**Nomination of Amul Thapar to the U.S. Court of Appeals for the Sixth Circuit**
**Questions for the Record**
**Submitted May 3, 2017**

## QUESTIONS FROM SENATOR FEINSTEIN

1. In *Winter v. Wolnitzek* (2016), you struck down a number of provisions in the Kentucky Judicial Code of Ethics, which governs the conduct of candidates for elected judgeships in Kentucky.

   You found that certain restrictions on judicial candidates' political activities, including campaign contributions, violated those candidates' First Amendment rights. You overturned a provision that prohibited judicial candidates from making contributions to political organizations or other candidates. You cited the Supreme Court's decision in *Citizens United* and wrote that "there is simply no difference between 'saying' that one supports an organization by using words and 'saying' that one supports an organization by donating money."

   The Sixth Circuit, however, disagreed. While that court upheld a number of your findings, it rejected your argument that Kentucky's ban on judicial candidates' political contributions was unconstitutional. In fact, the Sixth Circuit stated that this restriction served a "compelling interest in preventing the appearance that judicial candidates are no different from other elected officials when it comes to quid pro quo politics."

   **a. Do you agree that candidates for elected judicial office are fundamentally different than candidates for other elected offices?**

**Response:** As I recognized in *Winter*, "judges and politicians are different species of public officials: politicians are supposed to be responsive to their constituency, but judges are supposed to be 'responsive' to the law alone." *Winter v. Wolnitzek*, 186 F. Supp. 3d 673, 678 (E.D. Ky. 2016). The Supreme Court similarly stated in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), that "[j]udges are not politicians, even when they come to the bench by way of the ballot" and that "a state's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." *Id.* at 1662.

   **b. Do you agree with the Sixth Circuit that prohibiting judicial candidates' political contributions serves a compelling state interest in preventing the appearance of quid pro quo corruption among judicial candidates?**

**Response:** As I recognized in *Winter*, Kentucky's prohibition on political contributions by judicial candidates serves compelling state interests by "diminishing reliance on political parties in the election of judges" and "preventing bias against parties." 186 F. Supp. 3d at 693 (citing *Carey v. Wolnitzek*, 614 F.3d 189, 202 (6th Cir. 2010), and *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002)). The Sixth Circuit similarly stated that the prohibition serves Kentucky's "compelling interest in preventing the appearance that judicial candidates are no different from other elected officials when it comes to quid pro politics." *Winter v. Wolnitzek*, 834 F.3d 681, 691 (6th Cir. 2016). Though the Sixth Circuit disagreed as to

whether the contributions clause was narrowly tailored to serve these compelling interests, I respect the Sixth Circuit's decision and would have followed it had the case not been resolved shortly after remand.

2. In *Williams-Yulee v. Florida Bar* (2015) the Supreme Court held that "[j]udges are not politicians," and upheld a provision of Florida's Code of Judicial Conduct that barred judges from personally soliciting campaign contributions. Thus, under Supreme Court precedent, judicial candidates are treated differently than candidates for non-judicial political offices, even when it comes to campaign contributions. Would you agree?

**Response:** Please see the responses to Question 1(a) and 1(b).

3. In speech notes that you provided to the Judiciary Committee as part of your Judiciary Questionnaire, you state: "No one believes that courts — whether federal or state — are insulated from politics."

    **a. Please say more about the ways you believe courts are not insulated from politics.**

**Response:** This statement is from my notes for a speech on the "First Amendment and the Courts." In this section of the speech, I acknowledged that "politics" (in the broadest sense) plays a role in judicial selection at both the state and federal level—whether because a judge stands for election or because the judge is nominated and confirmed by elected representatives. But once a judge dons the robe, he or she cannot and should not be influenced by politics. Whatever the means that brought him or her to the bench, each judge owes a duty to decide cases faithfully and impartially, without respect to persons, personal beliefs, or any partisan ideology. *See, e.g.*, 28 U.S.C. § 453 (oath of United States judges). As I explained during the speech, judicial canons and the federal confirmation process play an important role in ensuring that judges are unbiased and committed to the rule of law. And having served as a district judge for nearly ten years, I can say that I am in awe every day of the integrity and impartiality of the men and women of the federal judiciary.

    **b. Given your belief that judges are not insulated from politics, how can you assure this Committee that you will function as an unbiased and independent check on the President who has nominated you?**

**Response:** I am firmly committed to the preservation of a fair and independent federal judiciary. Thanks to the founders' foresight and the protections of Article III, I am secure in the knowledge that I can, and indeed must, follow the law wherever it leads and without fear or favor. I believe that my almost ten-year record on the Eastern District of Kentucky bears out this commitment. When I take the bench, I set aside my personal views, listen respectfully to the parties, and decide cases impartially. And because I strive each day to apply the law faithfully, consistently, and without respect to persons, I have ruled against the government on many occasions. *See, e.g.*, *M.L. Johnson Family Props., LLC v. Jewell*, No. 16-CV-6-ART, 2017 WL 628457 (E.D. Ky. 2017) (ruling that the plaintiff could sue the Interior Department to reinstate cessation order on surface mining); *Hicks v. Colvin*, — F.

Supp. 3d —, 2016 WL 5944715 (E.D. Ky. 2016) (holding, contrary to other non-binding decisions in the district, that the Social Security Administration deprived beneficiaries of due process in redetermination proceedings); *United States ex rel. Griffith v. Conn*, No. 11-CV-157-ART, 2016 WL 4803970 (E.D. Ky. 2016) (denying the government's motion to stay this qui tam action); *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016) (sitting by designation) (reversing multiple convictions for failure to give a necessary jury instruction); *United States v. Arny*, 137 F. Supp. 3d 981 (E.D. Ky. 2015) (granting a defendant a new trial because his counsel was ineffective); *M.L. Johnson Family Props., LLC v. Jewell*, 27 F. Supp. 3d 767 (E.D. Ky. 2014) (ordering the Secretary of the Interior to inspect a surface mining permit that did not appear to comply with federal law); *United States v. Lee*, 862 F. Supp. 2d 560 (E.D. Ky. 2012) (suppressing evidence obtained as the result of an illegal GPS search); *United States v. Rice*, 704 F. Supp. 2d 667 (E.D. Ky. 2010) (suppressing evidence obtained through an unlawful search of the defendant's home). I can assure you that I will never shrink from my oath, from the principles the oath embodies, or from any case or controversy.

4. In your hearing, you discussed some work you had done for the Becket Fund while in private practice. Please detail all of your legal work for the Becket Fund, including any work before the Supreme Court, and any other association you have had with that organization.

**Response:** To the best of my memory, I assisted with only the two cases that I discussed at the hearing, and my assistance was minimal. I provided this assistance while I was an associate at Williams & Connolly LLP. I never worked on any cases before the Supreme Court on the Becket Fund's behalf.

5. Last year, President Trump included you on an expanded list of 21 potential Supreme Court nominees. The press reported that the President interviewed you earlier this year as one of four finalists for the Supreme Court vacancy. In your Senate Judiciary Questionnaire, you indicate that you also interviewed with White House Counsel Don McGahn and Vice President Mike Pence for the vacancy.

    **a. With regard to these meetings for the Supreme Court vacancy, was anyone else present in these meetings? For example, did you ever meet with Steve Bannon as part of any of the meetings with the President, Vice President, or White House officials?**

**Response:** On January 12, 2017, I was interviewed by Vice President-elect Mike Pence, Don McGahn (now White House Counsel), Mark Paoletta (now Counsel to the Vice President), and James Burnham (now Senior Associate Counsel to the President). On January 26, 2017, I was interviewed by President Donald Trump, and Mr. McGahn was present. I have never met Steve Bannon. Please also see the response to Question 26(a) on my Senate Judiciary Questionnaire.

    **b. In your meetings with members of the Trump transition team and/or the Trump Administration, did anyone indicate that your nomination to the Sixth Circuit was a precursor to your nomination to the Supreme Court?**

**Response:** No.

**c. Your name was first included on President Trump's short list on September 23, 2016. Your response to Question 26 on the Senate Judiciary Questionnaire indicates that your earliest contact with the Trump Administration regarding this vacancy occurred on January 7, 2017. Did you have any communications with the President-elect transition team or the presidential campaign prior to January 7, 2017?**

**Response:** Don McGahn left me a voicemail on January 6, 2017. I returned his call and left a voicemail of my own later that day. We spoke for the first time on January 7, 2017. I had no contact with the President-elect's campaign or transition team prior to this exchange.

**d. Again, in light of the fact that you were first included on President Trump's short list on September 23, 2016: Did you have any interviews or communications with outside organizations or individuals at the behest of anyone in the President-elect transition team or presidential campaign, before or after January 7, 2017? If so, who was present for or otherwise involved in these interviews or communications? What was discussed?**

**Response:** No.

6. As a presidential candidate, President Trump made clear that conservative interest groups played a significant role in choosing who made his short list of Supreme Court nominees. In June 2016, for instance, he stated "we're going to have great judges, conservative, all picked by the Federalist Society," and in September — after your name was added to the list — President Trump specifically thanked both the Heritage Foundation and the Federalist Society for their work on the list.

**a. Before your name was added to the President's list of potential nominees, did you have any contact with anyone from the Heritage Foundation, including John Malcolm, or the Federalist Society, including Leonard Leo, about your possible inclusion on that list, or your potential nomination to the Supreme Court generally?**

**Response:** No.

**b. Why do you think the Federalist Society and Heritage Foundation recommended you for inclusion on then-candidate Trump's list?**

**Response:** I do not know, and I am unable to speak to their thought processes.

**c. From 2008 to the present, did you have any contact with anyone at the Federalist Society or the Heritage Foundation about your possible elevation to the Sixth Circuit?**

**Response:** No.

**d. On January 9, 2017, the Judicial Crisis Network announced that it planned to spend at least $10 million to confirm President-elect Trump's as-yet-unannounced Supreme Court nominee—two days after you were first contacted for an interview. This money was spent on the heels of the Judicial Crisis Network's $7 million campaign to prevent Chief Judge Garland from ever getting a confirmation hearing. Please identify all communications you have had with individuals from the Judicial Crisis Network—or any of the affiliated groups listed on their January 9 press release (https://judicialnetwork.com/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/) announcing their campaign—since February 2016. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when the communications occurred.**

**Response:** I have not communicated with any individual from the Judicial Crisis Network or from any of the other groups listed in the Network's January 9 press release. I am not aware of anyone having communicated on my behalf with the Network or any of the listed groups.

7. In addition to being picked by the Heritage Foundation and the Federalist Society for the President's Supreme Court short list, you indicate on your Senate Questionnaire that you were a member of the Federalist Society from 2005 to 2008. The Federalist Society's "About Us" webpage, states that, "[l]aw 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." The same page states 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. You teach as a law school professor. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?**

**Response:** I do not know what the Federalist Society meant by this statement. Moreover, I do not have sufficient information to speak about law schools generally.

**b. As a former member of the Federalist Society, how exactly does the organization seek to "reorder priorities within the legal system"?**

**Response:** I do not know what the Federalist Society meant by this statement.

**c. As a former member of the Federalist Society, explain what "traditional values" you understood the organization placed a premium on.**

**Response:** I do not know what the Federalist Society meant by this statement.

8. President Trump repeatedly stated that he would apply a litmus test in selecting only Supreme Court nominees who will oppose a woman's right to choose and overturn *Roe v. Wade*. President Trump also repeatedly stated that he would apply a litmus test in selecting Supreme Court nominees who would be "very pro-Second Amendment."

   You were on President Trump's Supreme Court shortlist, which was drawn up by the Heritage Foundation and the Federalist Society. You also interviewed with President Trump.

   **a. In your meetings with President Trump, Vice President Pence, or any White House officials, please answer whether there was any mention or discussion of:**

      **i. Abortion, contraception, or the right to privacy**
      **ii. Second Amendment**

**Response:** No.

   **b. Have you ever spoken with anyone at the Heritage Foundation about how you would approach a case involving:**

      **i. Abortion, contraception, or the right to privacy**
      **ii. Second Amendment**

**Response:** No.

   **c. Have you ever spoken with anyone at the Federalist Society about how you would approach a case involving:**

      **i. Abortion, contraception, or the right to privacy**
      **ii. Second Amendment**

**Response:** No.

9. In a recent interview with Jeffrey Toobin, Leonard Leo, the head of the Federalist Society, said that Donald Trump told him that he wanted his Supreme Court nominee to be "somebody who was going to, quote, 'interpret the Constitution the way the Framers meant it to be.'" According to Toobin, "[t]he statement was, in effect, a call for an originalist."

   **a. Have any White House officials, anyone affiliated with the Federalist Society,**

**or anyone affiliated with the Heritage Foundation ever asked you whether you are an originalist, subscribe to an originalist theory of constitutional interpretation, or believe that the Constitution's terms should be read consistent with the original intent of the Framers or with its original public meaning?**

**Response:** I do not recall any such question.

**b. With respect to constitutional interpretation, do you believe judges should employ an originalist method of reading the Constitution?**

**Response:** I would follow the precedent of the Supreme Court and Sixth Circuit regarding the methods to be employed when interpreting the Constitution. That precedent suggests that a court should consult original sources when interpreting the language of at least some constitutional provisions. For example, in cases involving the Seventh Amendment, the Supreme Court has explained that courts must (1) compare the nature of the claim to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity," and (2) evaluate the remedy that the Plaintiff seeks to "determine whether it is legal or equitable in nature." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Where precedent calls for the use of other sources, I would use those other sources.

**c. How do you decide when an originalist reading of the Constitution should be controlling?**

**Response:** I will look to the precedent of the Supreme Court and Sixth Circuit to determine when an originalist reading of the Constitution should control.

**d.** In *Obergefell v. Hodges*, the Supreme Court upheld a constitutional right to same-sex marriage. **How do you understand an originalist reading of the Constitution to support this right?**

**Response:** In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect the right of same-sex couples to marry on the same terms and conditions as opposite-sex couples. I have not had occasion to consider what role, if any, originalism played in the Court's analysis. *Obergefell* is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge and, if confirmed, as a circuit judge.

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

**Response:** In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court held "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. I have not had occasion to consider what role, if any, originalism played in the Court's analysis. *Loving* is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge and, if

confirmed, as a circuit judge.

10. Please respond with your views on the proper role of precedent.

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

**Response:** I am not aware of any situation in which it would be appropriate. The Supreme Court has said that lower courts may not disregard controlling Supreme Court precedent even when a decision appears to be out of step with subsequent cases in analogous areas of law. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.").

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

**Response:** Please see the response to Question 8 from Senator Grassley.

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

**Response:** As a federal district judge, I am not in a position to advise the Supreme Court as to when it should overturn its own precedent. Please also see the response to Question 10(a) above.

11. 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"?**

**b. Is it settled law?**

**Response:** From the perspective of a district or circuit judge, it does not matter whether a Supreme Court precedent is labeled "super-stare decisis," "super precedent," "settled law," or anything of the like. Any Supreme Court decision, including *Roe v. Wade*, is binding on the lower federal courts, and it is my duty as a judge to apply that binding precedent faithfully.

12. 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?**

**Response:** Please see the response to Questions 9(d) and 11.

13. 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?**

**Response:** As I discussed at the hearing, my personal views are not relevant to my role as a judge. Expressing a personal view about a case risks giving litigants the impression that I could not be open-minded and impartial should a similar case come before me in the future. The majority opinion in *Heller* represents the binding precedent of the Supreme Court. As such, I will faithfully apply that decision, whether as a district or circuit judge. Please also see the response to Question 11.

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

**Response:** The Supreme Court stated in *Heller* that the "right secured by the Second Amendment is not unlimited" and counseled that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626–27 (2008).

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

**Response:** I have not had occasion to study the line of cases preceding *Heller*. However, *Heller* is a binding precedent of the Supreme Court, and like all other such precedent, I will faithfully apply it. Please also see the response to Question 11.

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

**Response:** Please see the response to Question 12 from Senator Grassley.