

**Nomination of Thomas Tullidge Cullen to the United States District Court for the  
Western District of Virginia  
Questions for the Record  
Submitted March 11, 2020**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. During the corruption trial of a Virginia police officer, you sought to exclude the officer's colleagues from the courtroom. According to the judge, you had an Assistant U.S. Attorney call a senior officer to tell him that the officers' presence in the courtroom, even out of uniform, was "certainly inappropriate and it could affect our working relationship." The senior officer called them and instructed them to leave, which they did.

As a result of the exclusion, the defendant police officer sought to overturn his eventual conviction as having violated his Sixth Amendment right to a public trial. The judge found your conduct to be insufficiently severe to warrant dismissal, but said that "[i]t was wrong to have excluded the officers." The judge concluded that you "made a serious error in judgment." (United States v. Workman (W.D. Va. 2019); Federal Judge Scolds U.S. Attorney Cullen for 'Serious Error' (Aug. 20, 2019))

**How would you deal with this kind of situation if you encountered it as a judge?**

If confirmed as a district judge, I will ensure that all criminal defendants are afforded the critical protections of the Fourth, Fifth, and Sixth Amendments, including the right to a public trial. In the rare circumstance where it may be necessary to consider excluding certain members of the public from a court proceeding – for example, where there are valid concerns about witness or jury intimidation – I will scrupulously follow Supreme Court and Fourth Circuit precedent in evaluating a request to exclude and balancing it against the constitutional rights of the defendant and public's right to attend court proceedings.

2. During your hearing, Senator Kennedy asked you, "As a rule, do you believe across America there are more acts of violence on the political right than the political left, yes or no?" You replied, "I don't know honestly the answer." Earlier in the hearing, in response to my question, you said "in reality in this country over recent years, most of the extremist-related violence has come from the right," quoting a statistic that "70% of [violent extremism was] caused or committed by right-wing extremists."

**Please clarify your answer to Senator Kennedy's question. Do you "think violence is greater on the political right than the political left"?**

In my response to Ranking Member Feinstein regarding the alarming increase in hate crimes and acts of domestic terrorism, I referenced a statistic from the Anti-Defamation League that 71% of "extremist related fatalities in the United States" from 2008 to 2017 were committed by members of far-right and white-supremacist groups, while Islamic extremists were responsible for 26 percent. This is a valid statistic and one that I understand has been corroborated by other studies. As noted above, in later questioning,

Senator Kennedy asked, “As a rule, do you believe across America there are more *acts of violence* on the political right than the political left, yes or no?” Senator Kennedy’s question, as I understood it, referred to acts of violence, rather than extremist-related killings, and thus was much broader than the ADL data I had previously cited. I am not aware of any studies or data establishing or comparing total acts of violence, however that phrase is defined, motivated or inspired by far-right or far-left groups.

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

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

It is never appropriate for an inferior court to depart from Supreme Court precedent.

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

District court judges are obligated to observe and apply all Supreme Court precedent. While it is generally improper for a district court judge to question Supreme Court precedent, there may be instances where respectfully identifying an issue well-positioned for Supreme Court review may be beneficial.

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

District courts are bound by precedents of the Supreme Court and the circuit court where the district court sits, but not by decisions of the other district courts. Moreover, a district court does not create precedent. Under the principal of the Rule of Law, however, a district court judge should render similar decisions when faced with similar facts. If the Fourth Circuit or the Supreme Court overrules a district court’s decision, the district court must faithfully apply that precedent when ruling in the same or subsequent case involving that issue.

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

The Supreme Court has made clear that “[o]verruling precedent is never a small matter.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015). Adhering to prior precedent, while not an “inexorable command,” constitutes “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the

quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

4. 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”?**

As an inferior court judge, I will faithfully observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Roe v. Wade*.

- b. **Is it settled law?**

Yes, *Roe v. Wade* is binding Supreme Court precedent and settled law. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Roe v. Wade*.

5. 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, *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Obergefell*.

6. 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?**

I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Heller*. As far as commenting on Justice Stevens's dissenting opinion, as a judicial nominee, it would be inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

The Supreme Court in *Heller* recognized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In *Heller*, the Supreme Court specifically stated that “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.” *Id.* at 626-27.

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

*Heller* does not expressly overrule or abrogate any prior Supreme Court precedent. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

7. 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*, the Supreme Court identified over twenty prior instances in which it had “recognized that the First Amendment protection extends to corporations.” *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). In the context of the specific issue in *Citizens United*, limits on corporate expenditures for electioneering communications, the Supreme Court held that “the Government may not suppress political speech on the basis of the speaker's corporate identity.” *Id.* at 365. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

**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 7.a.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2012), the Supreme Court addressed whether the protections afforded by the Religious Freedom Restoration Act applied to corporations, but the issue of the applicability of the Free Exercise Clause to corporations was not resolved in that case. Because there may be litigation implicating this unanswered question, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

8. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Supreme Court has recognized that the Constitution guarantees equal protection in a variety of contexts. The Court has also determined that the Constitution protects the free exercise of religion. Because there may be litigation involving the intersection of these constitutional protections, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

9. 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?

Please see my response to Question 8.

10. 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 8.

11. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society intermittently since 2002 (from 2002 to 2004 and from 2018 to present). 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 was not involved in drafting that language and do not know its intended meaning. I have never discussed that language with anyone.

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

Please see my response to Question 11.a.

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

Please see my response to Question 11.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.**

No.

- e. Why did you join the Federalist Society in 2002?**

To the best of my recollection, I joined the Federalist Society in law school because I wanted to attend a seminar in Washington, D.C., and listen to a wide variety of scholars and legal practitioners discuss constitutional and other legal issues. I do not recall if my law school had an active Federalist Society chapter while I attended, but I did not personally attend any meetings or events other than the seminar in Washington, D.C.

- f. Why did you decide to rejoin the Federalist Society in 2018, more than 13 years after you had been a member in law school?**

To the best of my recollection, I rejoined the Federalist Society in 2018, after my confirmation as U.S. attorney. The primary reason that I rejoined was that several of my U.S. attorney colleagues were members and I was interested in attending seminars and special events. Due to my busy schedule as U.S. attorney, I have not had the opportunity to attend any Federalist Society events or meetings since reactivating my membership.

**g. Did you rejoin the Federalist Society before or after being nominated to be U.S. Attorney for the Western District of Virginia? Do you remember specifically when you rejoined?**

Please see my response to Question 11.f.

**h. Was it at any time communicated to you that membership in the Federalist Society would make your judicial or U.S. Attorney nomination more likely? If so, who communicated it to you and in what context?**

No one ever communicated to me that membership in the Federalist Society would make my judicial or U.S. Attorney nomination more likely.

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))

**i. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?**

I am now aware of this draft ethics opinion and, if it is adopted, and I am confirmed, will follow its directives regarding continued membership in the Federalist Society.

**j. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?**

I will scrupulously adhere to the Code of Judicial Conduct and ethics opinions regarding continued membership in any legal organizations, including the Federalist Society, if confirmed.

12. On your Senate Questionnaire, you indicated that you were a member of the Republican National Lawyers Association (“RNLA”) from 2004 to 2007 and from 2016 to 2018. The RNLA’s “About Us” webpage states that “[e]ach member . . . must ascribe to the accomplishment” of the organizations missions, which include: “Advancing Republican Ideals. The RNLA further builds the Republican Party goals and ideals through a

nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates.”

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

I have not participated in any RNLA activities or initiatives while a member.

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

As I indicated on my Senate Judiciary Committee Questionnaire, in 2015, I endorsed U.S. Senator Marco Rubio for President of the United States and appeared on a list of supporters for his campaign in Virginia. I was also appointed to – and briefly served on – the Council for Virginia’s Future, a bipartisan state commission. It is also a matter of public record that I have made financial donations to various Republican candidates for federal and state office over the past 15 years.

**c. Do you support the missions of the RNLA?**

As a judicial nominee, it would be inappropriate for me to express my personal or political views on any matter, including the “missions of the RNLA,” of which I was not familiar.

**d. Why did you join the RNLA in 2004?**

To the best of my recollection, I joined the RNLA with the intention of attending various functions and networking with other Republican lawyers. I discontinued my membership after becoming an Assistant U.S. Attorney.

**e. Why did you rejoin the RNLA in 2016?**

I reactivated my membership in 2016 while an attorney in private practice. At the time, I was interested in applying for a political appointment as U.S. attorney, and I believed that highlighting my Republican affiliation could help me secure endorsements and recommendations from Republican public officials and groups involved in the selection and vetting process in Virginia.

**f. Given the RNLA’s statement that “each member of the Association . . . must ascribe to the accomplishment” of its missions, including “directly support[ing] Republican policy, agendas and candidates,” will you agree to recuse yourself in cases involving the Republican party?**

If fortunate enough to be confirmed, I will set aside any political views and advocacy positions and faithfully apply the law in all cases that come before me. I will also carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of



Conduct for United States Judges to determine if recusal is appropriate on a case-by-case basis. For specific cases on which I have worked, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate the requirements of 28 U.S.C. § 455 and Canon 3C, and any other relevant authorities, including ethics opinions, interpreting these provisions.

In its blog, the RNLA has posted stridently in favor of voter ID laws and against those who oppose them. In one post, the RNLA wrote that “voter ID remains a powerful tool to combat election fraud and inspiring voter confidence” and called opposition to voter ID “contrary to logic,” and referred to “voter suppression” in quotation marks, showing skepticism to the very idea. (*President Trump Spurs Renewed Calls for Voter ID* (Aug. 19, 2019)) Regarding Voter ID laws, the Brennan Center for Justice has written that “study after study has shown that voter impersonation fraud is vanishingly rare. Many [proponents of Voter ID laws] also claim that these laws impose little burden because everyone has the requisite ID — but the reality is that millions of Americans don’t, and they are disproportionately people of color.” (*The New Voter Suppression* (Jan. 16, 2020))

**g. Do you agree with the RNLA that opposition to voter ID is “contrary to logic”? If so, why? If not, have you registered your disagreement with the RNLA’s position on this in any way? (If so, please explain)**

As a judicial nominee, it would be inappropriate to express my personal views on any political issues, including voter ID laws. Moreover, because there is litigation implicating this issue, I respectfully refrain from responding to this question under Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

To the best of my recollection, no one from the White House or the Department of Justice has ever asked me about my personal views on any legal issue, including my “views on administrative law.”

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

No.

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

Respectfully, “administrative law” is a broad topic covering a wide range of issues. If confirmed, I would faithfully follow and apply all statutory law and relevant precedent, including the Administrative Procedures Act and *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994).

14. Do you believe that human activity is contributing to or causing climate change?

Respectfully, as a judicial nominee, I do not believe it is appropriate for me to express my personal views on policy or political matters, including important issues like climate change.

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

The Supreme Court has made clear that if a statute is ambiguous, as statutes sometimes can be, *see, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015) (examining whether the term “tangible object” as used in the Sarbanes-Oxley Act includes undersized red groupers caught by fishermen in the Gulf of Mexico), then it is permissible for a court to look to legislative history to understand the meaning of the ambiguous term, as both the plurality and the dissent did in *Yates*. *See id.* at 1084 (plurality op.) (Ginsburg, J.) (citing to legislative history); *id.* at 1093 (Kagan, J., dissenting) (“And legislative history, for those who care about it, puts extra icing on a cake already frosted.”)

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

No.

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

I received these questions on Wednesday, March 11, 2020. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, March 16, 2020. Each answer herein is my own.

**Written Questions for Thomas Cullen**  
**Submitted by Senator Patrick Leahy**  
**March 11, 2020**

1. You have argued that you “hope” law enforcement will apply the Anti-Riot Statute to prosecute domestic terrorism. Though the actions of white nationalists and homegrown terrorists are abhorrent, the Anti-Riot Statute was ruled unconstitutional under the First Amendment by one district judge because, “A defendant could be convicted for renting a car with a credit card, posting about a political rally on Facebook, or texting friends about when to meet up.”

- (a) **As a judge, how would you attempt to balance the government’s need to respond to security threats with the need to aggressively protect foundational civil liberties like free expression and the right to assemble?**

Although, as you referenced in this question, a district judge in California ruled in a separate case that the Anti-Riots statute was overbroad, a district judge in Virginia, considering a similar First Amendment challenge to our office’s prosecution of four militant white supremacists who traveled to and committed various acts of violence in connection with the “Unite the Right” rally in Charlottesville, concluded that the statute is constitutional. That decision is in accordance with prior court decisions upholding the Anti-Riots act despite constitutional challenges. The conflicting California and Virginia district court decisions are on appeal to the Ninth and Fourth Circuits, respectively. The U.S. Department of Justice has taken the position that the Anti-Riots statute, to the extent that it proscribes interstate acts of violence committed in furtherance of a riot, is constitutional and should be upheld.

Although federal, state, and local governments can proscribe and criminalize acts of violence and other conduct committed in furtherance of personal or political ideology, the First Amendment absolutely protects the rights of citizens to assemble and express controversial and even abhorrent views. If confirmed as a district judge, I would faithfully apply all Supreme Court and Fourth Circuit precedent regarding the application of this particular statute and others potentially implicating First Amendment rights and ensure, at all times, that bedrock constitutional considerations, like the right of free speech and assembly, are protected from unconstitutional government infringement.

2. In an op-ed for the *The Washington Times*, you stated you “embrace[d]” Attorney General Sessions’s approach, specifically praising his repudiation of former Attorney General Holder’s approach to “limit[] federal prosecutors’ ability to seek lengthy

mandatory-minimum prison sentences for drug dealers.” You have called mandatory minimums “necessary and effective.” But the United States just enacted the First Step Act with wide bipartisan support in part to reduce and ease the draconian mandatory minimum sentences for non-violent offenders that have given us the unwanted distinction of having the highest incarceration rate in the world.

**(a) Do you stand by your assertion that mandatory minimums are “necessary and effective,” even for non-violent drug offenses?**

As U.S. attorney, and consistent with Department of Justice policy, I have consistently expressed the view that mandatory minimum sentences are an important tool for investigating and dismantling large drug-trafficking organizations and protecting the public from future crimes by violent offenders who possess and use firearms. I have not advocated for mandatory minimums for non-violent drug offenders, and do not believe that the application of these strict penalties are appropriate in all cases, particularly those involving low-level, non-violent drug offenders.

**(b) What data are you relying on in concluding that they are “necessary and effective?”**

Congress has established certain mandatory minimum sentencing requirements for certain crimes, and if confirmed, I would follow the law established by Congress, regardless of my personal views. As a judicial nominee, I must respectfully refrain from responding to this question, which is asking for my personal views on a matter of policy reserved for Congress.

**(c) Even if you still support the use of mandatory minimums, do you acknowledge the human costs of imposing them widely? What are those human costs?**

As a former criminal-defense attorney, and having represented individuals facing significant sentences for their involvement in non-violent drug crimes, I recognize the human costs of imposing these strict penalties too widely. As stated above, I have consistently taken the view that mandatory minimums should be used judiciously and generally only applied in large drug-trafficking and overdose cases, as well as matters involving violent offenders who possess and use firearms.

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

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

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

As an inferior court judge, my primary obligation is to binding precedent on the meaning of any statutory term. Beyond that, I believe that looking to the text and structure of a statute is a salutary method of analysis, as the Supreme Court has repeatedly recognized.

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

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

The independence of the federal judiciary is established in Article III of the Constitution and is fundamental to our rule of law. In their wisdom, the Founders insulated the judiciary from outside pressures by providing that judges shall serve “during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.” If confirmed, I will faithfully fulfill my oath without fear or favor. Beyond that, it would be inappropriate for me to comment on the appropriateness of comments made by any political actor.

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

Please see my response to Question 4.b.

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

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

In *Webster v. Doe*, 486 U.S. 592 (1988), the Supreme Court held that due to national security concerns, the plaintiff’s case under the

Administrative Procedure Act could not proceed, but the Supreme Court permitted the plaintiff's constitutional claims to proceed, explaining that "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Id.* at 603 (quotations omitted).

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

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

Separation-of-powers principles rely in part on comity and respect among the three co-equal branches of government. If a party does not comply with a court order, the opposing party may seek injunctive relief or other remedies from the court to enforce that order.

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

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

The Constitution states that Congress has the power to declare war as well as the power of the purse to make or deny appropriations. As observed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

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

The Supreme Court has acted to enjoin Executive Branch actions, even during time of war, because no one is above the law. As an inferior

court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent in this area.

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

Please see my response to Question 7.b.

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

On occasion, a conflict arises in court as to the Executive Branch's expertise in national security. *See, e.g., Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). If such an issue arises, as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

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

The Supreme Court has applied the Equal Protection Clause to classifications that discriminate against women. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973). As a district judge, if confirmed, I would follow and apply all Supreme Court and Fourth Circuit precedent on this issue.

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

No.

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

Article I, section 9, clause 8 provides that “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatsoever, from any King, Prince, or foreign State.”

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

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

As a general rule, appellate courts do not engage in fact-finding; rather they evaluate the record on appeal. Federal Rule of Appellate Procedure 10(a) addresses the composition of the record on appeal. Under that rule, “[t]he following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.” See also Fed. R. App. P. 32(b) (providing requirements for the appendix). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent.

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

Each of those amendments contains an enforcement clause, *see, e.g.*, U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2. Those enforcement clauses provide Congress the ability to enforce the amendment by appropriate legislation.



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

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

As district judge, if confirmed, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Lawrence v. Texas*.

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

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

The Supreme Court has summarized the importance of adhering to precedent in its observation that “*Stare decisis* – in English, the idea that today’s Court should stand by yesterday’s decisions, is ‘a foundation stone of the rule of law,’” and that “[r]especting *stare decisis* means sticking to some wrong decisions.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). Adhering to prior precedent, while not an “inexorable command,” constitutes “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). As

an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent.

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

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

I would apply conflict rules and ethical standards to assess whether a recusal is required or would be beneficial to the integrity of the judiciary. For instance, I would recuse myself from any case in which I have participated as an attorney. As a sitting judge, I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

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

Footnote 4 of *Carolene Products* is one of the most significant footnotes in constitutional law due to its role in the development of tiers of constitutional scrutiny. Specifically, the footnote contemplated more exacting judicial scrutiny in certain spheres, such as the right to vote, while the opinion itself employed rational basis review for economic legislation. For context, the full sentence quoted above from footnote 4 states, “It is unnecessary to consider now whether legislation which restricts those political process which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

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

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

Yes.

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

As a judicial nominee, it is not appropriate for me to comment or opine publicly on this speculative and hypothetical scenario about a President’s ability to self-pardon. *See* Canons 2 and 5, Code of Conduct for United States Judges.

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

The Constitution confers to Congress certain enumerated powers, including the two identified in this question. The Supreme Court has addressed the scope of those powers on a number of occasions. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005); *Kimel v. Fla. Bd. of Regents*, 528

U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

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

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

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the plaintiff's request for a searching inquiry into the justifications for Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, because such an inquiry would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S. Ct. at 2409. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent in this area.

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

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the plaintiff's request for a searching inquiry into the justifications for Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, because such an inquiry would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Trump v. Hawaii*, 138 S. Ct. at 2409. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent in this area.

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

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

The Supreme Court developed the modern doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent on qualified immunity.

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

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

The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), recognized that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). In a similar vein, Congress has enacted the Electronic Communications Privacy Act, which imposes several statutory restrictions above and beyond those required by the Fourth Amendment on searches involving certain types of electronic communications. *See* 18 U.S.C. § 2518. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a]

judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

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

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court explained that “a fundamental principle of appropriations law is that where ‘Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements. . . .’” *Id.* at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen 307, 319 (1975)). Because there may be litigation implicating this question, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

Judicial independence is incredibly important, and this has been long and continuously recognized: from Federalist No. 78, which observed that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution,” to Canon 1 of the Code of Conduct for United States Judges, which provides that “[a]n independent and honorable judiciary is indispensable to justice in our society.”

**Nomination of Thomas T. Cullen, to be United States District Court Judge for the Western  
District of Virginia  
Questions for the Record  
Submitted March 11, 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?

I would look to the Supreme Court and the Fourth Circuit for the governing framework, starting with cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes, the Supreme Court has long recognized the importance of this factor.

- 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. Please see my response to Question 1.

- 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 to the first question. As to the second question, as an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent, and in the absence of any controlling precedent, I would look to precedent of other circuit courts.

- 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, 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*).

As a lower court judge, if confirmed, I would follow all binding Supreme Court and

Fourth Circuit precedent, including *Lawrence* and *Casey*.

- f. What other factors would you consider?

Please see my response to Question 1.

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

The Supreme Court has applied the Equal Protection Clause to race-based classifications and to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (gender-based classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race-based classification); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender-based classification).

- 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?

On several occasions, the Supreme Court has addressed the proper means for interpreting and applying the Fourteenth Amendment, and as an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent regarding the Equal Protection Clause.

- 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 understand that *United States v. Virginia* was not the first time that the Supreme Court struck down a gender-based classification relating to educational opportunities. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). I do not know why there was not an earlier challenge to Virginia Military Institute's former male-only admission policy.

- 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 same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent regarding the Fourteenth Amendment.

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

Because there may be litigation implicating this issue, I must refrain from further



responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, 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?

The Supreme Court has repeatedly recognized such a right. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent in this area.

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

The Supreme Court has repeatedly recognized such a right. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent in this area.

- 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 struck down a state criminal law based on the liberty interest protected by the Due Process Clause for “two adults who, with full and mutual consent from each other engaged in sexual practices. . . .” *Id.* at 578. As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent in this area.

- 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 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*, 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?

If confirmed as a district judge, I will fulfill my duty to follow and apply all Supreme Court and Fourth Circuit precedent, and when applicable precedent makes it appropriate to consider such evidence, I will do so in accordance with controlling precedent.

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

Under Rule 702 of the Federal Rules of Evidence as well as precedent in the *Daubert / Joiner / Kumho Tire* line of cases, expert opinions from these disciplines may be admissible into evidence.

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?

Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

I would look to the Supreme Court and the Fourth Circuit for the governing framework, starting with cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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?

This is a topic of academic debate among legal scholars. As a district judge, if confirmed, I would follow and apply all Supreme Court and Fourth Circuit precedent, including *Brown* and its progeny.

- 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 Mar. 4, 2020).

Please see my response to Question 6.a.

- 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?

As a district judge, I will follow and apply all Supreme Court and Fourth Circuit precedent regardless of whether that precedent is based on the original public meaning of a constitutional provision.

- 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?

I would apply all relevant Supreme Court and Fourth Circuit precedent that identifies appropriate sources to consider and use to discern the meaning of a constitutional provision.

7. In a 2018 op-ed in the *Richmond Times-Dispatch*, you encouraged a local jail authority board to notify Immigration and Customs Enforcement officials before releasing undocumented

immigrants that had been arrested. As a matter of law, can the federal government mandate that state and local law enforcement officials enforce federal immigration law?

Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

8. In a 2018 article in the *Roanoke Times*, you are quoted as saying that “mandatory minimums are a necessary and effective tool” to address the problem of drug trafficking. Do you continue to believe that mandatory minimum sentences are necessary to address the problem of drug trafficking? If so, why?

As U.S. attorney, and consistent with Department of Justice policy, I have consistently expressed the view that mandatory minimum sentences are an important tool for investigating and dismantling large drug-trafficking organizations and protecting the public from future crimes by violent offenders who possess and use firearms. I have not advocated for mandatory minimums for non-violent drug offenders, and do not believe that the application of these strict penalties are appropriate in all cases, particularly those involving low-level, non-violent drug offenders. As a former criminal-defense attorney, and having represented individuals facing mandatory minimums and significant sentences for their involvement in non-violent drug crimes, I recognize the human costs of imposing these strict penalties too widely. As stated above, I have consistently taken the view that mandatory minimums should be used judiciously and generally only applied in large drug-trafficking and overdose cases, as well as matters involving violent offenders who possess and use firearms.

**Nominations**  
**Hearing before the Senate Committee on the Judiciary**  
**March 4, 2020**

**QUESTIONS FROM SENATOR BLUMENTHAL**

**Questions for Mr. Thomas T. Cullen**

1. Like Americans across the country, I watched in horror as the protests in August 2017 in Charlottesville boiled over into violence at the hands of white supremacists groups. As you know, one man – inspired by white supremacist ideologies – killed a young woman, Heather Heyer, and injured 19 others when he drove his car into a crowd of counter-protestors. Because of you and your office, he is now serving a life sentence.

Since Charlottesville, I have repeatedly called upon President Trump and his Administration to speak out against hate crimes and devote increased resources to combat hate crimes across the country. The President has instead repeatedly equivocated on the evil of white supremacy. You have previously emphasized the need for federal law enforcement to “do a better job acknowledging violence committed by militant, right-wing, white-supremacists groups.”<sup>1</sup>

**a. What are the dangers of not acknowledging this kind of violence?**

As I have highlighted in connection with our prosecution of James Fields and militant white-supremacists who committed acts of violence at the “United the Right” rally in Charlottesville, hate crimes, acts of domestic terrorism, and killings perpetrated by far-right extremists have increased over the past decade. I believe it is important for the public and elected officials, including law enforcement agencies, to acknowledge this alarming trend to increase public awareness about this issue and foster meaningful policy solutions to mitigate the problem. Over the past two years, the Department of Justice and its principal leaders, including two Attorneys General and the current FBI Director, have spoken about the dangers of right-wing extremism and the need to guard against it. This is a very positive trend, and I am hopeful that it will continue.

I have also long advocated for a systemic response to white supremacist activity and to the recent rise in hate crimes. At a time when so many Americans face unprecedented threats on account of bigotry, Congress has a responsibility to take action to provide victims with more support, to improve hate crime reporting, and to encourage communities to come together and heal.

That is why I introduced the Jabara-Heyer NO HATE Act, named after Khalid Jabara and Heather Heyer, who were both victims of targeted hate crimes. The NO HATE ACT establishes a private right of action for hate crimes, offering victims the option to fight for remedies in federal court and ensuring that everyone can have access to justice. It also

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<sup>1</sup> Thomas Cullen, Community Roundtable Discussion about Hate Crimes in Roanoke, Virginia (Dec. 19, 2018).

supports the speedy implementation of the latest crime reporting standards and provides grants for the creation of state-run hate crime hotlines.

**b. How has the increase in hate crimes affected your work as the U.S. Attorney for the Western District of Virginia?**

In 2017, hate crimes increased by about 17% nationally and nearly 50% in my state of Virginia. The number of police agencies reporting hate crimes also rose, by about 6 percent. My experiences working on the “Unite the Right” prosecutions and serving on the Department of Justice’s Domestic Terrorism Executive Committee, have certainly increased my awareness of this alarming trend and motivated me to speak out, whenever possible, on this issue and the need to address it.

**c. Please describe the importance of hate crime reporting and how hate crime reporting can inform our preventative and prosecutorial responses to the disturbing rise in hate crimes.**

I believe that as local and state jurisdictions become increasingly aware of the general rise in hate crimes and acts of domestic terrorism, they will become more vigilant in monitoring for these types of crimes in at-risk communities, do a better job reaching out to and educating the public and potential victims, and more effectively formulate strategies, initiatives, policies, and laws to reduce these types of crimes and protect potential victims.

2. Last March, your office prosecuted a Virginia State Police Special Agent for bribery, obstruction of justice, and making a false statement to a federal agent. The defendant had unlawfully solicited and received sexual favors from female informants in exchange for agreeing to assist them with pending criminal charges. Prosecutors specifically presented evidence that when these female informants “expressed their reluctance about having sex . . . [the defendant] regularly threatened and implied that they would face lengthy prison terms and extended separation from their children.”<sup>2</sup> The defendant was ultimately convicted.

As your office was prosecuting this case, Senators Booker and Ernst and I introduced the Closing the Law Enforcement Consent Loophole Act. This legislation would close a legal loophole that allows law enforcement officers to claim consent as a defense against accusations of sexual assault and rape, because it is not consent when one person is exercising the power of law enforcement and the other is handcuffed, in custody, or in the back of a cop car.

**a. Is there a reason that your office did not prosecute that Special Agent for rape or sexual assault?**

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<sup>2</sup> See *Former Virginia State Police Special Agent Convicted of Bribery, Obstruction of Justice, and Lying to the FBI Following Five Day Jury Trial*, U.S. ATTORNEY’S OFFICE FOR WDVA (Mar. 25, 2019); see also SJQ Attachments to 12(e) at 699.

We made the charging decisions in this case based on the unique facts and circumstances of the officer's sexual coercion of multiple female victims. Ultimately, after a careful review of the underlying facts and evidence and detailed analysis of the specific federal statutes that were available to us, we determined that the most serious and readily provable federal offenses we could bring included bribery, obstruction of justice, and false statements. Based on our review of the evidence, and various jurisdictional and other limitations attendant to federal prosecutions, we weren't able to charge sexual assault and/or rape. Fortunately, numerous victims of the defendant's predatory conduct were still able to testify, in detail, about their encounters with the defendant and the sexual trauma they experienced.

**b. If this legislation were law, would your office have prosecuted the Special Agent for rape or sexual assault?**

Assuming that this legislation had been in effect, we certainly would have considered it.

**Questions for the Record for Thomas Tullidge Cullen  
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?**

Yes.

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

No, but I would.

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

If confirmed, I will participate in any training opportunities offered to assist me in learning my new role and performing it fairly and to the best of my ability.

3. In 2018, you wrote an op-ed strongly opposing a sanctuary jurisdiction policy. You argued that you hoped that the Albemarle-Charlottesville Jail Authority Board (ACJAB) would “tune out the misleading rhetoric and focus on the facts about this critical law-enforcement initiative.” Your op-ed, however, suggested that opposing a sanctuary jurisdiction policy would be “continu[ing] to stand for the rule of law.” You claimed that jail officials, after receiving a federal immigration detainer (an ICE detainer), had “become less conscientious about providing timely release notifications to ICE, resulting in the unjustified release of criminal unlawful aliens.”

ICE detainers are requests for a jurisdiction to detain an individual for a civil immigration violation. As has been publicly reported by the New York Times in 2017, “[j]udges have said that holding people in criminal custody for a civil infraction violates the Fourth Amendment protection against unreasonable seizures, and the [Trump] administration’s demands violate the 10th Amendment by forcing states to do the federal government’s bidding.”



- a. **Are you aware that in 2019, a federal judge in the Central District of California held in *Gonzalez v. Immigration and Customs Enforcement (ICE)*, that “ICE violates the Fourth Amendment by issuing detainers to state and local law enforcement agencies in states that do not expressly authorize civil immigration arrests in state statute”?**

I was not aware of this particular decision by a district judge in the Central District of California. If I am fortunate enough to be confirmed, I will faithfully follow and apply all precedents of the Supreme Court and the Fourth Circuit regarding the issuance of immigration detainers and any constitutional or other legal issues related thereto.

- b. **In *Gonzalez v. ICE*, the court found that the set of databases ICE checks to issue these detainers “contain serious errors.” The court concluded that “ICE’s Issuance of Detainers Through the Reliance on Inaccurate, Incomplete, and Error-Filled Databases Violates the Fourth Amendment.” Are you aware of the error rates in the databases used to issue ICE detainers?**

Please see my response to Question 3.a.

- c. **What was your reason for failing to address the constitutional issues raised by ICE detainer requests when you argued in your op-ed that the ACJAB should “tune out the misleading rhetoric and focus on the facts,” while claiming that declining to follow ICE detainer requests “result[] in the unjustified release of criminal unlawful aliens”?**

In writing this op-ed, I was generally taking the position, consistent with applicable U.S. Department of Justice policy, that a proposal to end a long-standing ICE-notification policy and cooperation with federal immigration officials would undermine important principles of federal-state comity and cooperation, public safety, and the rule of law. Respectfully, I wrote the op-ed in 2018, before the district judge in California issued the decision in *Gonzales*, and the constitutional issues at issue in that case had not, to my knowledge, been raised during the debates about our local notification policy.

4. In a 2018 press release, you stated, “The Department of Justice and this U.S. attorney’s office will not tolerate efforts, by any individuals or groups, to infringe on or interfere with this fundamental right through intimidation, voter-suppression tactics, or fraud.”

- a. **What concrete steps have you taken to stop voter-suppression tactics?**

I have designated an Assistant U.S. Attorney with experience prosecuting civil rights cases to work closely with our local FBI RA to receive, monitor, and respond to any complaints of voter-suppression tactics and other unlawful forms of voter intimidation or discrimination in connection with federal and state elections. We have also widely issued press releases informing the public of the importance of this issue and the need to report unlawful activities to our office and/or the FBI.

- b. After the Supreme Court’s decision in *Shelby County v. Holder*, which gutted Section 5 of the Voting Rights Act, many states passed laws under the guise of combatting voter fraud, such as voter ID laws, that suppress the voting rights of minorities and vulnerable populations. But voter fraud is actually incredibly rare – a 2014 study found a total of 31 credible cases in 14 years. Are you aware of any empirical evidence showing that voter fraud is a significant problem?**

I have not studied this issue in depth. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- c. As the U.S. Attorney of the Western District of Virginia, have you referred any voter suppression cases or cases involving violations of the Voting Rights Act to the Civil Rights Division in the Justice Department?**

No.

5. In 1999, you wrote an op-ed in your college newspaper after the mass shooting at Columbine High School. In your op-ed, you argued that “[t]hose who blame episodes like this on gun manufacturers and insufficient firearm regulation are missing the point. While sensible restrictions might alleviate some of the problem, it is only a part of the equation.”

- a. What are the sensible restrictions you thought might alleviate some of the problem of gun violence?**

As a judicial nominee, it would not be appropriate for me to express my personal or political views on this issue. Moreover, because there may be litigation implicating this issue, I respectfully refrain from responding to this question under Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comments on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- b. In your op-ed, you discussed the internet as another component that needed to be addressed to alleviate the problem of gun violence. In your view, what are the other components of “parts of the equation” that can would mitigate gun violence?**

Please see my answer to Question 5.a.

6. In a 2018 op-ed in the Washington Times, you claimed “Attorney General Jeff Sessions has made significant progress in reducing crime” by rescinding the Holder Memorandum and issuing a new Sessions Memorandum, which directed federal prosecutors to charge the most serious, readily provable offense. Human Rights Watch criticized the Sessions Memorandum, arguing that the policy change “will result in more disproportionately severe

sentences, often for minor offenses, driving up the number of people needlessly incarcerated” and “further erode the legitimacy of a justice system.”

- a. In December 2018, Congress passed the First Step Act, a substantial criminal justice reform bill. The First Step Act rolled back some of the “tough of crime” policies from the 1980s and early 1990s that resulted in mass incarceration that disproportionately affected minority communities. Is it your view that the federal government should revert back to the “tough on crime” policies of the early 1990s?**

The provisions of the First Step Act are established law, and I would faithfully follow this statute if confirmed as a district judge.

- b. A Pew study found that higher rates of drug imprisonment showed no statistically significant effect on rates of drug use or numbers of overdose deaths. What empirical evidence, if any, can you point to that shows that a policy of charging the most serious offense that is readily provable results in making the public safer?**

I am not familiar with this particular study. As U.S. attorney, and consistent with Department of Justice policy, I have consistently expressed the view that mandatory minimum sentences are an important tool for investigating and dismantling large drug-trafficking organizations and protecting the public from future crimes by violent offenders who possess and use firearms. I have not advocated for mandatory minimums for non-violent drug offenders, and do not believe that the application of these strict penalties are appropriate in all cases, particularly those involving low-level, non-violent drug offenders. As a former criminal-defense attorney, and having represented individuals facing significant sentences for their involvement in non-violent drug crimes, I recognize the human costs of imposing these strict penalties too widely. As stated above, I have consistently taken the view that mandatory minimums should be used judiciously and generally only applied in large drug-trafficking and overdose cases, as well as matters involving violent offenders who possess and use firearms.

**Nomination of Thomas Tullidge Cullen  
United States District Court for the Western District of Virginia  
Questions for the Record  
Submitted March 11, 2020**

**QUESTIONS FROM SENATOR BOOKER**

1. In 2018, you wrote an op-ed on the Armed Career Criminal Act and argued for the law to be revitalized. Under this Act, individuals convicted of unlawfully possessing firearms are subject to a 15-year mandatory minimum sentence, if they had three or more prior convictions for a “serious drug offense” or a “violent felony.”<sup>1</sup> In this op-ed, you argued that when the United States Supreme Court ruled in 2015 that the law was unconstitutionally vague, it made everyone “less safe.”<sup>2</sup>

- a. Do you believe that mandatory minimums deter crime? Please explain what data, evidence, or research you rely on to arrive at this conclusion.

Congress has established certain mandatory minimum sentencing requirements for certain crimes, and if confirmed, I would follow the law established by Congress, regardless of my personal views. As a judicial nominee, I must respectfully refrain from responding to this question, which is asking for my personal views on a matter of policy reserved for Congress.

- b. What should be considered a “serious drug offense” or “a violent felony”?

Over the past decade, the Supreme Court and various Courts of Appeals have issued scores of decisions interpreting, construing, applying, and limiting these statutory definitions in a variety of contexts. Moreover, litigation implicating these issues is ongoing and will likely remain the subject of court decisions for the foreseeable future. It would therefore be inappropriate for me, as a nominee to an inferior court, to express my opinion regarding these legal issues. If confirmed, I will scrupulously follow and apply all Supreme Court and Fourth Circuit precedent regarding the meaning of “serious drug offense” and “violent felony.”

- c. Do you believe that all drug crimes are inherently violent?

Based on my experiences as a federal prosecutor and criminal defense attorney, I do not believe that all drug crimes are inherently violent.

- a. Do you believe that mandatory minimums are a useful tool in combatting drug trafficking? Please enumerate what data, evidence, or research you rely on to reach your conclusion.

Based on my experiences as a federal prosecutor and criminal defense attorney, I believe that mandatory minimums can be a useful tool in gaining cooperation from members of drug-trafficking organizations and, in turn, investigating and dismantling these organizations and decreasing the flow of deadly controlled substances like

Fentanyl, heroin, methamphetamine, and cocaine into our communities. Also based on my personal experiences, I believe that mandatory minimums attendant to cases involving overdose deaths do deter, to a certain extent, distribution of substances like Fentanyl.

2. In 2018, Congress passed the First Step Act and the President signed it into law. The bill expanded the safety valve to allow judges to sentence qualified low-level nonviolent drug offenders below the mandatory minimum if they cooperate with the government. If confirmed, how would you utilize the safety valve for qualifying individuals? If confirmed I would carefully follow and apply the revised statutory and U.S. Sentencing Guidelines provisions regarding expanded safety-valve eligibility. Put simply, if a criminal defendant is eligible for a safety-valve reduction based on the statute and the Guidelines, I would faithfully award that reduction in calculating that defendant's advisory Guidelines range and considering an appropriate sentence under 18 U.S.C. § 3553(a).
3. During your hearing with the Senate Judiciary Committee, your fellow nominee, Thomas Cullen, stated that statistically there are more acts of violence perpetrated by far right extremists than any other group. In fact, between 2001 and 2015, more Americans were killed by homegrown right-wing extremists than by Islamist terrorists.<sup>3</sup> Additionally, a 2017 GAO report found that "Of the 85 violent extremist incidents that resulted in death since September 12, 2001, far-right wing violent extremist groups were responsible for 62 (73 percent) while radical Islamist violent extremists were responsible for 23 (27 percent)."<sup>4</sup> Is this the data you were relying on in making that statement? If not, what data did you rely on?

In my response to Ranking Member Feinstein regarding the alarming increase in hate crimes and acts of domestic terrorism, I referenced a statistic from the Anti-Defamation League that 71% of "extremist related fatalities in the United States" from 2008 to 2017 were committed by members of far-right and white-supremacist groups, while Islamic extremists were responsible for 26 percent. This statistic is in line with data from other studies, including the 2017 GAO report referenced in your question above.

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<sup>1</sup> Thomas Cullen, *Protecting Americans from Violent Offenders*, WASH. TIMES (Aug. 3, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> Jennifer Williams, *White American men are a bigger domestic terrorist threat than Muslim foreigners*, VOX (Oct. 2, 2017), <https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam>.

<sup>4</sup> UNITED STATES GOV'T ACCOUNTABILITY OFFICE, COUNTERING VIOLENT EXTREMISM 4 (Apr. 2017), <https://www.gao.gov/assets/690/683984.pdf>.

4. In 2018, you wrote an op-ed criticizing jurisdictions that adopted sanctuary policies.<sup>5</sup> You said that “ending the ICE-notification policy, in addition to thwarting federal immigration law, raises public-safety concerns.”

- a. In your article were you contending that sanctuary policies violate federal law?

In this op-ed, I was not contending that sanctuary policies violate federal law, but taking the position, consistent with U.S. Department of Justice policy, that a proposal to end a long-standing ICE-notification policy and cooperation with federal immigration officials would undermine important principles of federal-state comity and cooperation, public safety, and the rule of law.

- b. Is it your understanding that U.S. Immigration and Customs Enforcement detainer requests are mandatory or optional?

Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

- c. Do you believe that local governments are in the best position to determine how to properly utilize their limited resources in order to keep their communities safe or is the federal government in a better position to make that judgment?

As a general matter, I believe that state and local communities should play the primary role in exercising police power and providing for the safety, health, and well-being of individuals who reside therein. That said, the federal government, including federal law enforcement, also has a limited but nonetheless important role in protecting these important interests.

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

I tend not to label myself because the term “originalist” may mean different things to different people. As an inferior court judge, if confirmed, my primary obligation would not be to any specific interpretative method, but to binding precedent of the Supreme Court and the Fourth Circuit. Beyond that, the Supreme Court has indicated that that looking to the original public meaning of the terms in the Constitution is a salutary method of analysis in some cases. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were based on their respective understandings of the original public meaning of the Second Amendment.

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

For reasons similar to those articulated in my response to Question 5, I tend not to label

myself in light of the different meanings that people may ascribe to the term “textualist.” As an inferior court judge, my primary obligation is to binding precedent on the meaning of any statutory term. Beyond that, the Supreme Court has indicated that looking to the text and structure of a statute is a salutary method of analysis in some cases. In addition, in a 2015 lecture on statutory interpretation, Justice Kagan said, “we’re all textualists now.”

7. 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?

I recognize that the Supreme Court has made clear that when a statute is ambiguous and other tools of statutory interpretation, including structure, context, Canons, are not helpful or determinative, it is permissible for a court to consider 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 answer to Question 7.a.

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

I view judicial restraint as the opposite of judicial activism, and yes, as defined, I believe that judicial restraint is a critical value that all judges should have and exercise.

- a. The Supreme Court’s decision in *District of Columbia v. Heller* dramatically changed the Court’s longstanding interpretation of the Second Amendment.<sup>6</sup> Was that decision guided by the principle of judicial restraint?

*Heller* is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

- b. The Supreme Court’s decision in *Citizens United v. FEC* opened the floodgates to big

money in politics.<sup>7</sup> Was that decision guided by the principle of judicial restraint?

*Citizens United* is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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<sup>5</sup> Thomas Cullen, *Standing up for the Rule of Law?*, RICHMOND TIMES-DISPATCH (Sept. 9, 2018).

<sup>6</sup> 554 U.S. 570 (2008).

<sup>7</sup> 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>8</sup> Was that decision guided by the principle of judicial restraint?

*Shelby County* is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, respectfully refrain from further responding to this question.

9. 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>9</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>10</sup>

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 9.a.

- 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 9.a.

10. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>11</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>12</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>13</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>14</sup>

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

Unfortunately, I believe that there is implicit racial bias in numerous aspects of American society, including our criminal-justice system.

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

Yes.

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<sup>8</sup> 570 U.S. 529 (2013).

<sup>9</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

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

<sup>11</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>12</sup> *Id.*

<sup>13</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>14</sup> *Id.*

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

I have not studied this issue in depth, other than reading various news articles about the problem – including unconscious and unwarranted connections people make between particular groups and stereotypes about those groups – and the many ways these invalid associations and assumptions can lead to disparate and discriminatory treatment of certain groups, particularly minorities, within the criminal-justice system. This is an important issue and one that prosecutors, defense attorneys, police officers, and judges should better understand and guard against.

- 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>15</sup> Why do you think that is the case?

This disparity is very concerning to me. Although there are likely many causes, the former 100-to-1 crack-to-powder drug disparity and attendant mandatory drug minimums, which Congress took a substantial step in remedying through its passage of the Fair Sentencing Act of 2010, likely was a significant driving factor. Hopefully, other important reforms like the First-Step Act, passed in 2018, and efforts to reduce the length of incarceration for non-violent drug offenders will, over time, further reduce these disparities.

- 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>16</sup> Why do you think that is the case?

Please see my answer to Question 10.d.

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

In addition to ensuring that the district court correctly calculated the sentencing Guidelines range and evaluating the rulings on any departures, appellate judges can review the record to ensure a meaningful evaluation of statutory factors, *see* 18 U.S.C. § 3553(a), that consider the individual circumstances of the defendant (“history and characteristics”) to ensure that the sentence is “sufficient, but not greater than necessary” to satisfy relevant statutory sentencing objectives.

11. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.<sup>17</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>18</sup>

- 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 in depth, but I recognize that it is difficult to distinguish causation from correlation, especially on a multivariate issue such as this one.

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

Please see my response to Question 11.a.

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

Yes.

13. 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.

14. Do you believe that *Brown v. Board of Education*<sup>19</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

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<sup>15</sup> U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>16</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

<sup>17</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>18</sup> *Id.*

<sup>19</sup> 347 U.S. 483 (1954).

15. Do you believe that *Plessy v. Ferguson*<sup>20</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, *Plessy v. Ferguson* was a terrible wrong in our nation's history. As noted above, *Brown* rightfully overturned this terrible decision and abrogated the odious system of *de jure* racial segregation.

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

No.

17. 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>21</sup> Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself, *see* 28 U.S.C. § 455. In my experience, I am not aware of an instance in which a judge was recused or disqualified based on his or her race or ethnicity.

18. 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>22</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court explained that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Zadvydas*.

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<sup>20</sup> 163 U.S. 537 (1896).

<sup>21</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>.

<sup>22</sup> 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 March 11, 2020**  
**For the Nomination of:**

**Thomas T. Cullen, to be United States District Judge for the Western District of Virginia**

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?**

In sentencing a defendant, I would undertake a four-step process established by Supreme Court and Fourth Circuit precedent: (1) correctly calculate the advisory sentencing range recommended by the Sentencing Guidelines; (2) determine whether a sentence within that range, and within statutory limits, serves the factors set forth in 18 U.S.C. § 3553(a), including the need for the sentence to, among other things, reflect the nature and circumstances of the offense and history and characteristics of the defendant, and, if it does not, select a sentence that does serve those factors; (3) implement any applicable statutory limitations; and (4) articulate and explain the reasons for selecting a particular sentence.

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

I would follow the steps outline in my response to Question 1.a., but I would also draw on my experiences litigating well over a hundred sentencing hearings, both as a federal prosecutor and as a criminal defense attorney, where various district judges weighed competing interests and determined what constituted a fair and appropriate sentence.

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

Under the relevant statutory framework outlined in 18 U.S.C. § 3553(a), a district judge should consider, with respect to every individual defendant, whether a variance from the advisory Guidelines is appropriate based on the unique facts and circumstances of the case.

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

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

Congress has established certain mandatory minimum sentencing

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<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>.

requirements for certain crimes, and if confirmed, I would follow the law established by Congress, regardless of my personal views. As a judicial nominee, I must respectfully refrain from responding to this question which is asking for my personal views on a matter of policy reserved for Congress.

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.<sup>1</sup> **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?**

Respectfully, I don't believe it would be appropriate for me to make such a commitment at this time.

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

Based on my experience as U.S. attorney and my understanding of the separation of powers outlined in the Constitution, I believe it is important for charging decisions to be entrusted to the Executive branch.

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

Please see my response to question 1.d.iv.2.

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

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<sup>1</sup> See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>.

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, I am aware of statistics, from many sources, including from the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men, and that sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I will do everything in my power to guard against racial disparities in cases that come before me. I also commit that all persons that come into my courtroom will be treated with dignity, respect, and equality.

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?**

I will make staffing decisions on a case-by-case basis, and, in doing so, look for opportunities to hire minorities and women as judicial clerks.