

**Nomination of Kea Whetzal Riggs to the United States District Court for the
District of New Mexico
Questions for the Record
July 3, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

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

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

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

District courts are bound by precedent of the Supreme Court and the Circuit Court where the district court sits. A district court decision is not binding on the same court. To promote respect for the law, it is generally preferable for lower courts to decide cases in a consistent with other lower court cases.

However, each case is factually unique which may require different outcomes. Federal Rules of Civil Procedure 59 and 60 provide standards for a district court to set aside its prior rulings in a specific case.

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

Only the Supreme Court may overrule one of its own prior opinions. As a sitting judge and a judicial nominee, I do not believe it would be appropriate to comment further on when it may be appropriate for the Supreme Court to overturn its own precedent. *See* Code of Conduct for United States Judges, Canons 2 and 5.

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 “superprecedent” 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 “super-precedent” 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”?

Every Supreme Court decision, including *Roe v. Wade*, is binding on all district courts. As a sitting judge and judicial nominee it would not be appropriate for me to comment further or to characterize the precedential value of Supreme Court cases. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

b. Is it settled law?

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

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

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

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

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

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

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

In *District of Columbia v. Heller*, the Supreme Court explained that the “right secured by the Second Amendment is not unlimited” and further stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. 570, 626-27 (2008).

As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on scenarios, which are or may be the subject of pending or impending

litigation. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent.

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

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

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

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

The First Amendment states a fundamental guarantee to the people of the United States. As with the guarantees of each of the Bill of Rights, First Amendment rights should always be of concern to judges considering cases and controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6), and 5(C).

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

Please see my response to question 5(a).

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

This issue has not come before me as a sitting judge. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6), and 5(C).

6. On February 22, 2018, when speaking to the Conservative Political Action Conference

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

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

To the best of my recollection, no one in this Administration, including at the White House or the Department of Justice, ever asked me about my views on any issue related to administrative law or my "views on administrative law." If confirmed, I will fully and faithfully apply all statutes, regulations, and Supreme Court and Tenth Circuit precedent, including those concerning administrative law.

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

No. If confirmed, I will fully and faithfully apply all statutes, regulations, and Supreme Court and Tenth Circuit precedent, including those concerning administrative law.

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

As a lower court judge, I will fully and faithfully apply all statutes, regulations, and Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6), and 5(C).

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

The Supreme Court has stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The canons of statutory construction also provide that legislative history may be considered when construing an ambiguous statute. If confirmed, I will fully and faithfully apply all statutes, regulations, and Supreme Court and Tenth Circuit precedent.

8. 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.

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

I received the questions on Wednesday, July 3, 2019. I reviewed my Senate Judiciary Questionnaire, conducted limited research and consulted other materials, and drafted my answers. I then shared my draft responses with the Office of Legal Policy at the Department of Justice, which offered suggestions and comments. I revised my responses as I felt appropriate. After finalizing my answers, I authorized the Department of Justice to file these responses.

**Written Questions for Kea Riggs
Submitted by Senator Patrick Leahy
July 2, 2019**

1. Only 10 percent of your trials as a prosecutor were jury trials.

(a) What was the cause of this discrepancy between jury and non-jury trials? When is a bench trial preferable to a jury?

The nature of the criminal justice system is such that the number of cases filed continues to decrease as they progress through the system. The numbers decline as a substantial portion of cases resolve through motion practice, dismissal, plea or other avenues. State law may also dictate that certain categories of criminal cases may not qualify for a jury trial. As a result of the process, only a small amount of filed cases actually proceed to trial.

The decision regarding on whether a bench trial is preferable to a jury trial is reserved to the Legislative branch. As a sitting judge and a judicial nominee, I do not believe it is appropriate to comment further. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C). If confirmed, I would fully and faithfully apply the law and Supreme Court and Tenth Circuit precedent.

2. You have previously emphasized the importance of being empathetic to victims of crimes and the need for people to take responsibility for their actions. As a former prosecutor, I can tell you I agree.

(a) Should there be similar considerations of empathy for those charged with or convicted of a crime? How do the personal circumstances of each individual defendant play a role in sentencing?

Addressing the liberty interests of an individual is a multi-faceted and solemn responsibility that requires great thought and care. In the execution of their duties, a judge must be fair and impartial. Empathy is an essential human attribute that can assist a judge in making a decision within the boundaries of the facts and the law. However, a judge's decision must be based on the applicable law and relevant facts, not on personal feelings. If confirmed, I will uphold my judicial oath. *See* 28 U.S.C. § 453.

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

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

Determining the meaning of a statute requires examination of the text and the structure of the statute, with consideration given as to how the statutory provisions work together to form a consistent whole. The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision with the broader context of the statute as a whole. If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent concerning the methods for interpreting statutes.

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

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

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

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

Please see my response to Question 4(b)

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

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

Under Supreme Court precedent, courts can review certain decisions by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If confirmed, I will fully and faithfully follow the law and Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on a scenario, which is or may be the

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

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

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

If confirmed, and if such a scenario were to come before me, I would carefully examine the relevant authorities that may bear upon this question and fully and faithfully apply all applicable Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

The Constitution assigns powers over war and foreign affairs to the President and Congress. Questions regarding the appropriate exercise of these powers are the subject of pending or impending litigation. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent, as well as any constitutional and statutory authority. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

Please see my response to Question 7(a).

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

Please see my response to Question 7(a).

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

In *Marbury v. Madison*, the Supreme Court made clear that it is ultimately “the province and duty of the judiciary to say what the law is.” *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). In evaluating a challenge to Executive action, a court must consider the relevant precedents, together with applicable constitutional and statutory provisions. Please see my response in Question 7(a). As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an “exceedingly persuasive justification” for gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent, as well as any constitutional and statutory authority. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Voting Rights Act is the law. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent interpreting the Voting Rights Act. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Constitution provides in Article I, section 9 that “no Person holding any Office or Profit or Trust under” the United States “shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.” As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario,

which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

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

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

The Thirteenth, Fourteen, and Fifteenth Amendments reflect a constitutional commitment to counteracting racial discrimination. Each of these Amendments provides that Congress has the power to enforce them “by appropriate legislation.” U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

The Supreme Court has addressed and established a fundamental right to personal autonomy as expressed in *Lawrence v. Texas* and other decisions. If

confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent.

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

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

The Supreme Court has stated “the doctrine of stare decisis is of fundamental importance to the rule of law.” *Hilton v. South Carolina Public Ry. Comm’n*, 502 U.S. 197, 202 (1991) (citation omitted). It is never appropriate for lower courts to depart from Supreme Court or Circuit Court precedent. If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and Tenth Circuit, including precedent with respect to application of stare decisis.

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

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

The independence and impartiality of judges along with the appearance thereof are fundamental principles necessary for ensuring the integrity and public confidence in our courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges. I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I need to recuse myself. In every case, I will carefully consider whether recusal is necessary.

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

scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

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

The courts play a central role in protecting constitutional rights under the rule of law through the fair and impartial application of the law. If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including precedent considering and applying footnote 4 of *United States v. Carolene Products*. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

Yes.

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

I have not researched this issue and do not have considered views on it. If confirmed, and if such a matter comes before me, I will discern and fully and faithfully apply all applicable law and Supreme Court and Tenth Circuit precedent regarding the presidential pardon power. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

The Constitution confers on the federal government certain enumerated powers, including Article 1, Section 8, Clause 3 (the Commerce Clause) and Section 5 of the Fourteenth Amendment. The scope of those powers with respect to such provisions has been the subject of litigation and debate, with the Supreme Court deciding a number of

cases regarding the same. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent concerning the scope of congressional powers.

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

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

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

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

The Supreme Court held that “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden of the right.” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not

believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

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

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

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

The Fourth Amendment states a fundamental guarantee to the people of the United States. The Supreme Court has recognized that new technological developments can give rise to genuine Fourth Amendment concerns. If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including precedent applicable to date collection and the Fourth Amendment. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or a scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

I have not researched this issue and do not have considered views on it. If confirmed, and should such a matter come before me, I would discern and fully and faithfully apply all laws and applicable Supreme Court and Tenth Circuit precedent regarding presidential power in this respect. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

An independent judiciary is a fundamental principle of our constitutional system. Such independence is critical to the integrity and protection of the rule of law. Article III of the constitution sets forth certain protections to allow for judicial independence. The Code of Conduct for United States Judges emphasizes the importance of judges operating independent of political influence by affirming “an independent and honorable judiciary is indispensable to justice in our society. If confirmed, I will uphold my judicial oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of the United States. *See* 28 U.S.C. § 453.

**Nomination of Kea Whetzal Riggs
to the United States District Court for the District of New Mexico
Questions for the Record
Submitted July 3, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

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

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

Although unfamiliar with the facts and circumstances reported in the story, I am aware that judicial nominations continue to generate controversy and debate. Independence of the judiciary is fundamental to the promotion and protection of the rule of law. Such independence is a core component of our constitutional system. An independent judiciary requires a judge to be free from political influence or bias. The inclusion of spending limits and disclosure requirements is reserved to the judgment of Congress. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment on policy matters that are the subject of legislative consideration by Congress, or on scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 1, 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully seek to uphold the principle of judicial independence in accordance with the Constitution, governing statutes and the oath of my office.

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

I am unfamiliar with the facts and circumstances related to Mr. Leo’s statement. As such, I am unable to comment on the statement. Please see my response to Question 1(b).

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

No.

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

I am unfamiliar with the facts and circumstances related to Mr. Leo’s statement. As such, I cannot comment on his meaning. Please see my response to Question 1(b).

- 2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Yes. A judge should fairly and impartially apply the law and rules without favor or preference to one side or the other. A judge should also not place himself or herself in the role of an adversary.

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

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

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

Whether a genuine dispute as to any material fact exists requires the court to consider the parties’ factual assertions based on the evidentiary record, construed in the light most favorable to the non-moving party. In that sense, the analysis is objective. Judges should refrain from injecting their personal views or feeling into any determination.

- 4. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”
 - a. What role, if any, should empathy play in a judge’s decision-making process?

Empathy is an essential human attribute that can assist a judge in making a decision within the boundaries of the facts and law. However, a judge’s decision must be based on applicable law and relevant facts, not on personal feelings. If confirmed, I will uphold my judicial oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and to decide cases “faithfully and impartially” under the laws of the United States. *See* 28 U.S.C. § 453.

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

Every judge brings his or her life experience to the bench. This can assist with the judge's ability to communicate with and relate to people. However, a judge's personal views must not affect their duty to administer justice impartially and fairly to all. A judge's decisions must be based on applicable law and relevant facts. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of the United States. *See* 28 U.S.C. § 453.

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

I believe that my personal and professional experiences have equipped me well to be a judge and to fairly and impartially exercise my judicial responsibilities. However, judicial decisions should be based on applicable law and relevant facts, and not on personal feelings, life experiences, or identities of the parties appearing before them. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of the United States. *See* 28 U.S.C. § 453.

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

No. It is the duty of a district judge to follow Supreme Court and Circuit Court precedent.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."
a. What role does the jury play in our constitutional system?

The Seventh Amendment protects the rights of civil litigants to have the facts of the case decided by a jury of one's peers. As such, the jury plays a fundamental and critical role in our constitutional system.

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

The Seventh Amendment states a fundamental guarantee to the people of the United States. As such, the right to a jury trial in "suits a common law" should always be of concern to judges. If confirmed I will fully and faithfully apply the law and all Supreme Court and Tenth Circuit precedent. As a sitting judge and a judicial nominee, I do not believe it appropriate to comment further on a scenario, which is or may be the subject of pending or impending litigation. *See* code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see my response to Question 6(b).

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

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

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

- a. Have you read Advisory Opinion #116?

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

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

If confirmed, I will fully and faithfully abide by the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees in the execution of my judicial duties.

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

Please see my response to Question 8(b). I also commit to being alert to the potential that sponsoring organizations of educational programs might attempt to gain influence with participating judges or that there may be such an appearance. If I become aware of that fact, I will take appropriate action.

**Questions for the Record from Senator Kamala D. Harris
Submitted July 3, 2019
For the Nomination of**

Kea Whetzal Riggs, to the U.S. District Court for the District of New Mexico

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?**

Addressing the liberty interests of an individual is a multi-faceted and solemn responsibility that requires great thought and care. I would fully and faithfully follow the law and my judicial oath in carrying out this responsibility.

If confirmed, I would devote deliberate consideration to each sentencing proceeding. I would follow the process set forth in Fed. R. Crim. P. 32 and 18 U.S.C. §3553. I would carefully review the indictment, the governing statutes and applicable precedent. I would carefully review the presentence report of the probation officer pursuant to 18 U.S.C. § 3552, along with the advisory Sentencing Guidelines and other factors set forth in §3553(a). I would ensure that the government, defendant and any victim had the opportunity to speak. Finally, I would follow Supreme Court and Tenth Circuit precedent instructive to sentencing.

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

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

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

While the Guidelines are no longer mandatory, a district judge must carefully consider the advisory Guidelines calculation in each case. The Guidelines list specific circumstances that can justify a departure from the advisory Guidelines range based on the facts and circumstances of a particular case. In addition, the Supreme Court and the Tenth Circuit have provided guidance to district courts regarding circumstances as to when it is appropriate to depart or vary from the advisory sentencing range. If confirmed, I would fully and faithfully follow all applicable law and precedent when making a decision on sentencing matters.

- 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?**

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

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

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

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

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

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

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

I am aware that mandatory minimum sentences have generated significant debate and controversy. If confirmed, I would evaluate each case individually. I would carefully consider the law and my ethical obligations if confronted with the circumstances hypothesized in this question. I would fashion a sentence consistent with my duty to apply federal sentencing laws as determined by Congress and as required by Supreme Court and

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>

Tenth Circuit precedent. I would consider including commentary in the opinion explaining why the sentence imposed is not the sentence that I would have fashioned through application of the factors contained in 18 U.S.C. §3553(a).

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

Charging policies and decisions fall exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework. This issue has not come before me. If the issue did come before me, I would carefully study the issue and make every effort to ensure that my ethical obligations are strictly followed along with Supreme Court and Tenth Circuit precedent.

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

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

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

Yes.

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

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

Yes.

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

I believe that racial bias continues to affect our country in many ways. I am also aware that there are ongoing debates and study of this issue, including studies conducted by the United States Sentencing Commission on demographic differences and sentencing outcomes. Equal protection of the law is a fundamental right guaranteed by the U.S. Constitution. The administration of justice must be fair and impartial without regard to race. I have not otherwise researched this issue sufficiently to form an opinion on this question. If confirmed, I will make

every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

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

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

Yes.

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

Yes.