Senator Mazie K. Hirono

Questions for the Record following hearing on April 26, 2017 entitled:

"Nominations"

Judge Amul Thapar

1. What is your understanding as to the level of scrutiny that applies to limits on campaign contributions?

Response: In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court stated that restrictions on the size of financial contributions to political candidates are subject to a "rigorous standard of review." *Id.* at 29. The Court later explained that contribution regulations that involve "significant interference with associational rights" are nevertheless constitutional if they are "closely drawn to match a sufficiently important interest." *FEC v. Beaumont*, 539 U.S. 146, 162 (2003). The Court has distinguished this "closely drawn" standard from the "exacting" or "strict" scrutiny applicable to expenditure limits. *See id.* at 161–62; *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014); *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1664-65 (2015). Should the issue be raised before me, I will look to and faithfully apply the Supreme Court and Sixth Circuit precedent in this area.

2. In *Sours v. Big Sandy Regional Jail Authority,* you granted the defendant's motion for summary judgment on deliberate indifference claim. In reversing you, the Sixth Circuit emphasized testimony that you omitted, namely that "expert testimony indicated that . . . [the nurse's] actions were not reasonable within the bounds of standard nursing practice; and . . . reasonable care would have included insuring that Sours was under the care of medical staff." Why did you omit this evidence?

Response: Respectfully, I did not omit any evidence from my analysis of the case. After considering all of the evidence, I concluded that although his other tort claims could proceed, Sours was not entitled to relief on a deliberate-indifference theory under the standard then in place in the Sixth Circuit. That standard contained both an objective and a subjective component, which I found that he had not established. The Sixth Circuit disagreed, clarifying that Sours could establish the subjective component of his deliberate indifference claim if the facts "reveal that [the defendant nurse] consciously acted unreasonably in response to the known risk." *Sours v. Big Sandy Reg'l Jail Auth.*, 593 F. App'x 478, 485 (6th Cir. 2014). I respected and followed that decision when the case was remanded back to me.

3. Last year, you gave a speech in which you said, "[n]o one believes that courts – whether federal or state – are insulated from politics." You argued that the "[g]oal for both is

[the] impartial judiciary" and that "[b]oth federal and state courts [try] to make sure that judges appear unbiased."[1]

a. Should access to justice depend on who won the last election or who is in charge of nominating judges?

Response: No.

b. Do you believe that your personal views and your judicial philosophy have a bearing on how you act as a judge?

Response: No, other than what I have described below in my response to Question 4(b).

4. During your time on the bench you've advocated for "judicial modesty." You've stated that your job is to "[f]ollow the law," because "[n]one made me God, President, or King." You've argued that "shouldn't guess what [laws] mean," nor "predict how they could be better" because to do so would "destroy the separate branches of government."[2]

a. In a course you recently taught at the University of Virginia, you focused on Justice Scalia's use of originalism and textualism, calling the class "Judicial Philosophy: Justice Scalia and his Critics."[3] Is it your belief that all judges have some sort of judicial philosophy?

Response: I am unable to comment on the approaches of my colleagues. But I can speak from my own experience. And in my experience sitting with other judges on the Sixth and Eleventh Circuits, I have not encountered a single judge who has predetermined the result in a case. Each one has come to conference with an open mind and simply tried to follow the law as he or she understood it. Federal judges take an oath to administer justice fairly and impartially. I take that oath seriously, as does every judge with whom I have had the opportunity to serve.

b. How would you describe your judicial philosophy?

Response: My philosophy is that a judge should apply the law faithfully and impartially to the facts of the case. Personal views, sympathies, and ideologies have no place in judging. Consistent with my obligations under Article III of the Constitution to adjudicate cases and controversies, I interpret to the best of my ability the relevant constitutional provisions, statutes, regulations, and precedents. And I apply them to the best of my ability to the particular facts of the case. That is what I consider modest judging. To practice any other kind would be unfair to litigants and would overstep my constitutional authority.

5. In *Turner v. Astrue*, you held that no fees were no fees were required where a contingency fee arrangement required payment only where a plaintiff had "incurred"

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[1] Speech delivered November 7, 2016; a similar speech was also given in September 2016.
[2] See SJQ Appendix 12(d), p. 49.
[3] See SJQ Appendix 19, pp. 21-24.

attorney's fees—when he either paid them or has a legal obligation to pay them. In *Turner*, because the district court had remanded the case without awarding benefits, you reasoned that held the plaintiff did not incur attorney's fees. The Sixth Circuit reversed you finding that "litigants 'incur' fees under the Equal Access to Justice Act when they have an express or implied legal obligation to pay over such an award to their legal representatives." The Sixth Circuit highlighted "[c]ase law from multiple circuits establishes that the plain meaning of 'incurred' does not require the plaintiff to have paid counsel or to have a legal obligation to pay counsel."

a. What is your understanding of the plain meaning of "incurred"?

Response: In *Turner v. Astrue*, I concluded that "[i]f the claimant has not paid any attorney's fees, and is under no obligation to pay any attorney's fees, he has not 'incurred' any attorney's fees" as that term is used in the Equal Access to Justice Act (EAJA). 764 F. Supp. 2d 864, 872 (E.D. Ky. 2010), *rev'd and remanded sub nom. Turner v. Comm'r of Soc. Sec.*, 680 F.3d 721 (6th Cir. 2012). The Sixth Circuit read the statute differently, concluding that "litigants 'incur' fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives, regardless of whether the court subsequently voids the assignment provision." *Turner v. Comm'r of Soc. Sec.*, 680 F.3d 721, 725 (6th Cir. 2012). If confirmed, I would faithfully apply this Sixth Circuit precedent, as I did when the case was remanded back to me (and have in all subsequent cases).

6. In response to Senator Klobuchar's question about your application of strict scrutiny to the contribution ban in Kentucky's judicial canon in *Winter v. Wolnitzek*, you said that it seemed to you that if strict scrutiny is the proper standard to apply to a solicitation ban, it should also apply when analyzing contributions. You elaborated that in your view, solicitation by a judge has more potential for *quid pro quo* corruption than judicial contributions.

a. Do you agree with this assessment by the Supreme Court's assessment in *Buckley* v. *Valeo*?

> …[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate… A

> limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.
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> *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (footnote omitted).

Response: *Buckley* is a binding precedent of the Supreme Court and I will faithfully apply it.

7. Both myself and Senators Whitehouse highlighted a line in your opinion in *Winter*: "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."

    a. Do you concede that since *Buckley v. Valeo*—a decision that you cited in your opinion in *Winter*—the Supreme Court has treated contributions *not* as pure speech in which the donor controls the message but rather as attenuated speech or an act of association? According to clear precedent, then, there *is* an important difference between contributing and speaking words aloud. Do you agree?

Response: It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Please see the response to Question 13(a) from Senator Feinstein. Please also see the passage quoted in Question 6 and the response thereto and the response to Question 1. If faced with a campaign-contributions case, I would study the briefs and the relevant Supreme Court and Sixth Circuit precedent, and apply the law faithfully to the case at hand.

8. When I asked about your application of strict scrutiny to contribution limits in *Winter*, you emphasized that in that opinion, you *upheld* a provision in Kentucky's judicial cannon pertaining to judicial endorsements, since this in your mind raised a larger concern of *quid pro quo* corruption.

    a. Do you accept that Supreme Court precedent has repeatedly held that contribution limits *do* serve the government's interest in preventing *quid pro quo* corruption? *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 24-27 (1976); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-389 (2000).

Response: In *Buckley v. Valeo*, the Supreme Court stated that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined," and that "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. 1, 26–27 (1976). In *Nixon v. Shrink Missouri Government PAC*, the Court quoted this language and cited numerous other cases in which it had said similar things. 528 U.S. 377, 388–89 (2000). And, in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), the Supreme Court held that a ban on the solicitation of contributions by judicial candidates withstood strict scrutiny. I would apply these precedents faithfully.

b. Do you believe potential for *quid pro quo* corruption is reduced when it is judicial candidates making campaign contributions as opposed to other Americans making campaign contributions?

Response: It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Please see the response to Question 13(a) from Senator Feinstein. As far as I am aware, neither the Supreme Court nor the Sixth Circuit has spoken to the exact issue you raise. But, the Sixth Circuit has found 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." *Winter v. Wolnitzek*, 834 F.3d 681, 691 (6th Cir. 2016). I will follow that precedent. Please also see the response to Question 1(a) from Senator Feinstein.

9. I asked whether you would apply strict scrutiny to *all* rules governing campaign contributions (versus those in judicial canons). You responded that you would need to research the law to determine whether to apply strict scrutiny. Now that you've had an opportunity to do so, do you agree that the Supreme Court has never applied strict scrutiny to a regulation governing campaign contributions? Why or why not?

Response: Please see the response to Question 1.