**Nomination of Judge Neil M. Gorsuch to be Associate Justice of the United States Supreme Court**
**Questions for the Record**
**Submitted March 24, 2017**

## QUESTIONS FROM SENATOR COONS

1. Several recent Supreme Court cases have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record as well as relevant U.S. case law and practices in cases addressing capital punishment under the Eighth Amendment and privacy of same-sex intimacy under the Fourteenth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Is it your contention that foreign court decisions and foreign practices of democratic countries that follow the rule of law cannot be considered and cited in opinions interpreting the Constitution?

**RESPONSE**: As we discussed at the hearing, it is not categorically improper to cite international law in judicial opinions and there are circumstances when it is necessary and proper to do so. At the hearing we discussed some but by no means all examples, such as when a judge may need to interpret a contract with a choice-of-law provision that may adopt a foreign law or when a treaty, by its terms, requires a judge to look at international law.

2. From documents obtained during your tenure at the Department of Justice, it appears that you were directly involved in work leading to the enactment of the Detainee Treatment Act of 2005 on behalf of the administration, as well as in discussions about whether President Bush should append a signing statement to the bill and what the statement should say.
    a. If a case concerning this act and/or President Bush's signing statement came before the Supreme Court, would you recuse yourself from hearing the case?
    b. What standard or standards would you consult when making this determination?

**RESPONSE**: As I stated in my Senate Judiciary Committee Questionnaire, if confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest. I would apply the same standards in determining whether I should recuse from any case, including a case concerning the Detainee Treatment Act or President Bush's signing statement accompanying the Act.

3. In one document released to the Senate Judiciary Committee, you wrote by hand "Yes" next to a typed question asking, "Have the aggressive interrogation techniques used by the Admin yielded any valuable intelligence? Have they ever stopped a terrorist incident? Examples?"
    a. When you wrote this note, what did you understand to constitute "aggressive interrogation techniques"?

b. During your tenure at the Department of Justice, what actions, if any, did you take to defend the use of "aggressive interrogation techniques"?
c. Do you believe that "aggressive interrogation techniques" work to yield valuable intelligence?
d. Is it legal for U.S. officials to torture individuals?
e. Is it legal for the President to authorize the use of torture based on a claim of national security?
f. Would the President's authorization of the use of torture be within the scope of judicial review?

**RESPONSE:** I do not currently recall the specific context of the document you reference in your question. As I said at the hearing, my recollection of events from approximately 12 years ago is that the handwritten answer on the document reflected the position that clients had represented to lawyers at the Department of Justice. As we discussed at the hearing, torture, as well as cruel, inhuman, and degrading treatment, is expressly prohibited by law, and no person is above the law.

4. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures. In your hearing you said, "I have no problem living under the rules I've lived under. I'm quite comfortable with them. And I've had no problem reporting every year to the best of my abilities everything I can. So I can tell you that. It doesn't bother me what I've had to do. I consider it part of the price of service and it's a reasonable and fair one."
    a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?
    b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?
    c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

**RESPONSE:** As I said at the hearing in response to Senator Klobuchar, if confirmed I would commit to give a careful consideration to the practice of the Supreme Court on these questions, and I would want to hear what my colleagues have to say. In addition, as I stated in my Senate Judiciary Committee Questionnaire, if confirmed I would seek to follow the letter and spirit of the Code of Conduct for United States Judges (even though it is not binding upon Justices of the Supreme Court), the Ethics Reform Act of 1989, 28 U.S.C. § 455, the Ethics in Government Act of 1978, and other relevant guidelines. Among other things, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Tenth Circuit and other cases that might give rise to an actual or apparent conflict of interest.

5. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. You have written about the importance of access to justice, effective representation of capital defendants, and the challenges that many parties face in obtaining affordable representation. Please describe every pro bono matter you worked

on during your time in private practice.

**RESPONSE**: While in private practice, my colleagues and I took on various matters for clients that could not afford the firm's normal hourly rate. In these cases, the firm's fees were modified, were made subject to contingency arrangements, or were waived to allow the client to obtain legal representation. As a judge, I have sought to advance these same interests, including my work on the rules committees, and on our circuit's efforts to enhance representation for death row inmates. Please see also the response to Question 20 of Senator Hirono's questions for the record.

6. Prior to the commencement of your nomination hearing, the Committee received two letters from former students that concern me. In these letters, the students describe their recollection of one session of your Spring 2016 legal ethics class. These letters assert that, following a lively class discussion about work-family balance and the difficulties of law school debt for students of all genders, you asked students about their personal knowledge of women using maternity benefits provided by a law firm and then leaving the law firm shortly thereafter. These letters assert that you told the class that law firms and other companies should ask female interviewees about pregnancy plans in order to protect the employer from financial loss, and that it is legal for companies to do so. Title VII protects against discrimination on the basis of pregnancy, childbirth, and sex, and asking a candidate for employment about her plans to become pregnant or have a family can be used as evidence in a discrimination case.
    a. Please recount everything you recall concerning the conversation you had with your Spring 2016 legal ethics class on April 19, 2016.

**RESPONSE:** I respectfully refer you to my discussion with Senator Durbin at the hearing on this subject.

    b. Do you think it is ever acceptable for a professor or a judge to suggest that employers should ask about family planning in a job interview?

**RESPONSE**: I have not done so and respectfully refer you to my discussion with Senator Durbin at the hearing on this subject.

7. You have used descriptions of substantive due process that include "very much uncharted," "more than a little 'open ended,'" "murky," and something with a "paradoxical name." Given the complexity of this area of law, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
    a. Would you consider whether the right is expressly enumerated in the Constitution?
    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?
    c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?
    d. Would you consider whether a similar right has previously been recognized by

Supreme Court or circuit precedent?

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*).
f. What other factors would you consider?

**RESPONSE**: As discussed at the hearing, some of the descriptions of the doctrine you cite at the outset of your question come from Supreme Court cases. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended"); *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Respectfully, the questions posed here may come before me as a judge. Accordingly, I can promise no more than that I will endeavor to follow the law as faithfully as I am able. To offer more would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

8. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has exclusive jurisdiction over appeals from civil actions involving claims "arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. Because you have been at the Court of Appeals for the Tenth Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to appear before you. What specific patent law experience (such as in private practice, other governmental service, or as an inventor/entrepreneur) would you bring to bear when considering these cases?

**RESPONSE**: During my service as Principal Deputy Associate Attorney General at the Department of Justice, I had a supervisory role over litigating components that were involved in various kinds of intellectual property litigation. As a judge, I have participated in intellectual property cases, though of course not patent cases which, as you note, proceed to another circuit.

9. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. "Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to 'provide nationwide uniformity in patent law.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97–312, p. 20 (1981)).
    a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?
    b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?
    c. Resolving circuit splits is often viewed as one of the Supreme Court's core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is

the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

**RESPONSE**: Pursuant to Rule 10 of the Supreme Court Rules, a writ of *certiorari* is granted for "compelling reasons." Some factors that might indicate whether further review is warranted of a decision of the Federal Circuit include tension with Supreme Court decisions, the presence of intra-circuit conflicts, and the importance of the case.

10. During your nomination hearing, you spoke frequently about the "reliance interest" that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?

**RESPONSE**: As we discussed at the hearing extensively, when evaluating precedent a judge must analyze multiple factors, and reliance often may be an important one. On this score, I also respectfully refer you to the book I coauthored, the *Law of Judicial Precedent*.

11. During your nomination hearing, we had an exchange about your concurrence in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). I raised my concern that your characterization of the role of "complicity" in the context of determining whether a person is entitled to object to a facially neutral law under the Religious Freedom Restoration Act ("RFRA") could be expanded to allow the religious views of a few to impact the liberty interests of many, since it allows for religious objections based on the actions and choices of others. Following up on our exchange, please answer the following questions:
    a. Does the characterization of "complicity" in this question comport with what you meant when you used that term in your *Hobby Lobby* concurrence?

**RESPONSE**: Respectfully, I used that term when describing the claimant's assertion of a sincerely held religious belief, a statutorily prescribed consideration under the Religious Freedom Restoration Act (RFRA). As we discussed at the hearing, the same concept was discussed in *Thomas v. Review Bd. Of the Indiana Employment Security Division*, 450 U.S. 707 (1981), where a Jehovah's Witness sincerely believed that directly participating in the production of armaments made him complicit in their use in a way that violated his sincerely held religious belief. Of course, whether a law substantially burdens a sincerely held religious belief is only the first part of the RFRA analysis. There is also a second part: If a law substantially burdens such a belief, the government may show that the denial of an accommodation is the least restrictive means of furthering a compelling government interest.

    b. Can any level of support that an individual finds to be objectionable constitute complicity?

**RESPONSE**: Respectfully, whether a particular individual can show a substantial burden on a sincerely held religious belief under the Religious Freedom Restoration Act depends on the particular facts of each case.

c. Can a court ever inquire into how remote this support is to determine whether a RFRA claim based on "complicity" exists, even if the claim is based on a sincerely held religious belief that the legally mandated conduct requires "complicity . . . in the wrongdoing of others"?

**RESPONSE**: Please see the response to Question 11(b).

12. You wrote that judges should "strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be . . . ." You told Sen. Feinstein that it does not matter that "some of the drafters of the Fourteenth Amendment were racists, because they were, or sexist, because they were. The law they drafted promises equal protection of the laws to all persons. . . . And equal protection of laws does not mean separate in advancing one particular race or gender. It means equal."

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

**RESPONSE**: As I have stated during my testimony, *Brown v. Board of Education* overturned the deeply erroneous decision of *Plessy v. Ferguson.* It took many years—almost 60 years—for the Supreme Court to recognize that Justice Harlan in his dissent in *Plessy* got the original meaning of the Equal Protection Clause right the first time. It is one of the great stains on the Supreme Court's history that it took so long to get to the *Brown* decision.

b. How do you respond to the criticism of your approach 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-pages/democratic-constitutionalism (last visited Mar. 24, 2017).

**RESPONSE**: Respectfully, I am not familiar with this article.

c. How does your approach to judicial interpretation lead you to conclude that "equal" applies to equality across race *and gender*, even though the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction?

**RESPONSE**: As I discussed with Senator Feinstein at the hearing, the Fourteenth Amendment as drafted promises equal protection of the laws to all persons. The original meaning of those words, as captured by Justice Harlan in his dissent in *Plessy v. Ferguson*, is that equal protection of laws means just that—equal.

d. If the Fourteenth Amendment has always required equal treatment of men and women, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515, that states were required to provide the same educational opportunities to men and women?

**RESPONSE**: Whatever the reason, as I stated above the Fourteenth Amendment means equal protection of the law for all persons.

e. Does the Fourteenth Amendment require that states treat gay and lesbian couples equally to heterosexual couples? Why or why not?

**RESPONSE**: In *Lawrence v. Texas* and *Obergefell v. Hodges*, the Supreme Court held that gay and lesbian couples have a constitutionally protected right to engage in consensual sexual relations and to marry.

f. Does the Fourteenth Amendment require that states treat transgender people equally? Why or why not?

**RESPONSE**: This question appears to reference pending or impending cases likely to come before the Supreme Court, and accordingly it would not be proper for me to comment further. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

13. Chief Justice Warren wrote that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This approach explicitly calls on the Court to not limit its Eighth Amendment analysis to the meaning of "cruel and unusual punishments" when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Under this evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.
    a. Under your judicial approach described above, what is meant by the Eighth Amendment's prohibition against "cruel and unusual punishments"?
    b. Does the phrase "cruel and unusual punishments" have the same meaning from the Eighth Amendment's ratification in 1791 until now, or has our understanding changed?
    c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes "cruel and unusual punishments"?

**RESPONSE**: The Supreme Court has issued several opinions discussing the Eighth Amendment and how it should be interpreted. Recently in *Miller v. Alabama*, 132 S. Ct. 2455

(2012), the Court has reaffirmed the view that the Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Id.* at 2463 (citation and quotation marks omitted). That right, the Supreme Court has instructed, "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id.* The Supreme Court also has stated that it views the concept of proportionality according to "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (plurality opinion)).

14. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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 about the purported negative impact of such marriages on children.
    a. When is it appropriate to consider evidence that sheds light about our changing understanding of society?

    b. What is the role of sociology, scientific evidence, and data in the Supreme Court's analysis?

**RESPONSE**: Whether and what sociology, scientific evidence, and data a court should consider are questions that are often contested in litigation. I am unaware of a global answer to these questions. A judge can only take each case on its facts and in light of applicable law.

15. In *Prost v. Anderson*, 636 F.3d 579 (10th Cir. 2011), you authored a majority opinion holding that federal prisoners whose convictions have been undermined by a later Supreme Court decision construing the statute under which they were convicted may not invoke the "savings clause" of 28 U.S.C. § 2255(e) unless there are exceptional circumstances like the abolition of their sentencing court. Does your decision create a situation in which an actually innocent person could be in prison without any claim to habeas relief?

**RESPONSE**: In *Prost v. Anderson*, the Tenth Circuit sought to apply faithfully Congress's directions in 28 U.S.C. § 2255.

16. In *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009), you dissented from a majority opinion holding that a defendant who had ineffective assistance of counsel was entitled to a more meaningful remedy than the one provided under state law. You wrote, "The Sixth Amendment right to effective assistance of counsel is an instrumental right designed to ensure a fair trial. By his own admission, [the defendant] received just such a trial, at the end of which he was convicted of first degree murder by a jury of his peers. We have no authority to disturb this outcome." *Id.* You said the defendant

> "would have us follow him through the looking glass, to a world where a fair trial is called 'prejudice'; where the results of a fair trial are void because of a lost opportunity rather than an infringed legal entitlement; and where a lawyer's incompetence transforms the executive plea bargain prerogative into a judicially enforceable entitlement. I do not believe the Sixth Amendment permits us to accompany him there." 571 F.3d at 1110. If your dissent had been the majority opinion, would it be the case that any defendant receiving inadequate assistance of counsel on a plea agreement who subsequently has a "fair" trial would not have a remedy for the ineffective assistance of counsel claim?

**RESPONSE:** In *Williams v. Jones*, I suggested that a defendant cannot demonstrate prejudice from a claim of ineffective assistance of counsel in the pretrial plea bargaining process if he is later convicted after a trial he concedes was fair. The Supreme Court in *Lafler v. Cooper* and *Missouri v. Frye* later addressed this question, and these decisions are the controlling precedent.