Nomination of Kevin Newsom to the U.S. Court of Appeals for the Eleventh Circuit
Questions for the Record
Submitted June 21, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2009, you filed a Supreme Court amicus brief in *Caperton v. A.T. Massey Coal Co*. That case was about whether a state supreme court justice—who had received over $3 million in campaign contributions from the CEO of a coal company—was obligated to recuse himself when the coal company sought to overturn a jury verdict on appeal. You argued that the Due Process Clause did not require the justice to recuse himself. You also argued that a rule which mandated recusal in cases with such an obvious conflict of interest would nevertheless be "hopelessly inadministrable."

    a. Do you still believe it is proper for a judge to hear a case in which one party has made large contributions to that judge's campaign?

As with any brief I have filed as an attorney, the arguments made in the *Caperton* brief reflected the views of my client—the State of Alabama—and the other states who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). In any event, the sole point that the states' brief sought to make was that, in the main, the question whether and in what circumstances it is proper for a state-court judge to recuse should be left to state legislatures and bar committees. Of course, the Supreme Court's decision in *Caperton* is binding precedent, and if I am fortunate enough to be confirmed, I will apply it faithfully and to the best of my ability.

    b. How would you handle recusal issues if you are confirmed? Should we be concerned that you will find recusal standards for federal judges "hopelessly inadministrable"?

If confirmed, I will carefully study and apply 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing recusal determinations. I am not concerned that the standards articulated in those sources—and expounded in advisory opinions—will be difficult to administer.

    c. In your amicus brief, you argued that if the Supreme Court held that there was, in fact, a Due Process Clause violation, "*Caperton* motions [for judicial recusal based on due process] would fly fast and furious. And given the right's unwieldiness, resolution of those motions would gum up the state litigation process by requiring judges (1) to allow discovery into the pertinent considerations, (2) to slog through laundry lists of case-dependent factors, and, in all likelihood, (3) to refer their recusal decisions to their colleagues for independent review." Since *Caperton* was decided, have you filed a *Caperton* motion in any case you have litigated?

To my recollection, no.

d. How many times has a *Caperton* motion been filed by another attorney in a case you were litigating?

To my knowledge, none. Happily, so far as I am aware, the brief's prediction that the decision could lead to numerous recusal motions seems to have been incorrect.

2. In 2004, when you were Solicitor General of Alabama, you filed a Supreme Court brief on behalf of several states in *Rasul v. Bush*, and argued that U.S. courts did not have jurisdiction to hear challenges to the detention of foreign nationals held at Guantanamo Bay. You argued that because the President has "plenary" powers as Commander in Chief and because Congress has the power to declare war, the courts should "hesitate before second-guessing [those Branches'] military decisions, even indirectly." The Supreme Court disagreed in a 6-3 decision.

a. Do you still believe that courts should not second guess the President when he is making "military decisions"?

As with any brief I have filed as an attorney, the arguments made in the *Rasul* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). Moreover, although my name (along with the name of the Acting Attorney General) was on the signature block of the brief filed in the *Rasul* case, I was not counsel of record, and while I am certain that I reviewed the brief, I do not recall playing an active role in its drafting.

I have not had occasion to study the post-*Rasul* precedent carefully, and I am reluctant to express any views on that subject because a similar issue might come before me as a judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such a case were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. Do you believe an executive order precluding the entry of individuals from certain countries would qualify as a "military decision," and therefore not be reviewable by U.S. Courts?

Please see the response to No. 2(a) above.

c. How did you decide which amicus briefs to join or lead as Solicitor General of Alabama?

Decisions about filing or joining multi-state amicus briefs were ultimately the Attorney General's to make. But as a general matter, in making recommendations to the Attorney General, I sought to identify cases in which the State of Alabama's institutional interests (typically as a litigant or prospective litigant) were implicated and might not otherwise be fully

protected by the briefs of the principal parties to the case. To my recollection, the briefs that the State of Alabama filed or joined during my tenure were almost always joined by other states—the great majority by attorneys general from both sides of the aisle.

d. Why did you believe it made sense for your state to weigh in with the Court about *Rasul*?

Please see the response to No. 2(a) above.

3. You opposed the Supreme Court's 2005 decision in *Roper v. Simmons* that held it is unconstitutionally cruel and unusual to execute juveniles. You authored an amicus brief in the Supreme Court case on behalf of Alabama and other states defending capital punishment for minors under the age of 18. After the ruling, NPR reported on *All Things Considered* that you "regret[ted]" the Court's decision, and quoted you saying that, "there's no real magic in the number 18. Some of the court's reasoning would apply equally to 19-year-olds and some 25-year-olds, that at the same time won't apply to some 17-year-olds, you know, on the other side."

a. Why did you "regret" the decision in *Roper*? Do you regret it today?

As with any brief I have filed as an attorney, the arguments made in the *Roper* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). Moreover, it appears that the word "regret" is NPR's. In any event, *Roper* is binding precedent that I (if I am fortunate enough to be confirmed) will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

b. Was Alabama harmed by the *Roper* decision?

The State of Alabama was "harmed" by *Roper* only in the sense that the decision set aside the Legislature's determination that capital punishment may, in certain circumstances, be appropriate for 16- and 17-year-old offenders. I recognize, of course, that legislative determinations must give way when inconsistent with the Constitution, as the Supreme Court held was the case in *Roper*.

4. At your hearing, I asked you about a law review article you authored in 2000 criticizing the doctrine of substantive due process. You wrote that the doctrine is "at loggerheads with the intentions of those who framed the [Fourteenth] Amendment."

   You further criticized the Supreme Court's use of substantive due process to "ground[] protection for a substantive right in what is, by all accounts, a purely procedural provision" and cautioned that "courts invoking substantive due process… would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*."

a. Do you still believe the Due Process Clause should operate as a "purely procedural provision?"

The Supreme Court has held that the Due Process Clause contains a substantive component. The Supreme Court's decisions in that respect are binding on lower courts, and if I am fortunate enough to be confirmed, I will apply the Supreme Court's decisions so holding faithfully and to the best of my ability.

b. If confirmed as a judge, would you have any problem applying and upholding Supreme Court precedents grounded in substantive due process?

No.

c. If you are confirmed, and you have a substantive due process case before you, how will you follow your own advice to "remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*?"

If I am fortunate enough to be confirmed, I will apply the Supreme Court's substantive due process precedents faithfully and to the best of my ability.

d. Do you believe the Constitution should be interpreted based on the Framer's intent?

The Supreme Court has made clear that text and history play prominent roles in the interpretation of the Constitution. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Souter, J.). Should I be fortunate enough to be confirmed, I will apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

5. Your article concludes "I leave for another day the question whether the Court's privacy decisions (including, most infamously, *Roe v. Wade* … and its progeny) might find support in a resurrected Privileges or Immunities Clause."

a. What did you mean that *Roe* was the "most infamous" decision in the Court's privacy rights jurisprudence?

Roe is perhaps the most well-known decision in the Supreme Court's privacy rights jurisprudence, and it has been the subject of much controversy. Of course, as a precedent of the Supreme Court, *Roe* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

b. Do you believe that a resurrected Privileges or Immunities Clause would support the right to privacy as extended under *Roe v. Wade*? How do you understand an originalist reading of the Constitution to support this right?

As the article explains, I have not had occasion to consider that question. But again, *Roe* is precedent that (if I am fortunate enough to be confirmed) I will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

c. In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right? Would a resurrected Privileges or Immunities Clause support this right?**

I have not had occasion to consider that question. *Obergefell* is precedent that (if I am fortunate enough to be confirmed) I will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

d. In *Loving v. Virginia* (1967), the Supreme Court upheld a constitutional right to marry persons of a different race. **How do you understand an originalist reading of the Constitution to support this right? Would a resurrected Privileges or Immunities Clause support this right?**

I have not had occasion to consider that question. *Loving* is precedent that (if I am fortunate enough to be confirmed) I will be bound to apply as an Eleventh Circuit judge, which I will do faithfully and to the best of my ability.

6. The Eleventh Circuit vacancy to which you are nominated has been vacant for almost four years. After years of trying unsuccessfully to negotiate with then-Senator Sessions and Senator Shelby on a compromise nominee, President Obama finally nominated Abdul Kallon, a federal judge in the Northern District of Alabama, in 2016. Judge Kallon would have been the first African-American judge to sit on the Eleventh Circuit from Alabama. Both Senators Shelby and Sessions supported Judge Kallon's nomination to the Northern District of Alabama. Nonetheless, they refused to return their blue slips on Judge Kallon's nomination to the Eleventh Circuit.

   a. Do you know, or have you ever appeared before Judge Kallon?

Yes. Judge Kallon—Abdul, as I have always known him—is a former law partner of mine. To my recollection, I have never appeared before Judge Kallon in court.

   b. Do you have any reason to doubt that he would have been extremely well qualified and able to serve as a circuit court judge?

I do not know the specific circumstances surrounding Judge Kallon's nomination or its consideration by this Committee, and I cannot comment on any political questions surrounding that nomination or consideration. I can say, however, that when word began to circulate in Birmingham that I might be considered for this nomination, Judge Kallon reached out to offer his congratulations. I appreciated that very much.

7. On your Senate Questionnaire, you indicate that you have a member of the Federalist Society since 1999, and the President of the Birmingham Lawyers Chapter of the Federalist Society from 2012 to 2015. 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 had no role in authoring that statement, and I do not know precisely what the Federalist Society means by it.

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

I had no role in authoring that statement, and I do not know precisely what the Federalist Society means by it.

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

I had no role in authoring that statement, and I do not know precisely what the Federalist Society means by it.

8. 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?

I cannot envision any circumstance in which it would be appropriate for a lower court to depart from governing Supreme Court precedent. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (explaining that lower courts should "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions").

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

Lower-court judges—like the courts on which they sit—are bound to apply Supreme Court precedent, and if I am fortunate enough to be confirmed, I will do so faithfully and to the best of my ability. I can envision circumstances in which it might be appropriate for a circuit-court judge to question the advisability of a Supreme Court precedent in a separate writing. *See, e.g.*, *Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir. 2005) (Sutton, J., concurring) (criticizing mandatory two-step "order of battle" for deciding qualified-immunity cases); *compare Pearson v. Callahan*, 555 U.S. 223, 236-43 (2009) (overruling earlier decisions that had made two-step procedure mandatory). But if a Supreme Court decision is on point, a lower-court judge must follow it.

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

Under the Eleventh Circuit's "prior-panel-precedent rule," a "prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by [the Eleventh Circuit] sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). I would be bound to follow that rule if I am fortunate enough to be confirmed to the Eleventh Circuit, which I would do faithfully and to the best of my ability.

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

If I am fortunate enough to be confirmed as a circuit-court judge, I will not be in a position to opine on the circumstances in which the Supreme Court should overturn its own precedent.

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

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

As already explained, *Roe* is a precedent of the Supreme Court, which I will be bound to apply faithfully and to the best of my ability if I am fortunate enough to be confirmed. For judges on lower courts, it really does not matter whether a decision of the Supreme Court is labeled "super-stare decisis," "super-precedent," or just (plain old) "precedent"—all such decisions are binding.

b. Is it settled law?

Please see the response to No. 9(a) above.

10. 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 I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role as a circuit-court judge, should I be fortunate enough to be confirmed. *Heller* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

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

Although I have not had occasion to consider *Heller* in detail, the Supreme Court stated that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

Again, I have not had occasion to consider *Heller* in detail. *Heller* is Supreme Court precedent, which, if fortunate enough to be confirmed as a circuit-court judge, I will be bound to apply faithfully and to the best of my ability.

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

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

As I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role as a circuit-court judge, should I be fortunate enough to be confirmed. *Citizens United* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

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

Please see the response to No. 11(a) above.

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

Please see the response to No. 11(a) above.

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

I received the questions in the evening on Wednesday, June 21, 2017. I reviewed the questions, drafted answers, and (where necessary) conducted research. I shared the answers with the Office of Legal Policy at the Department of Justice. After conferring with lawyers there, I made revisions and authorized them to submit the responses on my behalf.

Senator Richard Blumenthal
June 21, 2017
Questions for the Record for Kevin Christopher Newsom

1. As Alabama Solicitor General, one of your job responsibilities was to defend the state's death penalty cases and practices. Alabama has been criticized because it does not give inmates facing the death penalty the right to counsel post-conviction. In 2007, you defended that practice, telling ABC News: "The idea that inmates are en masse unrepresented, and wandering through the system alone, is just not true."

    - Based on your experience as the former solicitor general and private attorney, do you believe the state should leave death penalty defense work to nonprofit organizations?

As you note, I made the comment quoted above in my official capacity as Alabama's Solicitor General, defending the state in a class-action lawsuit. The narrow legal question presented in that case was whether the inmate plaintiffs had a federal constitutional right to state-funded counsel at the post-conviction phase of litigation. The Eleventh Circuit unanimously agreed with Alabama that existing Supreme Court and circuit precedent squarely foreclosed the inmates' claim. *See Barbour v. Haley*, 471 F.3d 1222, 1227-30 (11th Cir. 2006) (citing, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality op.), *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Arthur v. Allen*, 452 F.3d 1234, 1249 (11th Cir. 2006).

The question whether states should leave death-penalty defense work to nonprofit organizations is a political question on which I cannot opine. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

    - The application of capital punishment has been criticized as racially biased and unfair to those with mental disabilities. Do you believe that the criminal justice system would be fairer if all people facing the death penalty were guaranteed access to counsel?

As with the question immediately preceeding this one, this is a political question on which I cannot opine. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

Nomination of Kevin Christopher Newsom to be
United States Circuit Judge for the Eleventh Circuit
Questions for the Record
Submitted June 21, 2017

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?

On the merits, I would faithfully apply the considerations and factors that the Supreme Court and Eleventh Circuit have outlined for determining whether an asserted right is fundamental and thus protected under the Fourteenth Amendment. As a matter of process, I would carefully review the briefs submitted for the court's consideration (including amicus briefs, if any), as well as the underlying precedents, and then engage in a dialogue with my law clerks and court colleagues to determine the correct answer.

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

Please see my response to No. 1 above.

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?

Please see my response to No. 1 above.

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?

Please see my response to No. 1 above.

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

Please see my response to No. 1 above.

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*).

Please see my response to No. 1 above.

f. What other factors would you consider?

Please see my response to No. 1 above.

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

I have never personally assessed whether Brown is consistent with originalism, although I understand that others have done so and have concluded that it is. See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995).

    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-pages/democratic-constitutionalism (last visited June 21, 2017).

I have not studied this issue, but I have never understood the chief proponents of originalism to assert that all constitutional terms are necessarily "precise or self-defining"—only that the original meaning of those phrases, if capable of being discerned, should play a prominent role in their interpretation. In any event, the debate over methods of constitutional interpretation, while interesting, would have little relationship to my role as a circuit-court judge, if I am fortunate enough to be confirmed. As a member of a lower court, my chief role would be to apply existing Supreme Court and Eleventh Circuit precedent, which I would do faithfully and to the best of my ability.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment's promise of "equal protection" guarantees equality across race and gender, or does it only require racial equality?

The Supreme Court has long (and repeatedly) held that the Fourteenth Amendment applies beyond racial classifications. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 3584 (2015) (same-sex couples); *United States v. Virginia*, 518 U.S. 515 (1996) (gender); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). Because the scope

of the Fourteenth Amendment's application to particular groups is currently the subject of active litigation, I must refrain from commenting further. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Should such a case come before me, I will (if fortunate enough to be confirmed) carefully review the briefs and the applicable precedent to determine the proper outcome.

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

Please see my response to No. 3 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?

Please see my response to No. 3 above.

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

Please see my response to No. 3 above.

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

Please see my response to No. 3 above.

4. During your hearing, you testified regarding substantive due process, which includes a right to privacy.

The Supreme Court has held that the Constitution protects the specific rights mentioned in the subparts of this question. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Court's decisions on those issues—as on all others—will be binding on me as a circuit-court judge, should I be fortunate enough to be confirmed.

a. Do you agree that the right to privacy protects a woman's right to use contraceptives?

Please see my response to No. 4 above.

b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?

Please see my response to No. 4 above.

c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?

Please see my response to No. 4 above.

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

Please see my response to No. 4 above.

5. 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 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?

I would assume that all judges (and nominees) would agree that the Constitution must be applied to changing societal circumstances and that it is appropriate to consider evidence relevant to such circumstances, consistent with the ordinary rules pertaining to the admission and consideration of evidence. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001) (Scalia, J.) (holding that a thermal-imaging scan constituted a "search" under the Fourth Amendment).

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

I have not had occasion to consider the specific questions whether and under what circumstances sociological, scientific, and empirical evidence should inform an appellate court's decisionmaking process. If that question arose, I would carefully review—and faithfully apply—Supreme Court and Eleventh Circuit precedent on those topics.

6. At your Senate Judiciary Committee hearing, Senator Kennedy asked whether, under the rational basis test, Congress needs to put forth "any reason whatsoever" for passing a law, or a "good reason." You responded that "any conceivable basis, even if not the articulated basis" is sufficient to justify a law under the rational basis test.
    a. What evidence would you rely on to determine if a basis is "conceivable"?

The understanding of the rational-basis test that I expressed at the hearing was based on Supreme Court precedent. *See, e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) ("On rational-basis review, a classification in a statute … comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." (citations omitted)). Given the frequency with which the rational-basis test is invoked in federal courts, and because cases arising under the test are likely to come before me as a judge if I am fortunate enough to be confirmed, I should not comment further. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). Should a case come before me requiring me to apply rational-basis review, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

    b. How would you identify Congress's reason for passing a law? For example, would you review legislative history, contemporaneous statements of individual legislators, or other extrinsic evidence in determining Congress's reason for passing a law?

Please see the response to No. 6a above.

    c. How would you identify the president's reason for signing a law or executive order?

Please see the response to No. 6a above.

    d. How would you ensure that a reason put forth by Congress or the president is not pretextual?

Please see the response to No. 6a above.

Senator Dick Durbin
Written Questions for John Bush, Kevin Newsom, and Damien Schiff
June 21, 2017

For questions with subparts, please answer each subpart separately.

Questions for Kevin Newsom

1. You say you have been a member of the Federalist Society since 1999, and you served as President of the Birmingham Lawyers Chapter from 2012-2015 and have served on the Society's Federalism and Separation of Powers Practice Group Executive Committee since 2007. **Why did you join the Federalist Society?**

I like ideas, and the free exchange of ideas. At its core, the Federalist Society is an open-debate society. To that end, the Federalist Society puts on high-quality programming that addresses interesting topics from a range of viewpoints. I recently read in an alumni newsletter that Harvard Law School's outgoing Dean, Martha Minow, remarked that "No organization has had a more positive and constructive impact on the Harvard Law campus than the Federalist Society." (Her observation was reminiscent of now-Justice Kagan's reported remark, as HLS's Dean, "I love the Federalist Society.") Robust discussion about important legal issues is valuable, and in my experience, the Federalist Society plays a vital role in sustaining that discussion.

2. **Do you agree with the views espoused by the Federalist Society?**

As I sought to explain at my hearing, my personal opinions and views will not be relevant to my role as a circuit-court judge, should I be fortunate enough to be confirmed. I am not certain as to what you mean by "the views espoused by the Federalist Society," as it is my understanding that the Federalist Society does not take positions on particular legal issues. Research reveals that the Federalist Society's website states that, as a general matter, the group was "founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." I do not believe that those are controversial propositions.

3. **Do you believe that the views espoused by the Federalist Society views are compatible with your own views?**

Please see the response to No. 2 above.

4.

   a. **Do you believe it was appropriate for the President to announce the involvement of the Federalist Society in the selection of his candidates for the Supreme Court?**

This question calls for me to opine on a political question, which I cannot ethically do. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

b. Do you believe that the President's announcement sent a message that lawyers and judges should not assert views that are at odds with the Federalist Society if they aspire to serve on the Supreme Court?

Again, I am not certain as to what you mean by "views that are at odds with the Federalist Society," and I would refer you to my response to No. 2 above. In any event, as a lawyer, I have not felt any pressure to join the Federalist Society, but chose to do so out of an appreciation for its role in promoting open debate. And as a judge—if I am fortunate enough to be confirmed—my principal obligation will be to apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?

Please see the responses to Nos. 4(a) and 4(b) above. Thanks to the genius and foresight of the framers, the independence and integrity of the judiciary are preserved through the protections of Article III of the Constitution, which gives Article III judges life tenure without diminution in compensation.

5. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." **Do you agree or disagree with this statement? Please explain your answer.**

I had no role in authoring that statement, and I do not know precisely what the Federalist Society means by it.

6. **Please list all years in which you attended the Federalist Society's annual national convention.**

Although I do not recall specifically, I believe that I attended portions of the event on two occasions. The first time would likely have been in 2003, shortly after I was appointed to be Alabama's Solicitor General but before I moved from Washington, D.C. to Alabama. The second occasion, I believe, would have been in 2007—the year in which the Federalist Society celebrated its 25th anniversary. The likely reason for my sporadic attendance is as follows: During my time at Bradley Arant Boult Cummings LLP, I have been very involved in the American Bar Association's Council of Appellate Lawyers ("CAL"), which exists within the ABA's Appellate Judges Conference. Each year, CAL helps to stage the Appellate Judges Education Institute's CLE "Summit," which almost always conflicts with the Federalist Society's

national convention. I have attended the Summit on numerous occasions—in Washington, Dallas, New Orleans, San Diego, etc.

7. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

    a. Do you want outside groups or special interests to make undisclosed donations to front organizations in support of your nomination?

I am not aware of any such donations made in support of my nomination—or against it, for that matter. I certainly have not solicited any such donations, nor could I ethically do so. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

    b. Would you discourage donors from making such undisclosed donations?

Please see the response to No. 7(a) above.

    c. If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?

Please see the response to No. 7(a) above.

8. I believe it is important for judicial nominees to demonstrate that they will be independent of President Trump. One of the ways to demonstrate this independence is for nominees to answer honestly whether they believe in the President's most outrageous assertions.

    Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?

This question calls for me to opine on a political question, which I cannot ethically do. *See* Canon 5, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

9. **Please discuss the work you performed for the U.S. Chamber Litigation Center, which you say in your questionnaire that you were a member of from 2014 to the present. Will you recuse yourself from litigation matters in which the Chamber of Commerce or the U.S. Chamber Litigation Center is involved?**

I have participated on an "amicus committee," which advises the U.S. Chamber Litigation Center about whether to file amicus briefs—primarily in cases pending in state courts. If confirmed, I will recuse in any matter that comes before the Eleventh Circuit in which I expressed an opinion in my role as a member of the U.S. Chamber's state-litigation amicus committee. Beyond that, I will of course carefully study and apply 28 U.S.C. § 455, the Code of Conduct for United States Judges, and all other laws, rules, and practices governing recusal determinations.

10. In an article you wrote in 2000, you said "courts invoking substantive due process – the idea of grounding protection for a substantive right in what is, by all accounts, a purely procedural provision – would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*."

    How do you want this statement of yours to be interpreted?

Please see the response to Question No. 4 submitted by Senator Feinstein.

11. In 1886, the Supreme Court noted that the right to vote "is regarded as a fundamental political right, because [it is] preservative of all rights," a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

    a. Do you believe that the right to vote is fundamental?

The Supreme Court has repeatedly held that the right to vote is a fundamental right. *See, e.g.*, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).

    b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?

In reviewing any claim that the right to vote has been infringed, I will (should I be fortunate enough to be confirmed) faithfully apply Supreme Court and Eleventh Circuit precedent articulating the proper standard of review.

    c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?

If I am fortunate enough to be confirmed, I will faithfully apply any controlling precedent of the Supreme Court and Eleventh Circuit governing the timing of judicial review of laws concerning the right to vote.

12. **Do you believe that systemic racial discrimination still exists in America today?**

Racial discrimination undoubtedly still exists in America today.

13. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

    In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

    > The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

    Do you agree with Justice Sotomayor's statement, or are your views closer to Chief Justice Roberts' statement in *Parents Involved*?

As I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role (should I be fortunate enough to be confirmed) as a circuit-court judge. *Parents Involved* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

14. **Do you believe that courts should interpret the Constitution according to its original public meaning?**

The Supreme Court has made clear that text and history play prominent roles in the interpretation of the Constitution. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Souter, J.). Of course, as a circuit-court judge (should I be fortunate enough to be confirmed), I will be bound to, and will, apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

15. **Do you believe that the original public meaning of the Constitution evolves or changes over time?**

As I sought to explain at my hearing, my personal opinions and views will not be relevant to my role (should I be fortunate enough to be confirmed) as a circuit-court judge. In that role, I will be bound to, and will, apply Supreme Court and Eleventh Circuit precedent on the meaning of the Constitution faithfully and to the best of my ability.

16. **What is your understanding of the original meaning of the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution?**

My understanding is that the meaning of the Foreign Emoluments Clause is currently the subject of active litigation in federal court. Accordingly, under the canons, I cannot comment on the issue. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *cf. also* Canon 1,

Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

17. **Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?**

Please see the response to No. 16 above.

Senator Mazie K. Hirono

Questions for the Record following the hearing on May 14, 2017 entitled:
"Nominations"

Kevin C. Newsom

1. You wrote an article for the *Yale Law Journal* in 2000 which said that the doctrine of substantive due process, upon which the *Roe v. Wade* decision was based, is "much and rightly maligned," and that it connected *Roe* to *Dred Scott*, the case in which the Court determined that African- Americans could not be citizens of the United States.

    a. As a judge, what would be your approach to legal doctrines that you personally consider to be wrong?

My personal views or opinions about any particular case or legal doctrine will not be relevant to my job as a circuit-court judge, should I be fortunate enough to be confirmed. My role will be to apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

    b. *Dred Scott* is widely considered the worst decision every made by the Supreme Court, and its holding that African-Americans could never be citizens of the United States was rejected by Americans in the Civil War and in the Constitutional Amendments that followed. In contrast, the core holding of *Roe*, as reaffirmed in *Casey*, is the law of the land, and based on the Constitution's protections for making intimate and personal decisions. If confirmed, would you be able to apply this important legal precedent which your writings suggest you find on par with the worst decision in the Supreme Court's history?

Yes. The connection that the article drew between *Roe* and *Dred Scott* was purely methodological, a connection that commentators from across the ideological spectrum have drawn. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 7-6, at 1331 (2000) (noting the substantive due process doctrine's "inauspicious pedigree – which infamously includes both *Dred Scott* and *Lochner*").

2. In 1992, in *Planned Parenthood v. Casey*, the Supreme Court re-affirmed the core holding of *Roe* that the right to an abortion is constitutionally protected. The Court held that these decisions are protected because they are among "the most intimate and personal choices a person makes in a lifetime."

    a. Do you believe that the Constitution protects the right to make "intimate and personal" decisions"?

My personal views or opinions about any particular case or legal doctrine will not be relevant to my job as a circuit-court judge, should I be fortunate enough to be confirmed. My role will be to apply Supreme Court and Eleventh Circuit precedent faithfully and to the best of my ability.

b. Does the Constitution define what a "person" is? Has the Supreme Court ever ruled that the Fourteenth Amendment confers personhood on a fetus?

So far as I am aware, no.

3. In *Hobby Lobby*, the corporation made claims about contraception based on religious beliefs which are directly contravened by scientific research. Are there any limits—and what are the limits—on what a corporation may claim as a belief in justifying its denial of health care for its employees?

My understanding is that this question is the subject of active litigation in federal court. Accordingly, under the canons, I cannot comment on the issue. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

4. What is the appropriate level of scrutiny to apply to challenges on campaign contribution limits or bans?

My understanding is that the Supreme Court held in *Buckley v. Valeo* that restrictions on campaign contributions to political candidates are subject to a "rigorous standard of review." 424 U.S. 1, 29 (1976). It is also my understanding that the Court has distinguished between contribution limits, on the one hand, and expenditure limits, on the other—subjecting the latter to more heightened scrutiny than the former. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). If I am fortunate enough to be confirmed, I will follow Supreme Court and Eleventh Circuit precedent in this area—and all areas—faithfully and to the best of my ability.

5. When Congress reauthorized the key expiring provisions of the landmark Voting Rights Act in 2006, it did so with a nearly unanimous vote. Before reauthorizing the protections of Section 5 in jurisdictions with a long history of discrimination in voting, the Judiciary Committee alone held 9 hearings on the Voting Rights Act. The thousands of pages of material the Senate reviewed, together with the record developed in a dozen hearings in the House, clearly established the continuing need for Section 5. And yet, in *Shelby County*, the Court ignored this evidence and the Court's long precedent, made its own determination about the value of the extensive evidence reviewed by Congress.

a. Does the *Shelby County* decision raise concerns about the limits of judges as policy- makers and the problems that arise when a Court steps outside of the judicial role and acts as a legislative body?

As I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role as a circuit-court judge, should I be fortunate enough to be confirmed. *Shelby County* is binding on lower courts, and I will apply it (again, like all Supreme Court decisions) faithfully and to the best of my ability.

b. You were reported as having called the *Shelby County* decision the "standout win for conservatives" of that Supreme Court term. What did you mean by that?

I have frequently given "Supreme Court Review/Preview" talks to interested groups. Typically, in describing the Supreme Court's term, I begin by running through the statistics—how many total decisions the Court issued, how many of those were unanimous, how many were 5-4, who voted with whom most often, etc. To give the audience a "sense" of the term, I also highlight a few of the more high-profile decisions—especially those that were decided 5-4. So far as I recall, I always ask the audience's advance forgiveness for using terms like "conservative" and "liberal"—because, I tell them, that is not the way I view judging. For better or worse, though, lay audiences—by which I mean even audiences comprising lawyers who are not avid Court "watchers"—often think about Supreme Court decisions in "conservative" and "liberal" terms based on the voting alignment, and so I will often highlight notable decisions that, in the popular consciousness, might be deemed one or the other. Although I do not recall making the comment attributed to me, in reviewing the notes of that talk, it seems clear to me that I was simply remarking that (1) the *Windsor* decision, which invalidated the Defense of Marriage Act, could be counted as a "liberal" win and (2) that *Shelby County* could be counted a "conservative" win.

6. The Supreme Court's decision in *Korematsu* has never been overturned, but has joined the short list of the most regrettable decisions in the Court's history.

a. Does *Korematsu* hold any precedential value?

Although *Korematsu* has never formally been overruled, it is my understanding that it has been limited to its facts. I am not aware that the Supreme Court has ever cited it affirmatively. It is also my understanding that in 2011, the then-Acting Solicitor General of the United States, Neal Katyal, issued a "confession of error" in which he apologized, on behalf of the Department of Justice, for the government's litigation tactics in the *Korematsu* case.

b. Are there other Supreme Court decisions that have not been overruled that you believe lack precedential value? If so, which ones, and why?

Except in the case of constitutional or statutory change, it is not the role of a lower-court judge to determine if and when Supreme Court decisions have lost precedential value. The Supreme Court has made clear that only it can overrule its own decisions. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower courts should "leav[e] to th[e Supreme] Court the prerogative of overruling its own decisions").

7. What remedies are available should the President or Executive Branch disregard a ruling of the Supreme Court or a lower federal court?

It would be inappropriate for the President or Executive Branch to disregard a ruling of the Supreme Court or a lower federal court. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

8. Do you believe that when analyzing a statute, and choosing to use the construction of original public meaning, such a choice reflects your values?

No. I am firmly committed to the notion that my own personal views, opinions, and values should not inform decisions that I will (if confirmed) make as a judge. My role will be to follow the law—text, history, applicable precedent—wherever it leads, without respect to my own personal preferences.

9. Do you believe that life experiences and unconscious biases play a role in judging?

As I said to Senator Durbin during my hearing, I would never deny that every judge is a human being—not a robot—and comes to the bench with a "bucket" of life experiences. However, I also believe that judges must be self-aware, so that personal preferences do not creep into their judicial decisionmaking. Adherence to the "rule of law" means that, should I be fortunate enough to be confirmed, I must apply governing legal principles, not my personal preferences, to all litigants who appear before me.

10. Should a judge attempt to discern the original meaning of the Constitution, rather than considering tradition, current norms, and precedent as the baseline or foundation of constitutional analysis?

The Supreme Court has made clear that text and history play prominent roles in the interpretation of the Constitution. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Souter, J.). Of course, as a circuit-court judge (should I be fortunate enough to be confirmed), my principal role will be to apply Supreme Court and Eleventh Circuit precedent, which I will do faithfully and to the best of my ability.

11. Do you believe that you will be able to separate ideological and partisan views when judging?

Yes.

Nomination of Kevin C. Newsom
to be Judge on the United States Court of Appeals for the Eleventh Circuit Questions for the Record
Submitted June 21, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

1. You represented Alabama in an amicus brief in *Caperton v. Massey Coal Co.*, an important case recognizing the corrupting impact of money in politics, including independent expenditures. You argued that a litigant's constitutional rights were not violated even when the judge hearing his case likely owed his position to the other party's multimillion dollar campaign spending on his behalf. In your amicus brief in *Caperton*, you warned that if the Court found a constitutional violation, "*Caperton* motions [for judicial recusal based on Due Process] would fly fast and furious."
    a. In your experience as a litigator, how many *Caperton* motions have you filed?

To my recollection, none.

    b. How may have been filed by the opposing party in a case you were litigating?

To my knowledge, none. Happily, so far as I am aware, the brief's prediction that the decision would lead to numerous recusal motions seems to have been incorrect.

2. You have opposed the Supreme Court's 2005 decision in *Roper v. Simmons* that held it is unconstitutionally cruel and unusual to execute juveniles. You authored an amicus brief in the Supreme Court case on behalf of Alabama and other states defending capital punishment for minor offenders. After the ruling, NPR reported on *All Things Considered* that you "regret[ed]" the decision, and quoted you saying: "there's no real magic in the number 18. Some of the court's reasoning would apply equally to 19-year-olds and some 25-year-olds, that at the same time won't apply to some 17-year-olds, you know, on the other side."
    a. Do you continue to believe that *Roper* was wrongly decided and that states ought to be permitted to execute juveniles?

As with any brief I have filed as an attorney, the arguments made in the *Roper* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). Moreover, it appears that the word "regret" is NPR's. In any event, as I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role (should I be fortunate enough to be confirmed) as a circuit-court judge. *Roper* is binding precedent, and if I am confirmed, I will apply it—like all other Supreme Court precedents—faithfully and to the best of my ability.

3. Large corporations routinely include arbitration agreements with class action waivers in the fine print of their consumer agreements. The proceedings are typically secret, there is virtually no right to appeal, and the arbitrators are often picked and paid for by the

company being sued—creating a clear incentive for arbitrators to rule in companies' favor.

a. Do you believe it is a concern that arbitrators sometimes have a financial incentive to rule against individual consumers or employees?

To my knowledge, I have not experienced a situation in which an arbitrator had a financial incentive to rule for or against either party.

b. Does the existence of repeat players among corporate litigants create a bias against consumers?

To my knowledge, I have not experienced a situation in which a corporate defendant's "repeat player" status seemed to create a bias either in favor of or against consumers.

c. Do you agree that individual plaintiffs also benefit from the right to appeal trial court decisions? The Seventh Circuit has held that an arbitrator's decision will be upheld if it is "incorrect or even wacky," a standard that does not exist in federal appellate review. Is it fair to say that "arbitration lacks the safeguards and judicial oversight that are indispensable" to any litigation?

Unsuccessful plaintiffs and defendants alike benefit from the right to appeal adverse trial-court decisions. In *AT&T v. Concepcion*, I filed an amicus brief on behalf of DRI – The Voice of the Defense Bar, arguing (as you say) that "arbitration lacks the safeguards and judicial oversight that are indispensable to class litigation." In its decision, the Supreme Court similarly commented that "[a]rbitration is poorly suited to the higher stakes of class litigation," in part because of the limited judicial review available in the arbitration context. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

4. In 2010, you were counsel of record on an amicus brief in *AT&T v. Concepcion*. Your brief argued that the Ninth Circuit's opinion conflicted with the FAA's pro-arbitration policy and that California's requirement for consumer arbitration agreements to permit class arbitration "is an attack on arbitration itself."

a. The Court's decision in *Concepcion* placed significant weight on the generosity of the AT&T arbitration provisions at issue in that case. What do you understand the Supreme Court's precedent to be for lower courts in cases where such generosity is not present in an arbitration provision?

I have not had occasion to study the post-*Concepcion* class-arbitration precedent carefully. I am reluctant to express any views on that subject because a similar issue might come before me as a judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such a case were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. The Discover Bank rule at issue in that case protected consumers who had been bound to arbitration by an adhesion contract. Do you consider arbitration by

adhesion contract to be a fair way for consumers to agree to arbitrate disputes with a business?

Please see the response to No. 4(a) above.

c. Under the subsequent *American Express Co. v. Italian Colors Restaurant* case, do you understand there to be any circumstances in which an arbitration agreement would be found to prevent the effective vindication of a federal right of action?

Please see the response to No. 4(a) above.

5. You co-authored a Supreme Court amicus brief filed on behalf of several states in *McCreary County v. ACLU of Kentucky*. Your brief argued that the Ten Commandments are a common feature of public life in the U.S. and that "public displays of the Ten Commandments should be upheld as a permissible 'acknowledgment . . . of the role of religion in American life.'
    a. Do you continue to view it as permissible to display the Ten Commandments in public buildings?

As with any brief I have filed as an attorney, the arguments made in the *McCreary* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). I have not had occasion to study the post-*McCreary* Establishment Clause precedent carefully, and I am reluctant to express any views on that subject because a similar issue might come before me as a judge should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. Does your reading of Justice Souter's opinion in that case make it possible for any public displays of religious symbols? If so, under what circumstances?

Please see the response to No. 5(a) above.

6. In 2004, as Alabama Solicitor General, you co-authored an amicus brief filed on behalf of Alabama and other states in *Rasul v. Bush*. Your brief argued that the courts should defer to the Executive and Legislative Branches in the conduct of military operations, and also argued that foreign nationals detained abroad have no rights to habeas corpus and that the Geneva Conventions did not apply to Guantanamo detainees. The Supreme Court ultimately rejected all of these arguments.
    a. What rights do you currently understand Guantanamo detainees to have under the Supreme Court's jurisprudence?

As with any brief I have filed as an attorney, the arguments made in the *Rasul* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model

Rules of Professional Responsibility 1.2(b). Moreover, although my name (along with the name of the Acting Attorney General) was on the signature block of the brief filed in the *Rasul* case, I was not counsel of record, and while I am certain that I reviewed the brief, I do not recall playing an active role in its drafting. I have not had occasion to study the post-*Rasul* precedent carefully, and I am reluctant to express any views on that subject because a similar issue might come before me as a judge should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such a case were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. As a judge, what role would you see for the judiciary in the context of military operations being conducted by the Executive Branch?

Please see the response to No. 6a above.