] that noting in our precedents forecloses our adoption of the original understanding of the Second Amendment.” *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). The Justices disagreed on the scope and applicability of the Supreme Court’s prior Second Amendment jurisprudence.

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?**

In *Citizens United v. FEC*, the Supreme Court concluded that “First Amendment protection extends to corporations.” 558 U.S. 310, 342 (2010). If I am fortunate enough to be confirmed as a district court judge, I would fully and faithfully apply *Citizens United*.

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

Justice Stevens raised this argument in his opinion concurring in part and dissenting in part in *Citizens United*. As a judicial nominee, it would be inappropriate for me to opine on the correctness or legal reasoning of an opinion authored by a Justice of the Supreme Court. See Code of Conduct for United States Judges, Canons 2A, 3A(6). If I am fortunate enough to be confirmed as a district court judge, I would be bound by the majority opinion in *Citizens United*.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that the Religious Freedom Restoration Act of 1993 applies to a closely held corporation. 573 U.S. 682, 707-08 (2014). If I am fortunate enough to be confirmed as a district court judge, I would fully and faithfully apply *Hobby Lobby*. As a judicial nominee, it would be inappropriate to opine further on an issue that is currently the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2A, 3A(6).

- 9) Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

Section 1 of the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The First Amendment states, in relevant part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Supreme Court is currently considering a case that presents issues related to the interaction of these two fundamental provisions of the Constitution. See *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020). As such, it would be inappropriate to opine further. See Code of Conduct for United States Judges, Canons 2A, 3A(6).

- 10) Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

In *Loving v. Virginia*, the Supreme Court concluded that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” 388 U.S. 1, 12 (1967). If I am fortunate enough to be confirmed as a district court judge, I would fully and faithfully apply the Court’s opinion in *Loving*. As noted in my response to Question 9, the Supreme Court is currently considering a case that presents issues related to the interaction of the Equal Protection Clause and First Amendment religious protections; as such, it would be inappropriate to opine further. See Code of Conduct for United States Judges, Canons 2A, 3A(6).

- 11) Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

Please see my response to Question 10.

- 12) You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2008. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and

uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

- a) **Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

I did not draft the quoted language and have not discussed it with any representative of the Federalist Society for Law and Public Policy Studies (Federalist Society). Therefore I cannot elaborate on what the Federalist Society meant in the quoted language.

- b) **How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

Please see my response to Question 12(a).

- c) **What “traditional values” does the Federalist Society seek to place a premium on?**

Please see my response to Question 12(a).

- d) **Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.**

I have had conversations about my nomination with friends, family, and colleagues. I understand that some of those individuals are members of the Federalist Society, but to my knowledge, I have not discussed my nomination with anyone employed by the Federalist Society.

- e) **Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?**

No.

- 13) In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial

Conduct].” (Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association (Jan. 2020))

**a) If confirmed to the District Court, will you relinquish your membership in the Federalist Society?**

If confirmed, I will consider whether and if so, how Canon 4 of the Code of Conduct for United States Judges and other applicable ethical guidelines affect my membership and affiliation with groups to which I belong, including the Federalist Society. I also anticipate conferring with other judges regarding this issue. I understand, however, that the above-referenced *Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* has been withdrawn.

**b) If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?**

Please see my response to Question 13(a) above.

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

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

During the nomination selection process, I do not recall specifically being asked any questions regarding administrative law.

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

No, not in connection with the nomination selection process or my nomination.

**c) What are your “views on administrative law”?**

If I am fortunate enough to be confirmed, my view on administrative law would be to fully

and faithfully apply applicable precedent of the Supreme Court and Sixth Circuit related to administrative law.

15) Do you believe that human activity is contributing to or causing climate change?

I am generally aware of scientific literature that associates changes in the environment with certain human activity. The Supreme Court has recently described “climate change” as a “controversial,” “sensitive political topic[.]” *Janus v. Am. Fed’n of State, Cnty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2476 (2018). As such, it would be inappropriate to opine further. See Code of Conduct for United States Judges, Canons 2A, 5(C).

16) When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has held that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I will follow Supreme Court and Sixth Circuit precedent on the use of legislative history.

17) At any point during the process that led to your nominations — either to serve as a United States District Court Judge for the Eastern District of Tennessee or to be Inspector General of the Tennessee Valley Authority — did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received these questions from the Office of Legal Policy. I read them and drafted responses. I received comments on my draft responses from attorneys at the Office of Legal Policy. The answers contained in this document are my own.



**Senator Dick Durbin**  
**Written Questions for Crytzer**  
**November 25, 2020**

For questions with subparts, please answer each subpart separately.

Questions for Katherine Crytzer

1. You currently work in the Justice Department’s Office of Legal Policy. You say in your questionnaire that you “provide legal and policy advice to the Assistant Attorney General and Department of Justice leadership” and you say the issues you have worked on include “the opioid epidemic, violent crime, contraband cellphones, religious liberty, and regulatory reform” as well as “judicial nominations work.” Your work on these policy and legal matters may raise questions of recusal should you be confirmed as a judge and should cases involving these matters come before you.

**a. Without disclosing the contents of any legal advice you provided, please list and describe the specific matters and policy issues you have worked on at the Office of Legal Policy.**

Throughout my time at the Office of Legal Policy, I have maintained a policy portfolio with principal focus on issues related to the opioid epidemic (including Fentanyl), violent crime, contraband cellphones, religious liberty, and regulatory reform. I have also been involved in judicial nominations work.

**b. Please explain the specific nature of the “judicial nominations work” that you have performed at the Office of Legal Policy and please identify specific nominations you worked on.**

The Office of Legal Policy (OLP) has a team of staff whose job duties primarily entail assisting the Attorney General with responsibilities in recommending candidates for federal judgeships and coordinating the judicial nomination and confirmation process with the White House and Senate. I have not been a member of that nominations team. During my time as both Principal Deputy Assistant Attorney General and Chief of Staff for OLP, my job duties included managing the various workstreams and operations of staff in the office. As such, as a general matter, my substantive involvement in judicial nominations work has been limited, with the exception of my work on the confirmation of Justices Brett M. Kavanaugh and Amy Coney Barrett.

I served on a team of attorneys at the Department of Justice that facilitated the Senate’s consideration of then-Judge Brett M. Kavanaugh and then-Judge Amy Coney Barrett to serve on the Supreme Court.

- c. Will you commit that if you are confirmed, you will recuse yourself from cases involving matters that you personally worked on while at the Department of Justice?**

If I am fortunate enough to be confirmed, I commit to recusing where I have “served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” *See* 28 U.S.C. § 455(b)(3). I would evaluate any potential conflicts of interest, or relationship that could give rise to appearance of a conflict, on a case by case basis, applying the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges. In considering those rules, I would further consult any judicial decisions or Judicial Conference opinions applying the rules to particular cases or circumstances, as appropriate.

**Nomination of Katherine A. Crytzer  
to the United States District Court for the Eastern District of Tennessee  
Questions for the Record  
Submitted November 25, 2020**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

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

Yes, I have reviewed the Washington Post story and associated recordings in connection with responding to this question.

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

The Code of Conduct for United States Judges prohibits me, as a judicial nominee, from commenting on matters of political and policy debate related to judicial nominations. *See* Code of Conduct for United States Judges, Canons 2A, 5(C).

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

Please see my response to Question 1(b).

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

No.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting

moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

Please see my response to Question 1(b).

2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
  - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree with Justice Roberts’ metaphor to the extent that it conveys that the proper role of the judiciary is to render a legal decision based on the facts and the law within the confines of a particular case or controversy before the court.

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

Generally, the practical consequences of a particular ruling play a part in a judge’s rendering of a decision when the applicable legal standard or precedent call on the judge to consider such practical consequences. One example of such a circumstance is criminal sentencing, where a judge must consider certain factors under 18 U.S.C. § 3553(a).

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

No; in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), among other cases, the Supreme Court has laid out a framework for lower courts to apply when considering a motion for summary judgment under Federal Rule of Civil Procedure 56.

4. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old.”

- a. What role, if any, should empathy play in a judge’s decision-making process?

A federal judge is duty-bound to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. Within this context, however, a judge can understand and appreciate the experiences, circumstances, and perspectives of the individuals who come before the court.

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

A judge's personal life experience can be valuable in building and demonstrating the judgment, respect, and integrity required to be an effective member of the judiciary.

5. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

It is not appropriate for a district court judge to ignore, disregard, refuse to implement, or issue an order that is contrary to a lawful order from a superior court.

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

The jury plays a critical role as a finder of fact in our judicial system in civil and criminal cases under both the Seventh Amendment and the Sixth Amendment, as appropriate.

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

The Supreme Court has issued key opinions on the Federal Arbitration Act, and I would fully and faithfully apply such Supreme Court precedent. Issues related to the enforceability of mandatory pre-dispute arbitration clauses are the subject of pending or impending litigation. As such, it would be inappropriate to opine further. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6).

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

Please see my response to Question 6(b).

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

The Supreme Court has stated that courts "must review legislative 'factfinding under a deferential standard,'" while "the Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2310 (2016) (citations and emphasis omitted).

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

- a. Have you read Advisory Opinion #116?

Yes, I have reviewed Advisory Opinion #116 in connection with responding to this question.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

The independence and integrity of the judiciary are central to the rule of law and our constitutional separation of powers. Federal law governing recusal of judges, the Code of Conduct for United States Judges, and Advisory Opinion #116 protect the independence and integrity of the judiciary. If confirmed, I commit to evaluating any potential conflict of interest on a case by case basis applying the relevant standards, including when considering participation in educational seminars.

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

Please see my response to Question 8(b)(i).

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

Please see my response to Question 8(b)(i).

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

Please see my response to Question 8(b)(i).

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

Please see my response to Question 8(b)(i).

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

Please see my response to Question 8(b)(i).

9. Earlier this year, the Federal Judiciary’s Committee on the Codes of Conduct drafted a proposed advisory opinion concluding that a judge’s ongoing “membership in. . . the Federalist Society is inconsistent with obligations imposed by the Code [of Conduct.]” After an aggressive lobbying campaign by Federalist Society-affiliated judges, the Committee ultimately voted to table the proposed opinion. In doing so, the Committee observed: “The nation depends on a judiciary that is impartial and independent. Consistent with the judge’s oath, each individual judge should take care to make all membership decisions in a way that is consistent with the highest ideals of the profession as expressed in the Code of Conduct.” (emphasis added.)

a. If confirmed, do you plan to continue your membership in the Federalist Society?

If confirmed, I will consider whether and if so, how Canon 4 of the Code of Conduct for United States Judges and other applicable ethical guidelines affect my membership and affiliation with groups to which I belong, including the Federalist Society for Law and Public Policy Studies (Federalist Society). I also anticipate conferring with other judges regarding this issue.

b. In the draft of Advisory Opinion #117, the Committee concluded that official affiliation with ACS or the Federalist Society “could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge’s impartiality on subjects as to which the organization has taken a position; and generally frustrates the public’s trust in the integrity and independence of the judiciary.”

i. Do you think the Federalist Society is an organization “that serves the interests generally of those who use the legal system, rather than the interest of any specific constituency”? Why or why not?

Please see my response to Question 9(a).

ii. Do you think the Federalist Society “is generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations”? Why or why not?

Please see my response to Question 9(a).

iii. Do you believe that a judge’s membership in the Federalist Society may reasonably be seen by the public as engendering indirect advocacy of the organization’s political, social, or civic objectives? Why or why not?

Please see my response to Question 9(a).

- iv. Do you believe that reasonable members of the public would perceive a judge who has membership in the Federalist Society, a self-described group of conservatives and libertarians, to be partial or impartial? Why?

Please see my response to Question 9(a).

- v. The draft opinion notes “the Federalist Society’s funding comes substantially from sources that support conservative political causes.” Do you believe that membership in an organization tied to such funding could give rise to the appearance of impropriety or partiality? Why or why not?

Please see my response to Question 9(a).

10. Please describe with specificity your role in Justice Kavanaugh’s confirmation process.

I served on a team of attorneys at the Department of Justice that facilitated the Senate’s consideration of then-Judge Brett M. Kavanaugh to serve on the Supreme Court.

11. Did you have any contact with the FBI in connection with your work on Justice Kavanaugh’s confirmation? Please specify.

Not to my recollection.

12. Did you have any contact with the FBI in connection with the supplemental background investigation conducted into Dr. Blasey Ford’s allegations?

Not to my recollection.

13. Who else at OLP had contact with the FBI regarding the Kavanaugh confirmation?

To the best of my knowledge, a subset of the Office of Legal Policy nominations team would have performed their normal functions with respect to any FBI contacts.

14. The FBI represented that the White House directed and set the scope of its supplemental background investigation into Dr. Blasey Ford’s allegations. Who at the White House directed the FBI (including any intermediaries involved)?

It was publicly reported that on October 5, 2018, the then-Chairman of the Senate Judiciary Committee stated that the FBI opened a supplemental background investigation on then-Judge Brett M. Kavanaugh at the Senate Judiciary Committee’s request. *See* Supplemental FBI Investigation Executive Summary, <https://www.grassley.senate.gov/news/news-releases/supplemental-fbi-investigation-executive-summary>. “The request was for an investigation into [then] current allegations against Judge Kavanaugh.” *Id.*

15. Multiple individuals—including some with firsthand knowledge relevant to the investigation—reported that they sent tips to the FBI for its supplemental Kavanaugh



background investigations but never received any follow-up from the FBI. Normally the FBI seeks out information rather than refuse to hear it. What explains this blockade, and who directed it?

I am not aware of any purported “blockade” by the FBI nor am I aware of anyone directing a purported “blockade.” Please also see my response to Question 14.

16. Was the process for receiving and following up on relevant tips run according to FBI procedures? If not, why not and at whose call?

I do not have personal knowledge sufficient to respond to this question.

17. The FBI’s supplemental background investigation ended very rapidly. Who decided when it would end?

I do not have personal knowledge sufficient to respond to this question. It was publicly reported that on October 5, 2018, the then-Chairman of the Senate Judiciary Committee issued a report on the Supplemental Background Investigation, outlining the specifics of the investigation and concluding that the Supplemental Background Investigation “confirms what the Senate Judiciary Committee concluded after its investigation: there is no corroboration of the allegations made by Dr. Ford or Ms. Ramirez.” *See* Supplemental FBI Investigation Executive Summary, <https://www.grassley.senate.gov/news/news-releases/supplemental-fbi-investigation-executive-summary> (emphasis omitted).

**Nomination of Katherine A. Crytzer, to be United States District Court Judge for the  
Eastern District of Tennessee  
Questions for the Record  
Submitted November 25, 2020**

**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?

The Supreme Court has used various formulations to describe the kind of fundamental rights that Fourteenth Amendment substantive due process protects, including the formulation in *Washington v. Glucksberg*, 521 U.S. 702 (1997). If confirmed, I would fully and faithfully apply relevant Supreme Court and Sixth Circuit precedent.

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

Yes. The Supreme Court has considered express enumeration of a right in the Bill of Rights as “powerful evidence that the right was regarded as fundamental.” *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010).

- 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, consistent with *Washington v. Glucksberg*, I would consider whether the rights in question are “objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” 521 U.S. 702, 720-21 (1997) (citations and quotations omitted). The Supreme Court has looked to historical references, treatises, state constitutions, and other sources to perform this inquiry.

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

Yes, as a lower court judge, I would fully and faithfully apply relevant Supreme Court and Sixth Circuit precedent. If there were no binding precedent, I would also consider precedent of other circuit courts of appeals.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has been recognized by any court of appeals?

Yes. Please see my response to Question 1(c).

- 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*).

Both *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003), are binding precedent of the Supreme Court. If confirmed as a lower court judge, I would fully and faithfully apply relevant Supreme Court precedent.

- f. What other factors would you consider?

If confirmed, I would consider any other relevant and applicable factors identified by the Supreme Court or Sixth Circuit.

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

In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment applies to sex.

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

Please see my response to Question 2. If confirmed as a lower court judge, I would be bound by applicable Supreme Court precedent.

- 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?

In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court held that the single-sex admissions policy of a state nursing school violated the Equal Protection Clause, prior to *United States v. Virginia*. I am not familiar with the Supreme Court’s decision-making process with respect to granting certiorari in cases presenting questions related to the Equal Protection Clause and sex prior to 1982.

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

In *Obergefell v. Hodges*, the Supreme Court held that the Fourteenth Amendment protects the right of gay and lesbian couples to marry “on the same terms as accorded to couples of the opposite sex.” 576 U.S. 644, 680 (2015). If confirmed, I would fully and faithfully

apply *Obergefell*. Other aspects of the Fourteenth Amendment’s applicability to gay and lesbian couples are the subject of pending litigation.

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

The scope of the Fourteenth Amendment’s applicability to transgender people is the subject of pending or impending litigation. As a judicial nominee, it would be inappropriate to opine on the issue. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6).

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

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court held that there is a constitutional right to privacy that protects a woman’s right to use contraceptives. If confirmed, I would fully and faithfully apply *Griswold* and *Eisenstadt*.

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

In multiple cases, including most recently *June Medical Services v. Russo*, 140 S.Ct. 2103 (2020), the Supreme Court has recognized a constitutional right to privacy that protects a woman’s right to obtain an abortion. If confirmed, I would fully and faithfully apply *June Medical* and other relevant Supreme Court precedent.

- 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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that there is a constitutional right to privacy that protects intimate consensual conduct between two adults regardless of their sexes or genders. If confirmed, I would fully and faithfully apply *Lawrence*.

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

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

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 576 U.S. 644, 668 (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?

The Supreme Court has stated that in some circumstances, a lower court may consider evidence of changing societal understanding. If confirmed, I will fully and faithfully apply the Supreme Court’s precedent on this issue, including *Virginia* and *Obergefell*.

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

A lower court may consider sociology, scientific evidence, and data in judicial analysis when relevant and appropriate under Supreme Court or binding court of appeals precedent.

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?

In *Obergefell*, the Supreme Court held that the Fourteenth Amendment protects the right of gay and lesbian couples to marry “on the same terms as accorded to couples of the opposite sex.” *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015). In *Lawrence*, the Supreme Court held that there is a constitutional right to privacy that protects intimate consensual conduct between two adults regardless of their sexes or genders. 539 U.S. 558, 579 (2003). More recently, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court stated that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” 138 S.Ct. 1719, 1727 (2018). If confirmed, I would fully and faithfully apply these Supreme Court precedents.

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

Please see my response to Questions 1(a-f) and 5(a).

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.
  - a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s

original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Although I have not studied the question as a legal matter, I am aware that scholars have argued that *Brown* is consistent with originalism. See, e.g., Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 Harvard J. Law & Pub. Policy 457 (1995); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1835 n.10 (2020) (Kavanaugh, J., dissenting).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘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 Nov. 25, 2020).

If confirmed, I will fully and faithfully apply Supreme Court and Sixth Circuit precedent on the meaning of the terms “the freedom of speech,” “equal protection,” and “due process of law.”

- 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 *District of Columbia v. Heller*, the Supreme Court recognized the importance of the text, structure, and original understanding of the Constitution in interpreting the Second Amendment, including the public’s understanding of the Second Amendment’s meaning at the time of its adoption. 554 U.S. 570 (2008). If confirmed, I would fully and faithfully apply applicable precedent from the Supreme Court and Sixth Circuit.

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

Please see my response to Question 6(c).

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

Please see my response to Question 6(c).

**Questions for the Record for Katherine (Katie) Amber Crytzer  
From Senator Mazie K. Hirono**

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

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

No.

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

No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

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

A federal judge is duty-bound to administer justice without bias or favor. Training can be helpful to assist judges in successfully performing this duty.

**b. Have you ever taken such training?**

Yes, as part of my training at the Department of Justice.

**c. If confirmed, do you commit to taking training on implicit bias?**

If confirmed, I commit to participating in training opportunities offered by the Administrative Office of the Courts and the Federal Judicial Center that will help me successfully perform my judicial duties.

3. You described your policy portfolio at the Justice Department's Office of Legal Policy (OLP) as including "regulatory reform."

**a. What are the "regulatory reform" policies you worked on during your time at OLP?**

I have worked on regulatory reform policies designed to enhance good government and ensure that the Department of Justice performs its regulatory activity lawfully, responsibly, and transparently.

- b. Were you involved in any way in the Department of Justice’s (DOJ) withdrawal of a guidance document that provided protections for transgender students, including the right to use bathrooms corresponding with their gender identity? If so, please describe your involvement.**

Not to my recollection. I understand that the withdrawal of a Dear Colleague Letter concerning the use of bathrooms in public schools occurred in February 2017, while I was still serving as an Assistant United States Attorney.

- c. Were you involved in any way in a DOJ internal memo directing senior civil rights officials to examine how decades-old “disparate impact” regulations might be changed or removed? If so, please describe your involvement.**

Not to my recollection.

- d. Have you been involved in any way in the DOJ process of reviewing or reconsidering use of “disparate impact” to address discrimination? If so, please describe your involvement.**

Not to my recollection.

4. Your college magazine described you as “serv[ing] in an influential role in the decisionmaking” of the Trump administration and “helping shepherd Supreme Court nominee Brett Kavanaugh through a tumultuous, but successful, Senate confirmation hearing.”

- a. What was your role in ‘shepherding’ Brett Kavanaugh through his ‘tumultuous’ Supreme Court confirmation hearing?**

I served on a team of attorneys at the Department of Justice that facilitated the Senate’s consideration of then-Judge Brett M. Kavanaugh to serve on the Supreme Court.

- b. You described your office’s work on Brett Kavanaugh’s Supreme Court confirmation process as “thrilling, humbling, and an honor.” Did you watch Dr. Ford’s testimony about being sexually assaulted by Mr. Kavanaugh?**

Yes, I watched Dr. Christine Blasey Ford’s testimony.

- c. Please explain your statement of how Brett Kavanaugh’s Supreme Court confirmation process was ‘thrilling, humbling, and an honor’ to you.**

The statement that you reference is incomplete and taken out of context. When describing my work at the Office of Legal Policy, I stated: “It’s humbling and an honor to be doing the work each of us is doing at the Office of Legal Policy every day.”

5. You are currently a Trump political appointee. When you were nominated to be Inspector General of the Tennessee Valley Authority, you refused to even acknowledge President



Trump's attacks on Inspectors General who tried to do their job and conduct oversight of the Trump administration.

- a. **An inspector general must be willing to act independently from the President who nominated her, and such independence is even more critical as a federal judge with a lifetime appointment. Have you taken any action showing your independence from President Trump?**

If confirmed to serve as a district court judge, I will act with integrity and independence as I have throughout my legal career.

- b. **Have you disagreed with the President's cruel and inhumane family separation policy?**

In my current capacity, I serve as a lawyer for the Department of Justice. As such, it would not be appropriate for me to opine on my personal agreement or disagreement with any Department initiative or policy.

- c. **Have you disagreed with his numerous false claims of voter fraud?**

As a judicial nominee, it would be inappropriate to opine on an issue that is the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6).

- d. **Have you disagreed with his refusal to denounce white supremacists and his statement telling them to "stand back and stand by"?**

I reject racism and white supremacy; both are unacceptable.

**Nomination of Katherine Amber Crytzer  
United States District Court for the Eastern District of Tennessee  
Questions for the Record  
Submitted November 25, 2020**

**QUESTIONS FROM SENATOR BOOKER**

1. You were previously nominated to be the Inspector General of the Tennessee Valley Authority. Following your hearing before the Senate Environment and Public Works Committee, Senator Carper—the Ranking Member of the Committee—sent you numerous Questions for the Record to elicit your views on the importance of the independence of Inspectors General. Unfortunately, you were unable provide suitable answers to nearly all of those questions, which resulted in Senator Carper opposing your nomination.

- a. In response to Senator Carper’s Question for the Record on whether it is appropriate to attack Inspectors General or the credibility of their work, you said, “I am not privy to the information that the President considered in making his remarks . . . .” Be that as it may, with the information that is available to you in the public record, which is more than sufficient, do you believe it is appropriate for the President to attack the credibility of Inspectors General when their findings do not fit his preferred narrative?

As a judicial nominee, the Code of Conduct for United States Judges prohibits me from opining on the propriety of comments made by the President, an elected political official. *See* Code of Conduct for United States Judges, Canon 5(C).

- b. Are you able to state unequivocally whether you believe it is appropriate for President Trump to berate and attack Inspectors General on Twitter and in public comments when he disagrees with their work?

Please see my response to Question 1(a).

2. While in the Office of Legal Policy at the Department of Justice, you worked on the nomination of Associate Justice Kavanaugh to the U.S. Supreme Court.<sup>1</sup> Were you at all aware of any efforts or actions by the White House or the Department of Justice to limit the scope of the Federal Bureau of Investigation’s probe of sexual assault allegations made against Justice Kavanaugh? If so, please describe those efforts or actions that limited the scope of the investigation.

It was publicly reported that on October 5, 2018, the then-Chairman of the Senate Judiciary Committee stated that the FBI opened a supplemental background investigation on then-Judge Brett M. Kavanaugh at the Senate Judiciary Committee’s request. *See* Supplemental FBI Investigation Executive Summary, <https://www.grassley.senate.gov/news/news-releases/supplemental-fbi-investigation-executive-summary>. “The request was for an investigation into [then] current allegations against Judge Kavanaugh.” *Id.*

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

---

<sup>1</sup> SJQ at p. 12

In general terms, I espouse an originalist jurisprudential philosophy, which means that in interpreting the Constitution, the meaning of the Constitution was fixed at the time it was ratified and, absent binding precedent, the original public meaning of the Constitution controls.

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

In general terms, I espouse a textualist jurisprudential philosophy, which means that in interpreting a statute, the meaning of the statute was set at the time the text was enacted and, absent binding precedent, the ordinary public meaning of text at the time it was enacted controls.

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

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

The Supreme Court has held that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). If confirmed, I will follow Supreme Court and Sixth Circuit precedent on the use of legislative history.

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

Please see my response to Question 5(a).

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

I understand judicial restraint to mean that the proper role of the judiciary is to render a legal decision based on the facts and the law within the confines of a particular case or controversy before the court. It is important for a district court judge to act consistent with his or her proper judicial role.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>2</sup> Was that decision guided by the principle of judicial restraint?

---

<sup>2</sup> 554 U.S. 570 (2008).

As a judicial nominee, it would be inappropriate for me to opine on the correctness or legal reasoning of an opinion, concurrence, or dissent authored by a Justice of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6). If I am fortunate enough to be confirmed as a district court judge, I would fully and faithfully apply the Court's opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

As a judicial nominee, it would be inappropriate for me to opine on the correctness or legal reasoning of a Supreme Court opinion. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6). If I am fortunate enough to be confirmed as a district court judge, I would fully and faithfully apply the Court's opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010).

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

As a judicial nominee, it would be inappropriate for me to opine on the correctness or legal reasoning of a Supreme Court opinion. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6). If I am fortunate enough to be confirmed as a district court judge, I would fully and faithfully apply the Court's opinion in *Shelby County v. Holder*, 570 U.S. 529 (2013).

7. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>5</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>6</sup>

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not specifically studied whether in-person voter fraud is a widespread problem in American elections at the state or federal level. As a judicial nominee, it would not be appropriate for me to offer an opinion on a matter of public policy that is the subject of pending litigation. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6).

---

<sup>3</sup> 558 U.S. 310 (2010).

<sup>4</sup> 570 U.S. 529 (2013).

<sup>5</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>6</sup> *Id.*

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I am aware that the Supreme Court and lower courts have addressed specific legal challenges relating to particular state voter ID laws, *see, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), but I have not studied whether any particular voter ID law could suppress votes. As a judicial nominee, it would not be appropriate for me to offer an opinion on a matter of public policy that is the subject of impending or pending litigation. *See* Code of Conduct for United States Judges, Canons 2A, 3A(6).

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 7(b).

8. 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.<sup>7</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>8</sup> 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.<sup>9</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>10</sup>

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

The question of whether implicit racial bias exists in our criminal justice system is the subject of significant academic research and literature and political and policy debate. In my own experience, I did not witness racial bias in my work as an Assistant United States Attorney. If I am fortunate enough to be confirmed, I commit to administering justice without bias or favor.

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

Based on statistics related to the federal prison population, I understand that racial minorities are disproportionately represented in federal prisons.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our

---

<sup>7</sup> 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>.

<sup>8</sup> *Id.*

<sup>9</sup> 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>.

<sup>10</sup> *Id.*

criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

Prior to my nomination, I have studied issues of race, the opioid epidemic, violent crime, and criminal justice in America's federal prison system. Most recently, I studied the United States Sentencing Commission's 2019 Annual Report and Sourcebook of Federal Sentencing Statistics.

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

I have not studied the particular report you cite and therefore cannot offer a view as to the disparity in sentences. If confirmed, I commit to avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, consistent with 28 U.S.C. § 3553(a).

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

I am not familiar with the particular study you cite and therefore cannot offer a view as to the disparity in charging. If confirmed, I commit to avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar crimes.

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

Federal district court judges committed to the rule of law can contribute to a more just criminal justice system. As one example, federal district court judges have a statutory duty to consider certain factors when imposing a sentence, including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. § 3553(a)(6).

9. 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.<sup>13</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>14</sup>

---

<sup>11</sup> U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>12</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>13</sup> 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>.

<sup>14</sup> *Id.*

- 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 state-specific incarceration rates compared to crime rates in the specific state, and as such, I am not in a position to assess any link between the two.

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

Please see my response to Question 9(a).

10. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person’s gender identity?

Yes.

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

Yes. *Brown v. Board of Education*, 347 U.S. 483 (1954), is a landmark opinion of the Supreme Court that holds a unique importance in our Nation’s history.

12. Do you believe that *Plessy v. Ferguson*<sup>16</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

*Brown v. Board of Education*, 347 U.S. 483 (1954), a landmark opinion of the Supreme Court, overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). As I stated in response to Question 11, *Brown* was correctly decided.

13. 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?

My answers contained in this document are my own. I understand that it is generally unacceptable and contrary to the Code of Conduct for United States Judges for a judicial nominee to “grade, or give a thumbs-up or a thumbs-down on particular Supreme Court cases” as Justice Elena Kagan explained at her Senate Judiciary Committee hearing.

14. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”<sup>17</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be

---

<sup>15</sup> 347 U.S. 483 (1954).

<sup>16</sup> 163 U.S. 537 (1896).

<sup>17</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

a basis for recusal or disqualification?

Under 28 U.S.C. § 455, a judge's race or ethnicity is not listed as a basis for recusal. As a judicial nominee, the Code of Conduct for United States Judges prohibits me from opining on the propriety of comments made by the President, an elected political official. *See* Code of Conduct for United States Judges, Canon 5(C).

15. 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."<sup>18</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, the Supreme Court held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." 533 U.S. 678, 693 (2001). As a judicial nominee, the Code of Conduct for United States Judges prohibits me from opining on the propriety of comments made by the President, an elected political official. *See* Code of Conduct for United States Judges, Canon 5(C).

---

<sup>18</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.