

**Nomination of Mark T. Pittman to the United States District Court for the
Northern District of Texas
Questions for the Record
March 12, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

Never.

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

It is never proper for a district court judge to question Supreme Court precedent. A district court judge should fully, fairly, and faithfully apply all Supreme Court precedent.

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

A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located. The Federal Rules of Civil Procedure provide standards for a district court to set aside its prior rulings in a specific case. See Fed. R. Civ. P. 59(e), 60.

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

As a district court nominee, I would not presume to opine on when the Supreme Court should overturn its own precedent. The Supreme Court has instructed lower court judges to leave to “this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989).

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

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

As a nominee to a district court, all Supreme Court precedent is “super-stare decisis” or “superprecedent” because such decisions are binding on all district courts. If confirmed, I would fully, faithfully, and fairly apply *Roe v. Wade* and its progeny.

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

Roe v. Wade is a binding Supreme Court precedent, and if confirmed, I would fully, faithfully, and fairly apply it.

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

Obergefell v. Hodges is a binding Supreme Court precedent, and if confirmed, I would fully, faithfully, and fairly apply it.

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

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

As a nominee for the district court, it would be inappropriate for me to comment on the merits of a dissenting opinion of the Supreme Court. See Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would faithfully follow Supreme Court precedent.

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

In *Heller*, the Supreme Court found that “the right secured by the Second Amendment is not unlimited.” 554 U.S. 570, 626-27 (2008). As a nominee for the district court, it would be inappropriate for me to comment on gun regulations that are currently the subject of litigation. See Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 4(b) above.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech

rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

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

If confirmed, I would follow all Supreme Court and Fifth Circuit precedent concerning the First Amendment rights of individuals and corporate entities. This includes the *Citizens United v. FEC* decision and any other applicable First Amendment precedent.

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

As a district court nominee, it would be inappropriate for me to comment on matters of campaign finance policy. See Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would follow all Supreme Court and Fifth Circuit precedent concerning campaign finance law.

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

Please see my response to Question 5(b) above.

6. In a 2017 speech, you reflected on your time working at the Department of Justice. You said the following of the Justice Department during President Obama's tenure: "In practice, the Justice Department's congressionally mandated job of prosecuting criminals and defending the United States often took a back seat to curing perceived social ills, such as the prosecution of local police departments for not having enough female or minority officers. Under Obama, conservative or traditional viewpoints were stifled, while progressive propaganda was often on full display in the offices and break-rooms." ("The Judiciary as Envisioned by the Founding Fathers" (Sept. 6, 2017))

a. What evidence do you have that the Obama Administration "stifled" conservative or traditional viewpoints among career members of the Department of Justice?

The Code of Conduct for United States Judges "is designed to provide guidance to judges and nominees for judicial office." See Commentary to Canon 1. Canon 3(A)(6) dictates that a judge should not make public comment on the merits of a matter pending or impending in any court. Matters involving partisan political activity in federal agencies are presently and frequently subject to pending litigation in federal courts. As such, it is inappropriate for me to answer this question.

b. What specific "progressive propaganda" was on "full display" in Department of Justice offices and break-rooms?

Please see my response to Question 6(a) above.

c. In what way is the lack of diversity on police forces around the U.S. merely a “perceived” social ill?

Please see my response to Question 6(a) above.

d. How did the Obama Administration “prosecute” police forces for their lack of diversity? Please provide specific examples of any such prosecution.

Please see my response to Question 6(a) above.

7. In the same 2017 speech, you criticized the fact that some judges “would even rely on foreign laws when their desired result is not found in the American law they are interpreting.” (“The Judiciary as Envisioned by the Founding Fathers” (Sept. 6, 2017))

What was the “foreign law” that you were referencing?

I was critiquing the general proposition that foreign law could, or should, be used to interpret our Constitution or laws. If confirmed, consistent with my Oath of Office, I would fully, fairly, and faithfully apply all Supreme Court and Fifth Circuit precedent without hesitation, even if such precedent relies upon foreign law.

8. In both the 2016 and the 2018 elections, you ran for your judgeship as a Republican. In the same 2017 speech, you noted that you have been a Republican since 1980. You have been involved in several get-out-the-vote efforts for Republican candidates and have made campaign contributions to Republican organizations as recently as last year. In 2017, you praised the efforts of local Republican clubs for the fact that, because of their efforts “in my home county [. . .] most of the judges didn’t even have Democrat opponents.” (“The Judiciary as Envisioned by the Founding Fathers” (Sept. 6, 2017))

What benefits are there to having only Republican judges compete in an election?

The political affiliation of judges should not affect how they rule. Texas judges take an oath to “preserve, protect, and defend the Constitution and laws of the United States and of” Texas regardless of political affiliation.

9. In 2018, you upheld the conviction of Rosa Marie Ortega for voting impermissibly in the 2012 presidential election. At trial, Ortega — a lawful permanent resident who has lived in the United States since infancy — testified that she did not know that she was not allowed to vote as a permanent resident. Ortega has a middle school education and claimed not to know the difference between being a permanent resident and a citizen. She is the mother of four children, all of whom are U.S. citizens. You wrote the opinion upholding Ortega’s conviction on the technical basis that Ortega’s attorney failed to say that his objection to a jury instruction at trial was “outside the record.” (*Ortega v. State of Texas* (Tex. Ct. App. Nov. 21, 2018))

Please describe the process by which you determined that this eight-year prison sentence was justified.

Ortega v. Texas, a unanimous decision by the Texas Second Court of Appeals, was decided on procedural grounds based on binding precedent of the Texas Court of Criminal Appeals. Furthermore, the appellant did not challenge the length of her prison sentence, and the court's opinion therefore did not analyze the appropriateness of that sentence.

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

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

No.

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

No.

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

If confirmed as a district court judge, I would follow all Supreme Court and Fifth Circuit precedent concerning administrative law.

11. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2011. 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 am unfamiliar with and did not draft this statement. Therefore, I am not able to comment on its meaning.

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

I am unfamiliar with and did not draft this statement. Therefore, I am not able to comment on its meaning.

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

I am unfamiliar with and did not draft this statement. Therefore, I am not able to comment on its meaning.

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

During the course of this process, I have had general discussions with many members of the legal community about my possible nomination, including members of the Federalist Society.

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

It is a well-settled rule of statutory construction that, if the language of the statute is unclear or ambiguous, or produces an absurd result, a court may look to the legislative history to determine legislative intent. *See, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995); *United States v. Kay*, 359 F.3d 738, 742-43 (5th Cir. 2004).

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

No.

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

I received the questions on Tuesday, March 12, 2018. I personally drafted the responses after consulting my Questionnaire and conducting limited research. After sharing those draft responses with the Department of Justice, Office of Legal Policy, which offered suggestions and comments, I revised my responses as I deemed appropriate in light of those comments.

Senate Judiciary Committee
Questions for the Record
March 12, 2019
Senator Amy Klobuchar

Question for Mark Pittman, Nominee to be U.S. District Judge for the Eastern District of Texas

In light of the challenges facing our democracy, the principles underlying our independent judiciary are more important than ever.

- What are your views on the importance of the independence of the judiciary?

The independence and impartiality of the judiciary are vital to the success and continuing survival of our system of government. Indeed, the structure of our Constitution mandates that the judicial branch is separate and independent from the legislative and executive branches. I agree with Thomas Jefferson when he said that the “judiciary . . . is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 426 (Adrienne Koch & William Peden, eds., 2004 Modern Library Paperback ed.) (1944).

An independent judiciary, as envisioned by our Constitution, is one in which judges follow the Rule of Law and base their decisions on the laws and precedents applicable to each case without applying their own beliefs or policy preferences. Judges must be immune to all external pressures or partisan interests and must make decisions according to the law, even when such may be unpopular. This independence ensures that all parties or persons that appear in court will have their cases decided fairly and without bias or prejudice.

**Nomination of Mark T. Pittman, to be United States District Court
Judge for the Northern District of Texas
Questions for the Record
Submitted March 12, 2019**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

In determining whether a right is fundamental and protected under the Fourteenth Amendment, I would consider the factors set forth by the Supreme Court and Fifth Circuit. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Loving v. Virginia*, 388 U.S. 1 (1967); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). If confirmed, I would fully, faithfully, and fairly follow Supreme Court and Fifth Circuit precedent interpreting the Fourteenth Amendment, as I would other such precedents interpreting other provisions of the Constitution.

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

Yes.

- b. Would you consider whether the right is deeply rooted in this nation’s history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation’s history and tradition?

Yes. In *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), the Supreme Court found that such an inquiry involves “examining our Nation’s history, legal traditions, and practices.” The Court then examined historical practice under the common law, the American colonies, historical state statutes, court decisions, and long-held traditions.

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

Yes. I would look first to the binding precedent of the Supreme Court and the Fifth Circuit. Then, I would look to the persuasive authority of other courts of appeal.

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

Yes.

- 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, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes, both *Casey* and *Lawrence* are binding Supreme Court precedents that I would apply fully, faithfully, and fairly.

- f. What other factors would you consider?

I would consider and apply other factors deemed relevant under applicable Supreme Court or Fifth Circuit precedent.

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

For many years, the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to both gender and race. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Reed v. Reed*, 404 U.S. 71 (1971).

- 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?

I would fully, faithfully, and fairly apply all Supreme Court and Fifth Circuit precedent regarding gender discrimination regardless of any outside criticism.

- 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 Question 2(a) above.

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

The Supreme Court has held that the Fourteenth Amendment protects the right of same-sex couples to marry on the same terms as opposite-sex couples, and I would faithfully follow that precedent.

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

I am unable to comment on this issue pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges because I understand that this issue is currently pending in the federal courts.

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

The Supreme Court has held that there is such a right. If confirmed, I would apply this holding, and all other binding precedent, fully, faithfully, and fairly.

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

The Supreme Court has held that there is such a right. If confirmed, I would apply this holding, and all other binding precedent, fully, faithfully, and fairly.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court has held that there is such a right. If confirmed, I would apply this holding, and all other binding precedent, fully, faithfully, and fairly.

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

Not applicable.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

If confirmed, I would follow the precedents of the Supreme Court and the Fifth Circuit on all such questions concerning the proper role of various categories of evidence in the adjudication of any legal disputes that may come before my court.

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

If confirmed, I would follow the precedents of the Supreme Court and the Fifth Circuit on all such questions concerning the proper role of various categories of evidence in the adjudication of any legal disputes that may come before my court.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and

lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

If confirmed as a district court judge, I would fully, faithfully, and fairly apply the *Obergefell* precedent and all other binding precedent.

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

Please see my response to Question 5(a) above.

6. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

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

The Supreme Court has made clear in numerous decisions that race discrimination has no place under the Constitution. I will apply all such precedent, including *Brown* and its progeny, fully, faithfully, fairly, and without hesitation.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Mar. 11, 2019).

I am not familiar with the cited article or the authors’ argument. If confirmed, I will fully, faithfully, and fairly apply the precedent established by the Supreme Court and the Fifth Circuit in interpreting such terms.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

For a district court judge, the original public meaning of a constitutional provision is dispositive when binding precedent of the Supreme Court and the Fifth Circuit have found that that the original public meaning is dispositive. If confirmed, I will fully, faithfully, and fairly apply the precedents established by the Supreme Court and the Fifth Circuit in interpreting such terms.

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

Please see my response to Question 6(c) above.

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

I would consult the text of the constitutional provision at issue and any applicable Supreme Court or Fifth Circuit precedent.

7. In a 2017 speech entitled, “The Judiciary as Envisioned by the Founding Fathers,” which you produced to the Senate Judiciary Committee, you stated that “[t]he courts have created new rights [] that are no where to [be] found in our Constitution.”

- a. Please provide a complete list of the rights you believe courts have created that are not contained in the Constitution.

If I am confirmed, I would fully, faithfully, and fairly apply the Supreme Court and the Fifth Circuit precedent with regard to any rights asserted by the parties.

- b. Is substantive due process a constitutional doctrine that courts must follow and apply?

Yes, according to the Supreme Court. If confirmed, I would fully, faithfully, and fairly follow Supreme Court and Fifth Circuit precedent.

8. You stated in the same 2017 speech that the Supreme Court “found the words ‘separation of church and state’ somewhere in the Constitution.” Is the separation of church and state embodied in the religion clauses of the First Amendment?

Yes, according to the Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and later decisions. If confirmed, I will fully, faithfully, and fairly follow Supreme Court and Fifth Circuit precedent.

9. In “The Judiciary as Envisioned by the Founding Fathers” speech, you further stated that “federal courts have increasingly become involved in all sorts of political questions, undermining the people’s ability to decide issues through our elected officials.” Please list the political questions to which you were referring.

Please see my response to Question 7(a) above.

10. In this speech, you also cautioned against appointing judges that are mainstream, stating, “[f]rankly, we don’t need judges who just go with the flow of the stream, but restrain themselves to the Constitution and the law [as] it was written and originally understood.” Do you believe that *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966), are restrained to the Constitution and the law as it was written and originally understood?

If I am confirmed, both *Gideon* and *Miranda* are binding Supreme Court precedents that I

will apply fully, faithfully, fairly, and without hesitation.

Questions for the Record for Mark T.
Pittman From Senator Mazie K. Hirono

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

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

No.

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

No.

2. In a series of speeches you gave titled “The Judiciary as Envisioned by the Fathers,” you claimed that you were “disturbed . . . by the harsh partisanship that I feel has infected our country and by extension our courts.” Yet, in two of those speeches, you praised local groups for electing Republican judges like yourself.

Please explain why your nomination to the federal bench isn’t simply another example of the partisan shift in the judiciary.

Texas has partisan judicial elections and I was running for office or an officeholder when these speeches were made. Every day, I aspire to be a judge like the judge that I clerked for, the late Judge Eldon B. Mahon. He said, “there is no such thing as Democrat judges or Republican judges, we are all just judges and have to follow the law.” I agree. If confirmed, I would, as I have in my career as a Texas judge, abide by the Rule of Law regardless of a litigant’s wealth, status, power, or political influence or my own personal feelings or policy preferences.

3. In a speech you gave to the Denton County Pachyderm Club in September 2017, you criticized so-called “activist judges,” including what you referred to as “one unelected judge in Hawaii” who “threw out an order signed by the President for the entire country.” In that same speech, you praised Judge Reed O’Connor, a judge that has issued nationwide injunctions and otherwise ruled against seemingly every Obama-era action targeted by the far right, including the Affordable Care Act, DACA, and protections for transgender individuals. I am concerned that you think a good judge is a judge that rules in ways consistent with your political position and an activist judge is one that rules against your political position.

What evidence can you provide that—should you be confirmed—you will objectively apply the law rather than rule based on what you personally feel is right?

Please see my response to Question 2 above.

4. You have claimed that during the Obama Administration, “the Justice Department’s congressionally mandated job of prosecuting criminals and defending the United States took a back seat to curing social ills, such as the prosecution of local police departments for not having enough female or minority police officers.”

Is it your view that the federal government has no place in ensuring that local police departments do not discriminate on the basis of sex, race, or ethnicity?

No.

5. You wrote the opinion in *Ortega v. Texas*, a case involving Rosa Maria Ortega, a 37-year-old woman who was convicted of illegally voting in two elections. Ms. Ortega was a Mexican citizen who had lived as a permanent resident in the United States since her early childhood and mistakenly believed that she was eligible to vote as a legal resident.

During the sentencing phase of the case, in an effort to inflame the jury, the prosecutor said, “And I just want to throw out one thought to you. You came back with the right verdict, that if you hadn’t, if you’d come back with a not guilty, can you imagine the floodgates that would be open to illegal voting in this county?” It apparently worked, because Ms. Ortega was sentenced to eight years in prison, a sentence the Fort Worth Star Telegram called “implausible and cruel.”

You upheld the sentence by finding that Ms. Ortega had waived her objection to the prosecutor’s statement even though her attorney objected that “that’s an improper argument here at sentencing.”

- a. Do you consider eight years in prison a fair sentence for not understanding the voting laws?

Ortega v. Texas, a unanimous decision by the Texas Second Court of Appeals, was decided on procedural grounds based on binding precedent of the Texas Court of Criminal Appeals. Furthermore, the appellant did not challenge the length of her prison sentence, and the court’s opinion therefore did not analyze the appropriateness of that sentence.

- b. Do you think it is appropriate for a prosecutor to draw on a jury’s prejudices by referencing unsubstantiated fears about opening the “floodgates” to illegal voting?

Please see my response to Question 5(a) above.

6. Over the past few years, Ms. Ortega was one of three people convicted in Tarrant County, Texas—your home county—for election-related fraud.
 - Crystal Mason—a 43-year-old African American woman—was convicted of illegally casting a provisional ballot because she was on supervised release at the time of the election and had not fully completed her sentence on a tax fraud conviction. She was sentenced to five years in prison.

- Russ Casey—a white, male justice of the peace—was convicted of submitting petitions with forged signatures in his re-election campaign. He was sentenced to five years of probation with no jail time.

Do you find it troubling that the two women of color were given lengthy prison terms, while the white man was only given probation? Please explain.

I am not familiar with the details of those other cases. Furthermore, it would be inappropriate for me to comment on matters that are or may be litigated in the Texas Second Court of Appeals or the Texas Court of Criminal Appeals. See Canons 2, 3(a)(6), and 5 of the Texas Code of Judicial Conduct; see also Canons 2, 3(a)(6), and 5 of the Code of Conduct for United States Judges.

**Nomination of Mark Timothy Pittman
United States District Court for the Northern District of Texas
Questions for the Record
Submitted March 12, 2019**

QUESTIONS FROM SENATOR BOOKER

1. In 2017, you gave a speech where you praised the election of Republican judges. You said, “I don’t think most folks realize that after the last election, many of the courts [in] our urban counties went from red to completely blue—that’s right, there are now no Republican judges in Dallas, Bexar, Travis or Harris Counties. But here in Denton and in my home county, Tarrant, most of the judges didn’t even have Democratic opponents—that is not just luck, that is because of your efforts.”

- a. Why did you bemoan the election of Democratic judges in your speech?

Texas has partisan judicial elections and I was running for office or an officeholder when these speeches were made. Every day, I aspire to be a judge like the judge that I clerked for, the late Judge Eldon B. Mahon. He said, “there is no such thing as Democrat judges or Republican judges, we are all just judges and have to follow the law.” I agree. If confirmed, I would, as I have in my career as a Texas judge, abide by the Rule of Law regardless of a litigant’s wealth, status, power, or political influence or my own personal feelings or policy preferences.

- b. Do you believe it is healthy for the independence of the judiciary to contrast Democratic judges versus Republican judges?

The political affiliation of judges should in no way affect how judges rule in the cases or controversies that come before them.

- c. Do you believe that Republican judges in Texas rule differently from Democratic judges? If so, how?

The political affiliation of judges should in no way affect how judges rule in the cases or controversies that come before them. Texas judges take an oath to “preserve, protect, and defend the Constitution and laws of the United States and of” Texas regardless of political affiliation.

2. You served as an attorney under both the Bush and Obama Administrations. After you served in both administrations you recounted your experiences and said that President Bush prioritized prosecuting criminals and going after terrorists. In contrast to that, you said, “Under President Obama, however, there was more of a push for government attorneys to spend their work days attending training sessions about various social issues. In practice, the Justice Department’s congressional mandated job of prosecuting criminals and defending the United States often took a back seat to curing perceived social ills, such as the prosecution of local police departments for not have enough female or minority officers.”

a. Do you believe implicit racial bias exists in the criminal justice system?

I believe that racial bias and racism continue to affect our country in many ways.

b. Did you ever receive implicit racial bias training when you worked for the Department of Justice?

I recall regularly receiving racial bias and anti-discrimination training; I do not recall receiving implicit racial bias training.

c. Do you believe requiring Assistant United States Attorneys to receive implicit racial bias training stands in the way of prosecuting criminals and defending the United States?

I have not studied this issue, and I do not have an opinion.

d. Do you believe a federal prosecutor's main job is to seek justice or to seek prosecutions?

A prosecutor should seek justice rather than merely seeking prosecution.

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

I do not strictly categorize myself as either a textualist or an originalist. If confirmed, I would apply the laws as written by the Congress and the precedents of the Fifth Circuit and the Supreme Court without regard to my personal feelings or policy preferences.

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

Please refer to my answer in Question 3 above.

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

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

Yes. It is a well-settled rule of statutory construction that, if the language of the statute is unclear or ambiguous, or produces an absurd result, a court may look to the legislative history to interpret the statute. See, e.g., *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995); *United States v. Kay*, 359 F.3d 738, 742-43 (5th Cir. 2004).

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

Please refer to my answer in Question 5(a) above.

6. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

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

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

No.

¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

² *Id.*

³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁴ *Id.*

- c. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.⁵ Why do you think that is the case?

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

⁵ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

- d. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.⁶ Why do you think that is the case?

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

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

I have not studied how federal appellate court judges can address this issue.

7. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.⁷ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.⁸

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

I have not studied this issue, and I do not have an opinion.

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

I have not studied this issue, and I do not have an opinion.

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

Yes.

9. Do you believe that *Brown v. Board of Education*⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown corrected an egregious wrong by applying the 14th Amendment's Equal Protection Clause to end racial segregation. If confirmed to serve as a district court judge, I would fully apply *Brown* and all other relevant Supreme Court and Fifth Circuit precedent on this issue. As a nominee, it is inappropriate for me to comment on or offer views on prior

⁶ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

⁷ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

⁸ *Id.*

⁹ 347 U.S. 483 (1954).

decisions of the Supreme Court. See Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm.on the Judiciary, 111th Cong. 64 (2010) (“I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.”); see also 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.”).

10. Do you believe that *Plessy v. Ferguson*¹⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Plessy upheld racial segregation, and the Supreme Court made clear that *Plessy* was incorrectly decided when the Court overruled that decision in *Brown*.

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

No.

12. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”¹¹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Yes. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

¹⁰ 163 U.S. 537 (1896).

¹¹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

Questions for the Record from Senator Kamala D. Harris
Submitted March 12, 2019
For the Nomination of

Mark T. Pittman, to the U.S. District Court for the Northern District of Texas

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

If I am confirmed, I would give careful consideration in all sentencing proceedings to ensure that the sentence imposed is “sufficient, but not greater than necessary, to comply with the purposes” of sentencing as set forth by Congress in 18 U.S.C. § 3553(a). As part of this process, I would consult the indictment, the governing statutes, applicable precedent from the Supreme Court and the Fifth Circuit, the presentence report of the probation officer, the advisory Sentencing Guidelines and other factors set forth in 18 U.S.C. § 3553(a), the arguments and objections of the parties, and the statements of the defendant, victims, or witnesses. I fully appreciate the magnitude of the sentencing process, and I would fully, faithfully, and fairly follow the law and my judicial oath in carrying out this responsibility.

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

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

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

The Sentencing Guidelines policy statements identify considerations that may justify a departure or variance. Part K of Section 5 of the Sentencing Guidelines provides specific circumstances that can justify a departure from the advisory sentencing range. The factors listed in 18 U.S.C. § 3553(a) may also call for a departure from the advisory sentencing range. Further, the Supreme Court and the Fifth Circuit have provided guidance to district courts regarding when it is appropriate to depart or vary from the advisory sentencing range. I would fully, faithfully, and fairly follow the law and my judicial oath in carrying out this responsibility.

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

indeterminate sentencing.¹

i. Do you agree with Judge Reeves?

I am not familiar with Judge Reeves's work, but it is my belief that inclusion of mandatory minimum sentences in criminal statutes is a policy matter that is reserved to Congress. As a federal judicial nominee, it would be inappropriate for me to comment on this matter. See Code of Conduct for United States Judges, Canons 2, 3(A)(6), 5. If I am confirmed, I would apply federal sentencing laws as required by Congress, the Supreme Court, and the Fifth Circuit regardless of my personal opinion.

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

Please see my response to Question 1.d.i. above.

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

Please see my response to Question 1.d.i. above.

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

1. Describing the injustice in your opinions?

I am not familiar with Judge Gleeson's opinions. However, I am aware that mandatory minimum sentences are the subject of much debate and commentary. If confirmed, I would evaluate each case individually and consider the law and my ethical obligations if confronted with the circumstances hypothesized in this question consistent with my duty to apply the law pursuant to the Constitution, as well as Supreme Court and Fifth Circuit precedent.

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

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

² See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

Charging policies and decisions lie exclusively with Executive Branch. As a judge, I would be bound to respect the separation of powers built into the Constitution. However, I would not hesitate to address ethical violations by prosecutors pursuant to my Oath of Office.

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

Because the clemency power lies with the Executive Branch, as a judge, I would be bound to respect the separation of powers built into the Constitution.

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

Yes.

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

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

Yes.

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

Yes. Please see my response to Question 2 of Senator Booker.

- 4. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.**

- a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

- b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

I would encourage qualified candidates from all backgrounds, including qualified minorities and women, to apply for a position in my chambers, and I would give serious consideration to each individual.