Nomination of Charles R. Eskridge III
to the United States District Court for the Southern District of Texas
Questions for the Record
June 12, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

   It is never appropriate for lower courts to depart from Supreme Court precedent.

   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?

   It is not proper for a district court judge to question Supreme Court precedent. A district court judge must fully and faithfully apply all Supreme Court precedent.

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

   A district court decision is not binding. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). As such, a district court is not bound by another district court's ruling. In addition, Federal Rules of Civil Procedure 59(e) and 60 provide standards for a district court to set aside its prior rulings in a specific case. A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located.

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

   Only the Supreme Court may overrule one of its own prior opinions. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). As a judicial nominee, I do not believe it appropriate to comment on a role unrelated to my nomination to the federal district court bench. *See* Code of Conduct for United States Judges, Canons 2 and 5. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

2. 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"?

Each and every Supreme Court decision is binding on all district courts. Every Supreme Court precedent is thus "super-stare decisis" or "superprecedent" with respect to the lower district courts. If confirmed, I will fully and faithfully apply *Roe v. Wade* and its successor cases.

b. Is it settled law?

Yes. Please see my answer to Question 2(a).

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes. If confirmed, I will fully and faithfully apply *Obergefell v. Hodges*.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" a dissenting opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

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

In *District of Columbia v. Heller*, the Supreme Court 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." 554 U.S. 570, 626–27 (2008). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Heller*. As a judicial nominee, I do not believe it appropriate to comment further on abstract or hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The First Amendment states a fundamental guarantee to the people of the United States. As with the guarantees of each of the Bill of Rights, First Amendment rights should always be of concern to judges considering cases and controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent concerning First Amendment rights and campaign finance law, including *Citizens United v. FEC*. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 5(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I will fully and faithfully follow all Supreme Court and Fifth Circuit precedent, including *Hobby Lobby*. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

6. In September 2017, you introduced Senator Cornyn at a Federalist Society event. In your introductory remarks, you highlighted Senator Cornyn's accomplishments, including his opposition to the Affordable Care Act. You said: "His efforts to get Obamacare back in the

bottle have been a heroic 24/7 effort recently, and in the recent past, and over the past many years."

Please explain your statement that efforts to put the Affordable Care Act "back in the bottle" have been "heroic."

As part of my introduction, I briefly referenced Senator Cornyn's legislative efforts with respect to the Affordable Care Act. I was not commenting on the constitutionality of the Act or any litigation with respect to the Act. If confirmed, I will fully and faithfully apply all statutes and Supreme Court and Fifth Circuit precedent, including the Affordable Care Act and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

7. 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. To the extent I have considered the topic as a judicial nominee, it has been with the view that, if confirmed, I will fully and faithfully apply all statutes, regulations, and Supreme Court and Fifth Circuit precedent, including those concerning 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?**

      To the best of my recollection, no. Please also see my response to Question 7(a).

   c. **What are your "views on administrative law"?**

      If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent concerning any subject matter, including administrative law.

8. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2004. You also indicated that you have served as President of the Houston Lawyers Chapter since 2018. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession

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

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I did not draft this statement and am unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C).

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

I did not draft this statement and am unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C).

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

I did not draft this statement and am unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C).

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

During the course of this nomination process, I have had general discussions with various members of the legal community about my nomination, some of whom are also members of the Federalist Society. I did not have any contact with anyone in the national office of the Federalist Society about my possible nomination. After I was nominated, I resigned as president of the Houston Lawyers Chapter, and I contacted the national office in that regard.

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

   The Supreme Court and the Fifth Circuit have stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. *See*, *e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

10. 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.

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

    I received the questions on Wednesday, June 12, 2019. I reviewed my Senate Judiciary Questionnaire, conducted limited research and consulted other materials, and drafted my answers. I then shared my draft responses with the Office of Legal Policy at the Department of Justice, which offered suggestions and comments. In light of those comments, I then revised my responses as I thought appropriate. After finalizing my answers, I authorized the Department of Justice to file these responses.

Written Questions for Charles R. Eskridge
Submitted by Senator Patrick Leahy
June 12, 2019

1. I do not fault judicial nominees for having previously been involved in politics or supportive of their home-state politicians. But I did notice you have been an extremely active supporter of and donor to your home state senators' campaigns, even making sizeable contributions just weeks before applying for a federal judgeship, and months before being nominated to this position.

    (a) Do you agree that the appearance of a nominee donating money around the time you are applying to be a judge is troubling? What assurances can you give this Committee that you will be impartial and free from political influence while serving as a federal judge?

    I knew and supported both Senator Cornyn and Senator Cruz prior to their initial electoral campaigns for the U.S. Senate. I have continued to support them as Senators in my home state of Texas and made political donations within the limits allowed by federal law. My contributions were made only in regard to their regular campaigns for re-election, and not with respect towards my application.

    If I am confirmed, my involvement in any and all political activities will cease, including contributions, as they already have during the pendency of my nomination. I commit to this Committee that I will leave aside all political considerations in my decision of cases and controversies before me, and will be guided only by my independent and unbiased review of the controlling law and precedent applicable to any such matters. I believe I have a reputation of integrity within the legal community, as reflected by the unanimous "well qualified" rating I received from the American Bar Association.

2. In addition to your campaign contributions, you also served on the panel that makes judicial nomination recommendations since 2009.

    (a) Do you believe there is any conflict of interest in the fact that you served on the very committee to which you applied to be a federal judge?

    The Federal Judicial Evaluation Committee established by Senator Cornyn and Senator Cruz in 2013 (as with the similar Committee established by Senator Hutchison and Senator Cornyn in 2009) consists of approximately 35 attorneys appointed from across the State of Texas to assist their evaluation of potential appointments to the federal bench. The membership is bipartisan and makes recommendations only. Prior to submitting my application to be considered for appointment to an open seat on the federal bench, I resigned from the Committee

and did not participate in the review process undertaken thereafter. I do not believe this presents a conflict of interest.

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?

Determining the meaning of a statute requires examination of the text and structure of the statute, with consideration given as to how statutory provisions work together to form a consistent whole. The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent concerning the methods for interpreting statutes.

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

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

The independence of the federal judiciary is a core feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in public debates and commentary. As a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see my response to question 4(b).

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

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

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

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

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

Please see my responses to Questions 5(a), 7(a), and 8. If confirmed, and if such a scenario were to come before me, I will carefully examine the relevant authorities that may bear upon this question and fully and faithfully apply all applicable Supreme Court and Fifth Circuit precedent. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

The Constitution assigns powers over war and foreign affairs to the President and Congress. Questions regarding the appropriate exercise of these powers continue to arise in litigation. In evaluating conflicts between the two branches in this area, the Supreme Court has sought guidance from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (citing Justice Jackson's concurrence). If confirmed, I will fully and faithfully apply

Supreme Court and Fifth Circuit precedent, as well as any constitutional and statutory authority. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

Please see my response to Question 7(a).

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

Please see my response to Question 7(a).

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

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

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

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

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

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

The Voting Rights Act is a historic and landmark law. Justice Scalia's comment was not part of a holding of the Supreme Court. If confirmed, I will fully and faithfully apply Supreme Court precedent interpreting the Voting Rights Act.

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

The Constitution provides in Article I, section 9 that "no Person holding any Office or Profit or Trust under" the United States "shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

As a general matter, a district court relies on the parties to discover and place before the court the appropriate factual record under the rules of evidence, and an appellate court then considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Shelby County v. Holder*. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Thirteenth, Fourteenth, and Fifteenth Amendments reflect a constitutional commitment to counteracting racial discrimination in the aftermath of the Civil War. Each of these Amendments provides that Congress has the power to enforce them "by

appropriate legislation." U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2.

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

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

    The Supreme Court has addressed and established a fundamental right to personal autonomy as expressed in *Lawrence v. Texas* and other decisions. If confirmed, I will fully and faithfully apply all Supreme Court 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 stated that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted). It is never appropriate for lower courts to depart from Supreme Court precedent. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

    With respect to circuit precedent, the Fifth Circuit imposes a "rule of orderliness" by which "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). The Fifth Circuit holds this to be a strong policy preference: "Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void." *Id.*

    If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and the Fifth Circuit, including precedent with respect to application of stare decisis.

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

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

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

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

(a) 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?

I believe that courts play a central role in protecting constitutional rights under the rule of law through the impartial application of the law. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent considering and applying footnote 4 of *United States v. Carolene Products*. As a judicial nominee, I do not believe it appropriate to comment further on abstract legal concepts and hypothetical scenarios, which are or may be the subject of pending or

impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

    Yes.

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

I have not previously researched this question and do not presently have considered views on it. If confirmed, and were such a matter to come before me, I will discern and fully and faithfully apply all applicable Supreme Court and Fifth Circuit precedent regarding the presidential pardon power. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Constitution confers on the federal government certain enumerated powers, including Article I, Section 8, Clause 3 (the Commerce Clause) and Section 5 of the Fourteenth Amendment. The reach of those powers with respect to such provisions has been the subject of litigation and debate, with the Supreme Court deciding a number of cases in these areas. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 of the Fourteenth Amendment). If confirmed, I will fully and faithfully apply Supreme Court and Fifth Circuit precedent concerning the scope of congressional powers, including those addressing the Commerce Clause and Section 5 of the Fourteenth Amendment.

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*, the Supreme Court held, among other things, that the challenged Proclamation was lawfully issued under 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." 138 S.Ct. 2392, 2409. The Court also held that "plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id*. The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Trump v. Hawaii*. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Supreme Court has held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Planned Parenthood v. Casey* and *Whole Woman's Health v. Hellerstedt*. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical legislative examples, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

The Supreme Court has held that "[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotations omitted). According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent applicable to qualified immunity. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the decisions of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 Fourth Amendment, as with each of the Bill of Rights, states a fundamental guarantee to the people of the United States. The Supreme Court has recognized that new technological developments can give rise to genuine Fourth Amendment concerns. The Supreme Court has explained that new technologies in the digital era can "risk[] Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (citation omitted); *see also*, *e.g*., *Riley v. California*, 573 U.S. 373, 402 (2014) (examining Fourth Amendment concerns involving modern cell phones). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent applicable to data collection and the Fourth Amendment. As a

judicial nominee, I do not believe it appropriate to comment further on abstract or hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

I have not previously researched this question and do not presently have considered views on it. If confirmed, and were such a matter to come before me, I will discern and fully and faithfully apply all applicable Supreme Court and Fifth Circuit precedent regarding presidential power in this respect. As a judicial nominee, I do not believe it appropriate to comment further on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

I firmly believe that an independent judiciary is a core feature of our constitutional system and that an independent judiciary is necessary to promotion and protection of the rule of law. An independent judiciary depends upon judges being free from political influence or bias. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independent of the political sphere by affirming that "[a]n independent and honorable judiciary is indispensable to justice in our society." *See* Code of Conduct for United States Judges, Canon 1. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

Nomination of Charles R. Eskridge
to the United States District Court for the Southern District of Texas
Questions for the Record
Submitted June 12, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. You have been a member of the Houston Lawyers Chapter of the Federalist Society since 2004 and president of that chapter since 2018.

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

    My understanding is that the Federalist Society does not take positions on particular legal issues in litigation, but rather, it attempts to foster debate on important legal topics. After my nomination, I resigned as president of the Houston Lawyers Chapter of the Federalist Society. If confirmed, I plan to maintain my membership and, when invited and consistent with my schedule, speak at Continuing Legal Education events that they sponsor. I will also evaluate all my memberships and affiliations, including with the Federalist Society, in light of the recusal statute, 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any other applicable laws, rules, or practices.

    b. If confirmed, do you plan to donate money to the Federalist Society?

    No.

    c. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

    No.

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

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

    I had not previously read or reviewed this material. I have done so, as requested. I have no basis upon which to know whether or the extent to which the facts and circumstances related in the Washington Post story are accurate.

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

I am unfamiliar with the facts and circumstances reported in the Washington Post story. I am aware that judicial nominations have generated significant controversy and debate, particularly since the 1980s. I believe that the inclusion of spending limits and disclosure requirements is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration by Congress, or on abstract and hypothetical scenarios, which are or may be the subject pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

Beyond this, I firmly believe that an independent judiciary is a core feature of our constitutional system and that an independent judiciary is necessary to promotion and protection of the rule of law. An independent judiciary depends upon judges being free from political influence or bias. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independent of the political sphere by affirming that "[a]n independent and honorable judiciary is indispensable to justice in our society." *See* Code of Conduct for United States Judges, Canon 1. If confirmed, I will seek to model the independence inherent in these statements.

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

I am unfamiliar with the facts and circumstances related to that statement. As such, I cannot comment on his meaning. Beyond this, please also see my response to Question 2(b).

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

I have no such knowledge.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

I am unfamiliar with the facts and circumstances related to that statement. As such, I cannot comment on his meaning. Beyond this, please also see my response to Question 2(b).

f. Please describe any involvement you have had as a member or chapter president of the Federalist Society related to advocacy for judicial nominations described in the Washington Post story.

I have had no such involvement. As president of the Houston Lawyers Chapter, my role mainly involved seeing to it that we had speakers scheduled to present at monthly Continuing Legal Education events.

3. In your Questionnaire, you indicated that you were a leader and volunteer with Young Life Ministries from 1982 to 1986. In Young Life Ministries' Volunteer Packet, under their Sexual Misconduct Policy, they state:

> "Young Life's understanding of appropriate sexual conduct comes from the Scriptures which affirm intimate sexual activity between married heterosexual partners. The biblical narrative also reserves intimate heterosexual activity exclusively within the context of the marriage covenant."

They also state:

> "We do not in any way wish to exclude persons who engage in sexual misconduct or who practice a homosexual lifestyle from being recipients of ministry of God's grace and mercy as expressed in Jesus Christ. We do, however, believe that such persons are not to serve as staff or volunteers in the mission and work of Young Life."

a. Were you aware that Young Life had a policy of excluding LGBT people from their volunteering?

My involvement as a leader and volunteer with Young Life dates back to 1982 to 1986. I was not aware of any such policy at that time, and I do not know if any policy in this respect even existed. I do not know what policy, if any, Young Life currently holds in this regard. Beyond this, as a judicial nominee, I do not believe it appropriate to entertain questions on, or to comment on, personal religious beliefs of private individuals or organizations. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 4, and 5(C).

b. Do you believe that LGBT people are unfit to mentor young children?

I am aware that this and related topics have been the subject of debate and litigation in recent years. As a judicial nominee, I do not believe it appropriate to comment on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent related to issues in this area.

4. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

a. Do you agree with Justice Roberts' metaphor? Why or why not?

I agree with the metaphor to the extent it captures the idea that the role of a judge is to fairly and impartially adjudicate cases within the constitutional boundaries of the judicial branch. Simply stated, judges should fairly and neutrally apply predetermined rules without favor or preference to one side or the other, and without placing himself or herself in the role of an adversary.

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

A judge's duty is to follow and apply the law in a fair and neutral manner, and it is generally the duty of the political branches to consider and address the practical consequences. To the extent that Supreme Court and Fifth Circuit precedent and applicable rules and statutes permit a judge to consider the practical consequences in rendering a decision on a particular issue, a judge may do so.

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

Whether a genuine dispute as to any material fact exists requires the court to consider the parties' factual assertions based on the evidentiary record, construed in a light most favorable to the non-movant. Such a decision requires judgment and reason, and in that sense is objective. Regardless, it should not be subjective in the sense that judges should refrain from injecting their personal views or feelings into the determination.

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

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

In execution of their duties, a judge must be fair, careful, and thorough. Empathy is an essential human attribute, and it should motivate a judge to conform his or her conduct to meet these characteristics. Ultimately, a judges' decisions must be based on applicable law and relevant facts, and not on personal feelings. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

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

Every judge brings his or her varied life experiences to the bench with them. But a judges' personal views should not affect their duty to administer justice impartially and fairly to all. Ultimately, a judges' decisions must be based on applicable law and relevant facts, and not on personal experiences. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

I believe that my broad personal and professional experiences have equipped me well to be a judge and to exercise a judicial role. I have a wide range of experiences in my life, with a diverse array of friends, colleagues, and acquaintances. As a lawyer and as a friend, I have counselled many persons in difficult times. However, judicial decisions should be based on applicable law and relevant facts, and not on personal feelings, life experiences, or the identities of the parties appearing before them. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

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

   No.

8. The Seventh Amendment ensures the right to a jury "in suits at common law."

   a. What role does the jury play in our constitutional system?

      The Seventh Amendment right to a jury trial in "suits at common law" is an important feature of the American justice system that protects the rights of civil litigants to have facts decided by a jury of one's peers. As such, the jury plays a fundamental and critical role in our constitutional system.

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

      The Seventh Amendment states a fundamental guarantee to the people of the United States. As with the guarantees of each of the Bill of Rights, the right to a jury trial in "suits at common law" should always be of concern to judges considering cases or controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent with respect to the Seventh Amendment. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

      Please see my response to Question 9(b).

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

   The Supreme Court has issued several opinions analyzing the level of deference that should be given to fact-findings by Congress in situations where they support expanding or limiting individual rights. If confirmed, I will fully and faithfully follow Supreme Court and Fifth Circuit precedent with respect to this issue.

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

    a. Have you read Advisory Opinion #116?

    I had not previously read or reviewed this material. I have done so, as requested.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.
        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
        iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
        v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

    Advisory Opinion #116 appears generally to summarize and emphasize particular aspects of the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees with respect to educational seminars. I commit to abide by and consider both Codes in the execution of my judicial duties, including with respect to participation in educational seminars.

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

    Please see my response to Question 10(b). In addition, I commit to being alert to the potential that sponsoring organizations of educational programs might attempt to gain influence with participating judges, and if I am aware of that fact, to taking appropriate action.

Nomination of Charles R. Eskridge III,
to be United States District Court Judge for the Southern District of Texas
Questions for the Record
Submitted June 12, 2019

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?

   If confirmed, I will fully and faithfully apply the framework set forth in the many Supreme Court decisions assessing these questions, including but not limited to *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

      Yes, as directed by Supreme Court and Fifth Circuit precedent.

   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, as directed by Supreme Court and Fifth Circuit precedent. The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), set for the analysis for whether a right is deeply rooted in the nation's history and tradition, stating that it involves "examining our Nation's history, legal traditions, and practices." The Court directed inquiry to historical practice under the common law, the practice in the American colonies, historical state statutes, judicial decisions, and long-established traditions.

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

      Yes. If confirmed, I will be bound by Supreme Court and Fifth Circuit precedent previously recognizing any such right. Absent binding precedent, I will look to decisions from other circuit courts as persuasive authority.

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

      Yes. If confirmed, and absent binding precedent, I will consider whether Supreme Court and circuit precedent previously recognizing any similar right constitutes persuasive authority.

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

Both *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Casey* and *Lawrence*.

f. What other factors would you consider?

If confirmed, I will consider any other factors deemed relevant under Supreme Court and Fifth Circuit precedent.

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 long held that the Equal Protection Clause of the Fourteenth Amendment applies to both race-based classifications and gender-based classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

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?

Any academic debate about the intent of the individuals who passed the Fourteenth Amendment does not affect the binding nature of Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including the precedent cited above.

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 am unaware why *United States v. Virginia* was filed at the time it was, instead of earlier. Regardless, please see my response to Question 2(a).

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*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Obergefell*.

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

Equality under the law is paramount in our legal system and to the rule of law. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent addressing this topic. However, as a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 addressed and established a constitutional right to privacy protecting a woman's right to use contraceptives in a series of cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Griswold* and *Eisenstadt*.

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

The Supreme Court has addressed and established a constitutional right to privacy protecting a woman's right to obtain an abortion in a series of cases, including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including these decisions.

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?

The Supreme Court has addressed and established a constitutional right to privacy protecting intimate relations between two consenting adults, regardless of their sexes or genders, in a series of cases, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Lawrence* and *Obergefell*.

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.

No response necessary. Please see my responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was

considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 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, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent finding it appropriate to consider such evidence.

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

   The role of sociology, scientific evidence, and data depends on the nature of the particular issue within a particular case. If confirmed, I will fully and faithfully apply Supreme Court and Fifth Circuit precedent establishing what role these sources should play in a given case, including precedent with respect to judicial notice and admissibility of expert opinion.

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?

      Obergefell is binding Supreme Court precedent. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court stated, "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Obergefell* and *Masterpiece Cakeshop*.

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

      Please see my response to Question 5(a).

6. 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.

a. 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?

   I am aware that several legal scholars have maintained that *Brown v. Board of Education* is consistent with originalism, including Robert Bork, Michael McConnell, and Ilan Wurman. Beyond any academic debate, however, the Supreme Court has made clear in numerous decisions that racial discrimination has no place under our Constitution. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Brown* and successor cases.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited June 7, 2019).

   I am not familiar with this article or these authors' argument. I am aware that determining the original public meaning of a constitutional provision can be difficult. The quoted language appears to acknowledge this fact. Beyond this, if confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent regardless of the breadth of a term such precedents interpret.

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?

   For a district judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If the Supreme Court or Fifth Circuit has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision is dispositive. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, regardless of their methodology.

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) above.

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

If confirmed, I will fully and faithfully apply all relevant Supreme Court and Fifth Circuit precedent that identifies the appropriate sources to use in discerning the contours of a constitutional provision.

Questions for the Record for Charles Eskridge
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. At a Federalist Society event in September 2017, you introduced Sen. Cornyn. In your prepared remarks, you stated:

   > "His efforts to get Obamacare back in the bottle have been a heroic 24/7 effort recently, and in the recent past, and over the past many years. Senators who sit on the sidelines make his task nearly impossible. But to the contrary, he has always been the man at the forefront—whatever the issue—the one helping to lead the fight, to plan it strategically, and to work for it relentlessly."

   a. It seems you are alluding to his efforts to repeal the Affordable Care Act. Why did you call those efforts "heroic"?

      As part of my introduction, I briefly referenced Senator Cornyn's legislative efforts with respect to the Affordable Care Act. I was not commenting on the constitutionality of the Act or any litigation with respect to the Act. If confirmed, I will fully and faithfully apply all statutes and Supreme Court and Fifth Circuit precedent, including the Affordable Care Act and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

   b. Who were you referring to when you referenced "Senators who sit on the sidelines" and "make this task nearly impossible"?

      Please see my response to Question 2(a). I was simply referring to Senators who took no action with respect to Senator Cornyn's legislative efforts.

   c. Since you've publicly spoken about this issue, please tell us – is it your view that the Affordable Care Act should be repealed or nullified?

      Please see my response to Question 2(a). If confirmed, I will fully and faithfully interpret and apply all statutes and Supreme Court and Fifth Circuit precedent, including the Affordable Care Act and *National Federation of Independent Business v. Sebelius*,

567 U.S. 519 (2012). As a judicial nominee, I do not believe it appropriate to comment further on subjects of current political debate, including the Affordable Care Act, or on abstract and hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

3. At the same Federalist Society event in September 2017, your prepared remarks praised Sen. Cornyn's efforts to confirm Neil Gorsuch to the Supreme Court. You called it a "legislative victory" when, in response to a potential Democratic filibuster, he "resolutely stated: 'This is their last gasp from trying to prevent him from being confirmed. But they won't, and Judge Gorsuch will be confirmed this week one way or another.'"

   a. Can you please explain how eliminating a rule that requires bipartisan support for Supreme Court Justices is a "legislative victory"?

      As part of my introduction, I briefly referenced Senator Cornyn's efforts with respect to the confirmation of Justice Neil Gorsuch to the Supreme Court. Article II, sec. 2, cl. 2 of the Constitution states that "Judges of the supreme Court" shall be appointed by the President "by and with the Advice and Consent of the Senate." My reference was simply to this feature of the Constitution.

   b. Is it your view that Justices further the legislative agenda of the party that nominates them?

      No. To the contrary, I believe that the independence of the federal judiciary is a core feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. These protections are designed to enable judges to make decisions that are grounded in law, without respect to politics or to criticisms in public debates and commentary. As a judicial nominee, I do not believe it appropriate to comment further on subjects of current political debate, including the judicial nomination and confirmation process. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C).

4. In 2008, you defended Walmart in a class action lawsuit brought by Walmart employees who argued that Walmart forced them to work through their breaks and meals and work after clocking out without pay. You argued that these workers should not be able to proceed as a class because an individualized inquiry was necessary to determine whether each worker voluntarily skipped their breaks or whether they even actually skipped their breaks at all.

   Do you think it is realistic to expect that individual Walmart workers who have been forced to skip breaks and meals would be able to sue Walmart to recover their lost wages?

In the referenced litigation, Walmart established that it had in place policies that comply with applicable law pertaining to wages, hours, breaks, and meals, and that those policies were enforced and taken seriously by management at both the corporate and store level. A central issue in the litigation was whether electronic timekeeping records could resolve action on a classwide basis. The matter settled before trial, so no final determination was made in that respect. Regardless, that action preceded the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Wal-Mart Stores, Inc. v. Dukes* and other precedent concerning employment law.

Nomination of Charles R. Eskridge
United States District Court for the Southern District of Texas
Questions for the Record
Submitted June 12, 2019

QUESTIONS FROM SENATOR BOOKER

1. According to your Questionnaire, after you submitted an application to be a district judge and interviewed with the Federal Judicial Evaluation Committee, you withdrew your name from consideration for the seat.[1]

    a. Why did you withdraw your name from consideration?

    My application was originally directed towards a vacancy in the Galveston Division of the Southern District of Texas. The courthouse is approximately 65 miles from my home in Houston, entailing a 90 minute drive. I have children that were then going into the 4th and 7th grades, and my wife and I determined that we did not want to immediately relocate until our children were done with their school years at home. I believed it to be untenable to commute that distance for that number of years, and so, I withdrew my name once it was known that other able and well-qualified candidates were under consideration.

2. For several years, you represented the London Insurance Market on matters related to the "multitude of asbestos-related bankruptcy filings in the early 2000s."[2]

    a. In this capacity did you ever publicly advocate for federal legislation related to asbestos litigation?

    No.

3. In 2017, you spoke at a Federalist Society event and introduced Senator Cornyn who was the keynote speaker.[3] You said, "His efforts to get Obamacare back in the bottle have been a heroic 24/7 effort recently, and in the recent past, and over the past many years. Senators who sit on the sidelines make his task nearly impossible. But to the contrary, he has always been the man at the forefront—whatever the issue—the one helping to lead the fight, to plan it strategically, and to work for it relentlessly."[4]

    a. Based on these statements do you pledge to recuse yourself from all cases involving the Affordable Care Act should you be confirmed?

    As part of my introduction, I briefly referenced Senator Cornyn's legislative efforts with respect to the Affordable Care Act. I was not commenting on the constitutionality of the Act or any litigation with respect to the Act. If confirmed, I will fully and faithfully apply all statutes and Supreme Court and Fifth Circuit precedent, including the Affordable Care Act and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Beyond this, when deciding whether I should recuse from any case, I will consult the recusal statute,

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[1] SJQ at p. 48.
[2] SJQ at p. 36.
[3] September 23, 2017: Speaker, "Introduction of Keynote Speaker, Senator John Cornyn," The Federalist Society, Texas Chapters Conference, Houston, Texas (SJQ Attachments at pp. 1436-1437)
[4] *Id.*

28 U.S.C. § 455, as well as the Code of Conduct for United States Judges, and make a case-by-case determination of the proper course of action.

4. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[5] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[6] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[7] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[8]

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

      I am not familiar with this Brookings Institution study. However, based on the statistics it reports and similar news reports of which I am aware, I believe that racial bias continues to affect our country in many ways, including implicit racial bias in our criminal justice system.

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

      Yes, based on my understanding of statistics like those mentioned above.

   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 the issue of implicit racial bias in our criminal system, beyond articles and opinion pieces I have seen or heard in daily media.

   d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[9] Why do you think that is the case?

      I have not studied this issue closely enough to form an opinion on this question. Ours is a nation committed to the equality of all people without regard to race, and as such, racial bias should play no role in our criminal justice system. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

   e. According to an academic study, black men are 75 percent more likely than similarly situated white men are to be charged with federal offenses that carry harsh mandatory minimum sentences.[10] Why do you think that is the case?

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[5] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.

[6] *Id.*

[7] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.

[8] *Id.*

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

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

Please see my response to Question 4(d).

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

All judges should be mindful of the potential for bias—implicit and explicit—in their courthouses and in the cases before them, and should endeavor to run their courtrooms and chambers in a manner that is free from bias of any sort, including racial bias. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

5. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[11] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[12]

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

I have not studied this issue closely enough to form an opinion on this question.

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.

I have not studied this issue closely enough to form an opinion on this question.

6. 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.

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

I do not categorize myself as exclusively an originalist or textualist, as all labels are themselves of debated meaning. I do believe that the original public meaning of constitutional and statutory texts must be considered when interpreting and applying any such text. The Supreme Court has looked to the original public meaning of texts and considered that meaning relevant when interpreting those texts in certain contexts. The Supreme Court has also repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

1323 (2014)

[11] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates -continue-to-fall.

[12] *Id.*

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

   Please see my response to Question 7.

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

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

      The Supreme Court has stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

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

      Please see my response to Question 9(a).

10. Would you honor the request of a plaintiff, defendant, or witness in your courtroom, who is transgender, to be referred in accordance with their gender identity?

    Yes.

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

    Yes. In *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson* and struck down the doctrine of "separate but equal," noting that it "has no place" in American law, thus correcting an erroneous decision shortly after ratification of the Fourteenth Amendment. *Brown*, 347 U.S. 483, 494–95 (1955). As a judicial nominee, it would typically be inappropriate to comment on the correctness of prior Supreme Court decisions or matters that are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). However, I am not aware of any such litigation to challenge or call into question the core holding in *Brown*, and in any event, I have previously indicated in public presentations my belief that *Brown* corrected the error of *Plessy*.

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

[13] 347 U.S. 483 (1954).
[14] 163 U.S. 537 (1896).

Please see my response to Question 11.

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

No.

14. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[15] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. The Code of Conduct for United States Judges sets recusal standards, along with statutory guidance such as 28 U.S.C. § 455 and other applicable rules. The independence of the federal judiciary is likewise a core feature of our constitutional design. Article III of the Constitution sets forth certain protections designed to enable judges to make decisions that are grounded in law, without respect to criticisms in public debates and commentary. As a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

15. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[16] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Zadvydas*. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

Questions for the Record from Senator Kamala D. Harris
Submitted June 12, 2019
For the Nomination of
Charles R. Eskridge, to the U.S. District Court for the Southern District of Texas

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?**

    I fully appreciate the magnitude and seriousness of the sentencing process, along with the care and attention it requires. I would fully and faithfully follow the law and my judicial oath in carrying out this responsibility.

    If confirmed, I would devote careful thought to every sentencing proceeding, working to ensure that the sentence imposed is "sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing set forth by Congress. *See* 18 U.S.C. § 3553(a). To meet that goal, I anticipate that I would consult the indictment, the governing statutes, and applicable precedent. I would also carefully review the presentence report of the probation officer pursuant to 18 U.S.C. § 3552, along with the advisory Sentencing Guidelines and other factors set forth in § 3553(a). I anticipate that I would also consider the arguments and objections of the parties, as well as any statements from the defendant, victims, and witnesses.

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

    Please see my answer to Question 1(a) above.

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

    Supreme Court precedent and the advisory Sentencing Guidelines explain the circumstances and considerations that can justify a departure or variance from the Guidelines. Part K of Section 5 of the Guidelines lists specific circumstances that can justify a departure from the advisory Guidelines range. Under Supreme Court precedent, the factors listed in 18 U.S.C. § 3553(a) may also call for varying from the advisory Guidelines range. In addition, the Supreme Court and the Fifth Circuit have provided guidance to district courts regarding circumstances as to when it is appropriate to depart or vary from the advisory sentencing range. If confirmed, I would fully and faithfully follow all applicable law and precedent when considering departures from the Sentencing Guidelines.

    d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum

sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

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

I am not familiar with Judge Reeves's work. I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration and debate by Congress. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C). If confirmed, I would fully and faithfully apply federal sentencing laws as determined by Congress and as required by Supreme Court and Fifth Circuit precedent.

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

Please see my answer to Question 1(d)(i) above.

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

Please see my answer to Question 1(d)(i) above.

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

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

I am unfamiliar with Judge Gleeson's work. I am aware that mandatory minimum sentences have generated significant controversy and debate. I am also aware of other debate regarding judges using judicial opinions to publicize their disagreement with a law, as opposed to other channels. If I am confirmed, I would evaluate each case individually and would carefully consider the law and my ethical obligations if confronted with the circumstances hypothesized in this question, consistent with my

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," 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

duty to apply federal sentencing laws as determined by Congress and as required by Supreme Court and Fifth Circuit precedent.

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

   The separation of powers among the coordinate branches of federal government places charging policies and decisions exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework. However, if I am aware of ethical violations by prosecutors, I would not hesitate to consider and take appropriate action consistent with my oath of office.

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

   The separation of powers among the coordinate branches of federal government places the clemency power exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework.

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

   Yes.

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

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

      Yes.

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

      I believe that racial bias continues to affect our country in many ways. Ours is a nation committed to the equality of all people without regard to race, and as such, racial bias should play no role in our criminal justice system. I have not otherwise studied this issue closely enough to form an opinion on this question. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

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 have been fortunate in nearly twenty-five years of private practice to work at two respected law firms that take seriously the commitment to diversity and equal opportunity in hiring. At times, I have served on my firms' recruiting and/or diversity committees, and have observed that the firms' diversity and equal opportunity policies were implemented in practice. If confirmed, I would do the same in chambers. I will encourage qualified candidates from all backgrounds, including qualified minorities and women, to apply for a position in my chambers. I will give serious and equal consideration to every individual who applies.