Nomination of Daniel Collins to the United States Court of Appeals for the Ninth Circuit
Questions for the Record
March 20, 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 directly controlling Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American 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."); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam).

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

   While it may be appropriate for a circuit judge to note in an opinion that a directly applicable Supreme Court precedent "appears to rest on reasons rejected in some other line of [Supreme Court] decisions," a circuit court judge "should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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

   As a general matter, a three-judge panel is "bound by prior panel decisions and only the *en banc* court may overrule panel precedent." *S & H Packing & Sales Co., Inc. v. Tanimura Distrib., Inc.*, 883 F.3d 797, 801 (9th Cir. 2018) (en banc). The en banc Ninth Circuit has held that, "where intervening Supreme Court authority is clearly irreconcilable with … prior circuit authority," a "three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The en banc Ninth Circuit has overruled panel precedent when, for example, doing so would "eliminate a circuit split." *S & H Packing*, 883 F.3d at 801 & n.7.

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

The Supreme Court has repeatedly held that its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (same). As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine further as to when the Supreme Court should revisit or overturn one of its precedents.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as "super-stare decisis." One text book on the law of judicial precedent, co-authored by Justice 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"? "superprecedent"?

    Roe v. Wade, 410 U.S. 113 (1973), is binding precedent from the U.S. Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Roe* and any other applicable Supreme Court precedents.

    b. Is it settled law?

    Yes. For judges of inferior federal courts, *Roe v. Wade*, like all other Supreme Court precedent, is settled law that must be followed fully and fairly.

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. For judges of inferior federal courts, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), like all other Supreme Court precedent, is settled law that must be followed fully and fairly. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Obergefell* and any other applicable Supreme Court precedents.

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?

District of Columbia v. Heller, 554 U.S. 570 (2008), is binding precedent from the U.S. Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Heller* and any other applicable Supreme Court precedents. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine as to whether the majority or the dissent was correct in *Heller*.

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

Heller stated that "the right secured by the Second Amendment is not unlimited," and the Court gave a non-exhaustive list of "presumptively lawful regulatory measures," including "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. at 626-27 & n.26. As a judicial nominee, I do not think that it would be appropriate for me to opine as to how *Heller* might apply in future cases that may come before the courts.

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

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

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

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

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court stated that "First Amendment protection extends to corporations"; that "[t]his protection has been extended by explicit holdings to the context of political speech"; and that "[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id*. at 342-43. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine as to whether the majority or the dissent was correct in *Citizens United*. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Citizens United* and any other applicable Supreme Court precedents.

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?

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court addressed the scope of the protections afforded under the Religious Freedom Restoration Act of 1993 ("RFRA"), and in doing so, the Court stated that it had "entertained RFRA and free-exercise claims brought by nonprofit corporations" and that "the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights." *Id*. at 708, 714-15 (citing *Gallagher v. Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961)). As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine as to whether the majority or the dissent was correct in *Hobby Lobby*. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Hobby Lobby* and any other applicable Supreme Court precedents.

6. During your hearing, Senator Graham asked you how you felt about the First Step Act. You responded that you think the First Step Act "appeared…to be a balanced approach to reform some of the sentencing provisions which seemed unduly harsh."

   However, you refused to offer your thoughts on several other issues raised at your hearing. In light of your willingness to comment on the First Step Act, and the fact that issues related to this newly enacted law could come before you as a judge if you are confirmed, there is no basis for you to refuse to comment on other questions that might implicate case law, legislation, or policy decisions. As such, please address the following:

   a. Senator Blumenthal asked you whether you believe *Brown v. Board of Education* was correctly decided. You declined to answer. Do you believe *Brown v. Board of Education* was correctly decided? If you again decline to comment, please explain why you are able to offer your thoughts on the First Step Act, but not on this topic.

   As I stated at the Committee hearing, *Brown v. Board of Education*, 347 U.S. 483 (1954), is an important landmark decision of the Supreme Court that consigned the separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to the ash heap of American jurisprudence. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine on the correctness of the Supreme Court's decisions. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Brown v. Board of Education* and any other applicable Supreme Court precedents.

   At the hearing, I was asked, as a "former prosecutor," what I thought of the First Step Act. As the Committee is aware, I previously participated extensively in

public discussions concerning sentencing and charging policies between 2002 and 2005, as set forth in my responses to Questions 12.b, 12.c, and 12.e of my Senate Questionnaire. Given that extensive record of prior public comments, I did not think it inappropriate to briefly acknowledge my understanding of the recent bipartisan legislation that reformed certain sentencing provisions, and I did so without opining on any legal question concerning the scope or application of the provisions of that Act.

b. Senator Klobuchar asked you what you believe are the limitations on the President's Commander-in-Chief powers in a time of war. You responded that it would not be "appropriate" to opine on that question. What do you believe are the limitations on the President's Commander-in-Chief powers in a time of war? If you again decline to comment, please explain why you are able to offer your thoughts on the First Step Act, but not on this topic.

As a judicial nominee, I do not think that it would be appropriate for me to opine upon legal questions that may come before the courts. With respect to my comment concerning the First Step Act, please see my response to Question 6(a).

c. Senator Whitehouse asked you whether you believe it is factually accurate to say climate change results from carbon emissions caused by the burning of fossil fuels that has taken place over the last century. You responded that it would not be "appropriate" to express your personal view. Do you believe climate change has resulted from carbon emissions caused by the burning of fossil fuels over the last century? If you again decline to comment, please explain why you are able to offer your thoughts on the First Step Act, but not on this topic.

As I noted at the hearing, I am currently among the counsel of record for certain defendants in currently pending litigation matters in which the defendants have been sued under various tort theories based on the allegation that they are liable for injuries caused by climate change. In view of those current representations, I do not think that it would be appropriate for me to make personal comments on factual matters related to that pending litigation. With respect to my comment concerning the First Step Act, please see my response to Question 6(a).

7. During your hearing, I asked you about a provision of the 2005 PATRIOT Act Reauthorization that removed the ability of federal district court judges to name interim U.S. Attorney appointees. A 2007 *U.S. News and World Report* article identifies you as the "author" of the provision, which stemmed from a suggestion you initially made while serving as Associate Deputy Attorney General at the Department of Justice. (Chitra Ragavan, *Change in Naming Interim U.S. Attorneys was Benign*, U.S. NEWS & WORLD REPORT (2007))

You stated at your hearing that while in private practice, you continued to advise then-Principal Associate Deputy Attorney General William Moschella on the provision and suggested language to him. However, you also denied drafting the provision. You stated that "[t]he language that was ultimately used in 2005 and enacted in 2006 is not any of the options" that you provided to Mr. Moschella and that "[t]hey came up with their own language to implement the concept."

a. How did the language that was ultimately enacted in the PATRIOT Act Reauthorization differ from the suggestions you made while at DOJ?

I do not recall that I ever suggested any draft language on this point during the time that I was an Associate Deputy Attorney General. In a July 9, 2003 inter-office email to Mr. Moschella, who was then the Assistant Attorney General in the Office of Legislative Affairs at the Department of Justice, I recommended "eliminating the district courts' role in selecting interim USAs," and I identified the relevant statutory provisions, but I did not propose any actual language for an amendment.

b. How did the language that was ultimately enacted in the PATRIOT Act Reauthorization differ from the language that you suggested to Mr. Moschella?

Section 502 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, 246 (2006), implements a concept I had proposed, but the specific language that it uses is not identical to any of the particular alternatives for actual verbatim draft language that I had set forth in my June 2004 email responding to Mr. Moschella's email to me.

8. As I noted in your hearing, in 2006, Attorney General Alberto Gonzales fired nine U.S. Attorneys for political reasons. The Bush Administration then used the PATRIOT Act Reauthorization provision in an attempt to fill those open vacancies indefinitely and bypass Senate confirmation. You stated during your hearing that you "did not envision what was going to happen" and "did not foresee that [the provision] could be used" in this manner.

a. At either DOJ or while in private practice, did you ever have conversations with DOJ officials in which you discussed strategies to carry out politically motivated firings of U.S. Attorneys?

No, not that I recall.

b. At either DOJ or while in private practice, did you ever have conversations with DOJ officials in which you discussed strategies to allow the Attorney General to fill U.S. Attorney vacancies indefinitely?

No, not that I recall.

c. At either DOJ or while in private practice, did you ever have conversations with DOJ officials in which you discussed strategies to bypass Senate confirmation of U.S. Attorneys?

No, not that I recall.

9. During your hearing, you stated that your suggestion to remove the ability of federal district court judges to name interim U.S. Attorney appointees was "largely driven by the significant blowback the administration had gotten from the bench on the PROTECT Act."

Do you believe it is appropriate for the Executive Branch to retaliate against the Judicial Branch over policy disagreements?

As I stated at the hearing, I first raised the idea of removing district courts from appointing interim U.S. Attorneys in July 2003, based on a concern that, at a time when there were significant policy differences on sentencing between the Justice Department and many judges, it did not make the most sense to have U.S. Attorneys be selected by the courts rather than by the Executive Branch. I do not believe that such an effort to ensure that Executive Branch officials will by selected by the Executive Branch represents an effort to "retaliate against the Judicial Branch."

10. During your hearing, we discussed your 1995 book review in which you wrote that the Supreme Court's decision in *Miranda v. Arizona* should be "jettisoned…in favor of the constitutional *text*." (*Farewell* Miranda? 1995 Pub. Interest L. Rev. 185) (emphasis in original) You stated that the Supreme Court "rejected those academic arguments" in the 2000 case *Dickerson v. U.S.*

a. In what way does *Miranda* depart from the text of the Constitution?

My 24-year-old review of Professor Grano's then-recent book on confessions and *Miranda* sets forth my views in 1995 as to whether Professor Grano was correct in arguing, as I put it, "for overruling *Miranda v. Arizona* and reinstating the 'voluntariness' test as the sole standard for determining the constitutional validity of a confession made during police interrogation" (footnote omitted). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and it therefore held that 18 U.S.C. § 3501, which sought "to overrule *Miranda*" by designating "voluntariness as the touchstone of admissibility," was unconstitutional. 530 U.S. at 436, 444. *Dickerson* and *Miranda* are binding precedents, and if I am

confirmed to the Ninth Circuit, I would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

b. Please specify which of your arguments the Supreme Court rejected in *Dickerson*.

Please see my response to Question 10(a).

c. Please list any other Supreme Court precedents you believe should be "jettisoned." If you decline to comment, please explain why you are able to offer your thoughts on the First Step Act, but not on this topic.

As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine further as to when the Supreme Court should revisit or overturn one of its precedents. With respect to my comment concerning the First Step Act, please see my response to Question 6(a).

11. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 1995. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

Not having drafted the quoted phrase, I am not in a position to opine as to what was intended by those who did.

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

Please see my response to Question 11(a) above.

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

Please see my response to Question 11(a) above.

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

    I recall that, during my interview in June 2017 with persons from the White House Counsel's Office and the Justice Department's Office of Legal Policy, I generally discussed my understanding of the applicable law governing statutory interpretation, and in the course of that general discussion, I stated that I was familiar with the criticisms made by then-recently confirmed Justice Gorsuch and others of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). I did not state whether I affirmatively agreed with these criticisms of *Chevron*, and I do not recall that anyone asked me to state whether I did. I stated that, if I were confirmed to the Ninth Circuit, I would be bound by, and would faithfully follow, *Chevron* and any other applicable Supreme Court precedent.

    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, not that I recall.

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

    If I am confirmed to the Ninth Circuit, I would faithfully follow and apply the applicable Supreme Court and Ninth Circuit precedents concerning administrative law.

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

Reliance on legislative history is unnecessary when a statute's language is unambiguous. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458 (2012); *see also Whitfield v. United States*, 543 U.S. 209, 215 (2005) (where the meaning of statutory text "is plain and unambiguous, we need not accept [a party's] invitation to consider the legislative history").

To the extent that legislative history may be properly considered, it "is meant to clear up ambiguity, not create it." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011). If confirmed, I would faithfully apply all relevant precedent of the Supreme Court and the Ninth Circuit concerning the use of legislative history.

14. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I drafted my responses to each of these questions. After receiving feedback from persons at the Office of Legal Policy at the U.S. Department of Justice, I finalized my answers and authorized them to be submitted to this Committee. My answers are my own.

Written Questions for Daniel P. Collins
Submitted by Senator Leahy
March 19, 2019

1. You have an extensive history of defending utility, chemical, and energy companies against environmental mass tort lawsuits filed by victims of the effects of climate change. One of the main arguments you have made in defending against these lawsuits is that the plaintiffs lacked standing to sue your clients in federal court.

   (a) Is there any scenario in which you believe that a plaintiff could obtain standing to sue a company in order to seek redress for any contributions of that company to the effects of climate change?

   As I noted at the hearing, I am currently among the counsel of record for certain defendants in currently pending litigation matters in which the defendants have been sued under various tort theories based on the allegation that they are liable for injuries caused by climate change. In view of those current representations, I do not think that it would be appropriate for me to make personal comments on issues related to such tort theories.

2. In 2003, you attended a panel in your capacity as Associate Deputy Attorney General to discuss the government's domestic intelligence, surveillance, and detention policies after September 11, 2001. During this panel, you argued that the PATRIOT Act "did not change the standards under which the wiretap regime operates," and that "the procedural requirements" for allowing wiretaps were unchanged by the PATRIOT Act.

   (a) Do you still believe that the PATRIOT Act did not change the legal standards for wiretaps?

   In the quoted comment, I noted that a provision of the PATRIOT Act, *see* Pub. L. No. 107-56, § 201, 115 Stat. 272, 278 (2001) (amending 18 U.S.C. § 2516(1)), "add[ed] most of the terrorism offenses to the list of authorized offenses for which wiretaps are permitted" under "what's called Title III." I noted that, in doing so, this particular provision of the PATRIOT Act did not generally change the underlying threshold showings that must be made to obtain a wiretap order under Title III. *See* 18 U.S.C. § 2518 (not amended by the PATRIOT Act).

   (b) As a result of the PATRIOT Act, would you agree that changes were made to the Foreign Intelligence Surveillance Act?

   The PATRIOT Act made a number of amendments to the Foreign Intelligence Surveillance Act.

   (c) Do you believe there were any abuses or violations of civil liberties committed by the United States government under the auspices of the PATRIOT Act?

   I am aware that a number of claims have been made, and lawsuits have been filed, alleging that the Government has not properly used the authorities that were granted

by the PATRIOT Act.

3. You participated in the formulation of the DOJ Civil Rights Division's 2003 guidelines on the use of race by federal law enforcement officers. On the issue of law enforcement activities at our borders, the guidance stated that because such activities "may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards."

   (a) In what specific circumstances, and under what authorities, can law enforcement authorities at our borders appropriately consider race or ethnicity in their law enforcement activities?

   These guidelines reflected the views of the Justice Department in June 2003. In the relevant operative language, the cited guidelines stated that "Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States." The guidelines specifically noted, *inter alia*, that the Supreme Court has held that the "Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813 (1996). The guidance explained that application of constitutional standards "in the context of national security and border integrity will depend to a large extent on the circumstances at hand," but that "[i]n absolutely no event … may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination."

   If confirmed, I would faithfully apply the applicable laws and precedents in addressing any claim of racial discrimination in law enforcement.

4. You also contributed to a 2003 DOJ survey of federal law enforcement agencies, a survey that apparently "did not disclose any basis for concluding that racial profiling is a systematic problem within the federal law enforcement community."

   (a) Knowing what we know today, do you still believe that there is no basis to conclude that racial profiling is a widespread problem within the law enforcement community, writ large?

   The survey summarized, for the relevant time period, claims of racial profiling that had been reported by various federal law enforcement agencies, as well as lawsuits that had been filed against such agencies alleging racial profiling. The survey report concluded that, "[a]lthough any incident of racial profiling is unacceptable, the information provided by federal agencies in response to the Department's survey did not disclose any basis for concluding that racial profiling is a systemic problem within the *federal* law enforcement community" (emphasis added). The survey did not purport to address whether racial profiling is a widespread problem within the law enforcement community, writ large.

5. In 2000, you filed an amicus brief with the Supreme Court in *Dickerson v. U.S.*, arguing for a limited reading of the rights afforded to criminal defendants under *Miranda*. You argued that Congress should be empowered to write a law effectively overriding the

constitutional protections afforded to defendants under *Miranda*.

(a) When is it appropriate for a congressional statute to effectively override constitutional protections afforded to criminal defendants?

In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and it therefore held that 18 U.S.C. § 3501, which sought "to overrule *Miranda*" by designating "voluntariness as the touchstone of admissibility," was unconstitutional. 530 U.S. at 436, 444. *Dickerson* and *Miranda* are binding precedents, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

(b) Do you believe *Miranda* should be overturned? If yes, why?

Please see my response to Question 5(a).

6. In 2005 testimony before the House Judiciary Committee, you stated that "we simply cannot be sure that, if we heed recent calls for less severity, for smaller prison populations, or for greater flexibility, we will not again see a spike in crime rates."

(a) But in recent years, in dozens of states across the country, prison sentences, prison populations, and crime rates have all fallen together.[1] How do you explain that?

In my 2005 testimony before the House Judiciary Committee, I expressed the view that stricter sentences would be expected to lead to lower crime rates, and in doing so I relied on the premise that enhanced sentences for recidivists would reduce their opportunities to commit additional crimes. The desirability and efficacy of such enhanced sentencing laws have been questioned by many in recent years, including by many in Congress. Indeed, at the hearing, I briefly acknowledged my understanding of the recent bipartisan legislation that reformed certain sentencing provisions. Beyond that general observation, I do not think it would be appropriate for me to opine on whether the relevant data available today do or do not support any particular approach to sentencing policy. If confirmed, I would faithfully apply the applicable laws and precedents governing criminal sentencing.

7. 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?'"

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

[1] From a June 2016 Brennan Center report: "Over the last ten years, 27 states have decreased both crime and imprisonment. . . . Nationally, imprisonment and crime have fallen together, 7 percent and 23 percent respectively since 2006." Lauren-Brooke "L.B." Eisen and James Cullen "Update: Changes in State Imprisonment Rates," The Brennan Center, June 7, 2016.

reaching for a dictionary?

The Supreme Court has stated that "[t]he definition of words in isolation … is not necessarily controlling in statutory construction" and that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). If confirmed, I will faithfully follow the applicable precedents of the Supreme Court and the Ninth Circuit concerning statutory construction.

8. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(a) 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?

The structural protections granted to federal judges by Article III of the Constitution are designed to ensure that judges will have the functional independence necessary to faithfully and fairly adjudicate the matters that come before them, without regard to any criticisms that may be leveled at them.

(b) 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 8(a).

9. 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?

The Supreme Court has reviewed certain presidential actions, including actions taken during a time of military conflict. *See*, *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

10. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

Questions concerning the constitutional and statutory standards governing the admission of foreign nationals into the United States, including the application of the Free Exercise Clause in such circumstances, have recently been the subject of litigation before the federal courts. As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to opine on matters that may be "pending or impending in any court." *See* Code of Conduct of U.S. Judges, Canon 3A(6).

11. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to address what measures a court should or should not take to enforce an order or judgment in an abstract hypothetical scenario.

12. 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?

In making the quoted statement, the Supreme Court cited Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). The Supreme Court has stated that, under the "familiar tripartite

framework" set forth in that concurring opinion, "when 'the President takes measures incompatible with the expressed or implied will of Congress ... he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.'" *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). If confirmed, I would faithfully apply the Constitution, any relevant statutes, and the applicable precedent of the Supreme Court in evaluating any challenge to a given exercise of Executive authority.

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

In making the quoted statement, the Supreme Court cited its prior decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), which held unconstitutional a presidential order "directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills." *Id*. at 582. The Supreme Court has also stated that, "[i]n considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework" from his concurring opinion in *Youngstown*. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015). If confirmed, I would faithfully apply the Constitution, any relevant statutes, and the applicable precedent of the Supreme Court in evaluating any challenge to a given exercise of Executive authority.

13. 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, under the Equal Protection Clause, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996). The Court explained that "[t]he State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*. at 533 (citations and internal quotation marks omitted). If confirmed, I would faithfully apply *United States v. Virginia* and any other applicable Supreme Court precedents.

14. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

The quoted comment was apparently made during oral argument in *Shelby County v. Holder*, and no such comment occurs in the opinion of the Supreme Court in that case. The Voting

Rights Act is an important and landmark piece of legislation, and if confirmed I would faithfully apply the relevant precedent concerning that Act, including *Shelby County v. Holder*, 570 U.S. 529 (2013).

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

Article I, section 9 provides, in part, 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." The applicability of this clause to the President is the subject of litigation before the federal courts. As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to opine on matters that may be "pending or impending in any court." *See* Code of Conduct of U.S. Judges, Canon 3A(6).

16. 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 the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

    Shelby County v. Holder, 570 U.S. 529 (2013), held that the "coverage formula" of section 4(b) of the Voting Rights Act did not meet the applicable constitutional standards governing Congress's exercise of its enforcement powers under the Fifteenth Amendment. *Shelby County* is a binding precedent of the Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply all applicable Supreme Court precedents, including *Shelby County*.

17. **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"?**

Each of these three important constitutional amendments provides that "Congress shall have power to enforce" the respective provisions of these amendments "by appropriate legislation." U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2.

18. 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?

Lawrence v. Texas, 539 U.S. 558, 578 (2003), overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that the Texas criminal statute at issue "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence* is a binding precedent of the Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply all applicable Supreme Court precedents, including *Lawrence*.

19. In the confirmation hearing for Justice Gorsuch earlier this year, 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?

    It is never appropriate for lower courts to depart from directly controlling Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American 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."); *see also Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam).

    As a general matter, a three-judge panel is "bound by prior panel decisions and only the *en banc* court may overrule panel precedent." *S & H Packing & Sales Co., Inc. v. Tanimura Distrib., Inc.*, 883 F.3d 797, 801 (9th Cir. 2018) (en banc). The en banc Ninth Circuit has held that, "where intervening Supreme Court authority is clearly irreconcilable with … prior circuit authority," a "three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The en banc Ninth Circuit has overruled panel precedent when, for example, doing so would "eliminate a circuit split." *S & H Packing*, 883 F.3d at 801 & n.7.

20. 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.

    If I am confirmed, most of the potential conflict-of-interest issues that may arise will likely come from my prior practice. I would recuse myself from particular matters in which I was involved at any time during my practice. I would also recuse

myself from matters involving my former firm for an appropriate number of years following any appointment. Possibly, some of my former clients may be involved in federal litigation, and I would recuse myself from those cases if required or appropriate. It is also possible that there could be cases raising discrete legal issues that I had litigated during my practice, and I would recuse myself from such matters if required or appropriate. I would likewise recuse myself from any particular matters in which I was involved during my time in government, and to the extent required or appropriate, I would also recuse myself from matters raising discrete legal issues in which I was personally involved during my government service. If confirmed, I will address all actual or potential conflicts of interest by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

21. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. 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."

    (a) 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 federal courts play a crucial role in protecting constitutional rights by fairly and impartially applying the relevant constitutional standards to the cases and controversies that properly come before them. As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to further address abstract questions of law that might arises in future cases.

22. 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 and politically motivated hiring and firing at the Justice Department during the Bush administration. 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 Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

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

    Yes.

23. **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 Supreme Court observed long ago that "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 176 (1803) (Marshall, C. J.). The Supreme Court has addressed the scope of Congress's enumerated powers under the Commerce Clause and under section 5 of the Fourteenth Amendment in a variety of cases, including *United States v. Morrison*, 529 U.S. 598 (2000). If I am confirmed to the Ninth Circuit, I would faithfully follow and apply all applicable Supreme Court precedents in evaluating any question presented concerning Congress's exercise of its enumerated powers.

Senator Dick Durbin
Written Questions for Daniel Collins and Kenneth Lee
March 20, 2019

For questions with subparts, please answer each subpart separately.

Questions for Daniel Collins

1. You say in your questionnaire that two of the ten most important cases you have worked on involve your representation of tobacco companies. In the 2009 9th Circuit case *Phillip Morris USA v. King Mountain Tobacco Company*, you were lead counsel for Philip Morris in a trademark infringement suit. In the 2001 Supreme Court case *Lorillard Tobacco Company v. Reilly*, which involved a First Amendment challenge to a Massachusetts law barring cigarette ads within 1000 feet of a school, you were lead counsel for Phillip Morris during merits briefing and you reported that you played a key role in the joint briefs filed by the tobacco companies.

   a. **Why did you list these two cases as among the ten most significant in your career?**

   As indicated in my response to Question 16.e on my Senate Questionnaire, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), is the only U.S. Supreme Court case in which I was listed as a counsel for a party (as opposed to an *amicus curiae*) on a merits brief filed after the granting of a petition for certiorari. As such, I believe that it qualifies as one of the 10 most important cases on which I have worked.

   Philip Morris USA Inc. v. King Mountain Tobacco Co., 552 F.3d 1098 (9th Cir. 2009), *amended*, 569 F.3d 932 (9th Cir. 2009), raised important issues concerning the scope of tribal court jurisdiction in the context of trademark infringement claims asserted against tribal members. The panel majority described the case as "difficult"; the panel amended its initial published opinion, taking more than two years after the oral argument to issue its final decision; and one judge on the panel concurred in the judgment and criticized the majority opinion. In view of these factors, the case in my view qualifies as one of the 10 most important cases on which I have worked.

   b. **How did you come to represent tobacco company clients in these matters?**

   Philip Morris Inc. was a client of Munger, Tolles & Olson at the time that I arrived at the firm in April 1996, and I worked on a variety of matters for that client, and its successor or related entities, over the ensuing years.

   c. **Will you commit that if you are confirmed you would recuse yourself from matters involving your former clients in the tobacco industry?**

   I would recuse myself from particular matters in which I was involved at any time during my practice. Possibly, some of my former clients may be involved in federal litigation, and I would recuse myself from those cases if required or appropriate. If confirmed, I will address

all actual or potential conflicts of interest by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

2. You note in your questionnaire that when you served in the Deputy Attorney General's Office you were designated as the DOJ Chief Privacy Officer. In 2002, you gave remarks before the Electronic Privacy Information Center's Advisory Board in which you said that "not all privacy interests are of the same magnitude" and that "while privacy is an important right, it is by no means the only important value."

   a. **What privacy interests are of the greatest magnitude?**

   In the cited remarks, I primarily focused on informational privacy, and among the categories of information that I identified as implicating a higher "order of magnitude" in terms of privacy concerns were the content of "phone conversations" and "medical records." If confirmed to the Ninth Circuit, I would faithfully apply all applicable constitutional provisions, statutes, regulations, and precedents governing the privacy of particular categories of information or records.

   b. **Please discuss your understanding of what the Constitution has to say about privacy.**

   The Fourth Amendment states, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Supreme Court has recently explained that the "basic purpose of this Amendment … is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (citation and internal quotation marks omitted). If confirmed to the Ninth Circuit, I would faithfully apply all applicable precedents governing the scope of the privacy protections afforded by the Fourth Amendment and any other applicable provisions of the Constitution.

3. Last year the City of Oakland filed suit against Wells Fargo alleging that the bank had engaged in a number of federal and state fair housing law violations by discriminating against minorities in its mortgage lending business. **How did you come to represent Wells Fargo in this matter?**

Wells Fargo & Co., including its related entities, has been a client of Munger, Tolles & Olson LLP in a variety of matters, and at the time that the *City of Oakland* action was filed in 2015, I and others at my firm were already representing Wells Fargo in a comparable suit filed by the City of Los Angeles in 2014. *See City of Los Angeles v. Wells Fargo & Co.*, 2015 WL 4398858 (C.D. Cal. 2015) (granting summary judgment to Wells Fargo), *aff'd*, 691 F. App'x 453 (9th Cir. 2017).

4. You were counsel of record on amicus briefs filed by an organization called the Ethics and Public Policy Center in *Burwell v. Hobby Lobby* and *Zubik v. Burwell*.

a. **How did you come to represent the Ethics and Public Policy Center in these cases?**

I have been familiar with the work of the Ethics and Public Policy Center, and of its various scholars, for many years. The Center has long had an interest in matters concerning protections for religious exercise, and I and my firm were retained by the Center to represent it in connection with the filing of its *amicus curiae* briefs in these matters.

b. **Did you have any interactions with Ethics and Public Policy Center President Ed Whelan in the course of your representation of the Center? If so, please discuss your interactions with Mr. Whelan.**

Yes. Because I was counsel of record for the Ethics and Public Policy Center, my communications with my client in connection with the filing of its *amicus curiae* briefs in these matters are protected by the attorney-client privilege.

c. **Will you commit that if you are confirmed, you will recuse yourself from any matters in which the Ethics and Public Policy Center is involved, given your representation of them?**

I would recuse myself from particular matters in which I was involved at any time during my practice. Possibly, some of my former clients may be involved in federal litigation, and I would recuse myself from those cases if required or appropriate. If confirmed, I will address all actual or potential conflicts of interest by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

5. You say in your questionnaire that you have been a member of the Federalist Society since 1995.

a. **Why did you join the Federalist Society?**

I thought that the Federal Society presented interesting presentations reflecting a range of thoughtful views on important contemporary legal issues, and I valued the discussions among persons attending such events.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

The nomination and confirmation of federal judges are matters committed to the judgment of the President and the Senate. As a judicial nominee, I do not think that it would be appropriate for me to opine on the President's or the Senate's exercise of its judgment on such matters.

c. **Please list each year that you have attended the Federalist Society's annual convention.**

I have only infrequently attended the National Lawyers' Convention in Washington, D.C. The last year that I specifically recall attending any part of the convention was the 25th anniversary convention in 2007. Prior to that, I believe that I attended parts of the annual conventions during the years that I lived in the Washington, D.C. area while serving in the Office of the Deputy Attorney General (2001 & perhaps 2002). I may have attended during other years, but I do not have a specific recollection.

6.

a. **Do you believe that judges should be "originalist" and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

As I stated at the hearing, I would begin addressing any question of textual interpretation of a statute or the Constitution by applying any applicable precedent of the Supreme Court or the Ninth Circuit construing that provision. If such precedent does not resolve the question, then it would be appropriate to consider the original public meaning, *i.e.*, what rule or rules would the contemporaneous legal community have attached to the words at the time of their adoption, and then to consider how those rules would apply to the contemporary circumstances presented by the particular matter.

b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

> …no Person holding any Office of 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.

The scope and applicability of this clause are the subject of litigation before the federal courts. As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to opine on matters that may be "pending or impending in any court." *See* Code of Conduct of U.S. Judges, Canon 3A(6).

7.

a. **Is waterboarding torture?**

To the extent that waterboarding is "committed by a person acting under color of law" and is "specifically intended to inflict severe physical or mental pain or suffering … upon another person within his custody or control," it constitutes "torture" under the definition provided in 18 U.S.C. § 2340(1).

b. **Is waterboarding cruel, inhuman and degrading treatment?**

To the extent that waterboarding constitutes "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984," it constitutes "cruel, inhuman, or degrading treatment or punishment" under the definition provided in 42 U.S.C. § 2000dd(d).

c. **Is waterboarding illegal under U.S. law?**

I am aware that, in connection with his recent confirmation proceedings, Attorney General William P. Barr acknowledged that "section 1045 of the National Defense Authorization Act for Fiscal Year 2016 [42 U.S.C. § 2000dd-2] prohibits the use of waterboarding on any person in U.S. custody." He explained that "[t]hat statute clarifies that no individual in U.S. custody may be subjected to any interrogation technique that is not authorized or listed in the Army Field Manual, and it prohibits the Army Field Manual from including techniques involving the use or threat of force." The Executive Branch has thus conceded that waterboarding of any person in U.S. custody is illegal under U.S. law.

8. **To the best of your knowledge, was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

I have not examined any data concerning such a claim, and as a judicial nominee, I do not think that it would be appropriate for me to comment on matters of political controversy.

9.

a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I have no knowledge of any such donations. To the extent that this question is addressed to whether I think such donations to be problematic as a policy matter, I do not believe that it would be appropriate for me, as a judicial nominee, to address such policy questions. To the extent that this question is addressed to whether I think such donations to be problematic as a legal matter, I do not believe that it would be appropriate for me, as a judicial nominee, to opine on abstract legal issues that might come before the courts.

b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

If confirmed, I will address all actual or potential conflicts of interest by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances. To the extent that this question is addressed to whether I think such donations should be made public as a policy matter, I do not believe that it would be appropriate for me, as a judicial nominee, to address such policy questions.

c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my responses to Questions 9(a) and 9(b).

10.

a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not studied this question.

b. **What answer does an originalist view of the Constitution provide to this question?**

I have not studied this question.

Nomination of Daniel P. Collins
to the United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted March 20, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. At your hearing, I asked in reference to your filing in *Kivalina v. ExxonMobil* why you wrote that "climate change *allegedly* results from the aggregate effects of greenhouse gas emissions from billions of sources around the world accumulating in the global atmosphere over the course of centuries, and thus it cannot be attributed to [the fossil fuel defendants]." (emphasis added). You responded that you had written "allegedly" because of the procedural posture of the case and that was a "verbal tick" of lawyer when arguing a rule 12 motion.
    a. Do you agree that carbon dioxide and other greenhouse gases cause the phenomenon known as global warming?

    As I noted at the hearing, I am currently among the counsel of record for certain defendants in currently pending litigation matters in which the defendants have been sued under various tort theories based on the allegation that they are liable for injuries caused by climate change. In view of those current representations, I do not think that it would be appropriate for me to make personal comments on factual matters related to that pending litigation.

    b. Do you agree that the carbon dioxide causing global warming is primarily the product of human activity?

    Please see my response to Question 1(a).

    c. Do you agree that greenhouse gas levels have been increasing steadily since the beginning of the industrial revolution in the late 18th century, with more than a one-third increase having occurred since 1980?

    Please see my response to Question 1(a).

    d. Do you believe that the small amount of greenhouse gasses emitted prior to the industrial revolution has had the same effect on global warming as greenhouse gasses emitted by the burning of fossil fuels after the industrial revolution?

    Please see my response to Question 1(a).

2. In an amicus brief you filed on behalf of Chevron and others in *American Electric Power Company v. Connecticut*, you wrote that fossil fuel companies are "alleged to have contributed to the global phenomenon of climate change. The same allegation, of course, could be made against any other company - or person - in the world."
    a. Do you believe that statement to be true?

    I was among the many lawyers listed on this brief, and I believed that the brief, as written, reflected proper advocacy on behalf of the relevant clients in accordance with the applicable law.

    b. Do you believe the average person contributes to global climate change on the scale of a fossil fuel corporation?

    As I noted at the hearing, I am currently among the counsel of record for certain

defendants in currently pending litigation matters in which the defendants have been sued under various tort theories based on the allegation that they are liable for injuries caused by climate change. In view of those current representations, I do not think that it would be appropriate for me to make personal comments on factual matters related to that pending litigation.

c. Do you believe alleging in a court filing that a specific person "contributed to the global phenomenon of climate change" would satisfy the requirements of Fed. R. Civ. P. 11?

In the litigation matters in which I have represented one or more specific clients who have been sued based on their alleged contributions to climate change, to my recollection, my clients have not asserted a violation of Fed. R. Civ. P. 11 against another party to such litigation and no such violation has been asserted against my clients.

d. Do you believe that Chevron has contributed to global climate change?

Please see my response to Question 2(b).

3. The Ninth Circuit is widely understood to be one of the most important courts in the country on issues of environmental law. How can you assure me that you will be an impartial judge to litigants bringing environmental claims before you when you've spent such a significant amount of your career representing the fossil fuel industry?

As I stated at the hearing, I believe that both the appearance of impartiality and actual impartiality are important in maintaining public confidence in our system of justice. I would recuse myself from particular matters in which I was involved at any time during my practice. Possibly, some of my former clients may be involved in federal litigation, and I would recuse myself from those cases if required or appropriate. If confirmed, I will address all actual or potential conflicts of interest by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

4. Will you commit to recuse yourself from any case implicating the fossil fuel industry's role in causing climate change? If not, why not?

Please see my response to Question 3.

5. In your discussions and interviews with the White House concerning your nomination, were you asked about your work representing the fossil fuel industry? Please describe the nature of any conversations about this subject.

No, I do not recall being asked about my work representing clients in the fossil fuel industry.

6. You've praised the Supreme Court's decision in *Lewis v. Casey* because of its interpretation of standing doctrine.

a. Do you believe in the tightening of standing requirements so that it is increasingly more difficult for individuals who have been harmed to obtain access to the federal courts?

In the referenced article, I noted that Article III standing doctrine, which is an element of the limitation of the federal judicial power to cases and controversies, plays an important structural role in upholding the Constitution's separation of powers. If confirmed to the Ninth Circuit, I would faithfully apply all applicable precedents governing the requirements of Article III standing.

b. Do you believe prudential standing requirements should be used to restrict access to the federal courts?

The Supreme Court has recently referred to certain aspects of "prudential standing" as a "misnomer." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 & n.3 (2014) (citation and internal quotation marks omitted). If confirmed to the Ninth Circuit, I would faithfully apply all applicable precedents governing the various doctrines that have been captured by the concept of "prudential standing," such as the "zone-of-interests test" and the "limitations on third-party standing." *Id*. at 127 n.3.

c. What power do you believe Congress has to confer standing to sue?

The Supreme Court has stated that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citation omitted). The Court has also held that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). The Court has further stated that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). If confirmed to the Ninth Circuit, I would faithfully apply all applicable precedents governing Congress's power to confer standing to sue.

7. In response to Senator Kennedy's question, "what is your definition of justice?," you responded that justice is to have the law fairly and faithfully applied and have a court give litigants their rights in accordance with the law. When Mr. Kennedy asked, "and what if the law is wrong?" you responded that law should be changed through the political process and the role of the judge is to rule in accordance with the law. In the 1933 North Carolina Supreme Court case *Brewer v. Valk*, the Court upheld the compulsory sterilization of Mrs. Brewer, to which she did not consent. Compulsory sterilization was legal under North Carolina Law and the Supreme Court had ruled that compulsory sterilization did not violate the 14th Amendment in *Buck v. Bell.* Mrs. Brewer was forcibly sterilized.
   a. Was justice done to Mrs. Brewer?

   In *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638, 641 (1933), the North Carolina Supreme Court held that the sterilization act at issue in that case "makes no provision for notice and hearing, and therefore impinges the due process clause of the Constitution." The Court therefore affirmed the judgment below, which permanently enjoined the state "from sterilizing the said Mary Brewer." *Id*. at 639. Having obtained the relief that she sought, Mrs. Brewer presumably concluded that justice was done to her.

   b. What should a judge do if faced with applying a law that on its face is manifestly unjust?

A judge is required to faithfully follow the applicable law and precedents, regardless of whether he or she personally believes those laws and precedents to be substantively just. If a judge is unable to fulfill this obligation, then the judge should consider whether he or she should recuse from the matter or whether he or she should resign from the bench.

8. You have praised harsh sentencing and once wrote "Common sense suggests that if you lock up criminals for longer periods of time and lock up the very worst for very long periods of time, there will be less crime."
    a. Why does "common sense" suggest the conclusion you reached?

    In making this comment during my 2005 testimony before the House Judiciary Committee, I relied on the premise that enhanced sentences for recidivists would reduce their opportunities to commit additional crimes. The desirability and efficacy of such enhanced sentencing laws have been questioned by many in recent years, including by many in Congress. Indeed, at the hearing, I briefly acknowledged my understanding of the recent bipartisan legislation that reformed certain sentencing provisions. Beyond that general observation, I do not think it would be appropriate for me to opine on whether the relevant data available today do or do not support any particular approach to sentencing policy. If confirmed, I would faithfully apply the applicable laws and precedents governing criminal sentencing.

    b. Do you still hold the belief that harsh sentencing reduces crime?

    Please see my response to Question 8(a).

    c. If so, is this belief based on scientific studies?

    Please see my response to Question 8(a).

    d. Do you believe that judges can and should use "common sense" in reaching their decisions? Please elaborate.

    A judge is required to faithfully follow the applicable law and precedents, regardless of whether he or she personally believes that those laws and precedents reflect "common sense."

    e. In your view, what is the point of incarceration?

    Section 3553 of Title 18 of the U.S. Code sets forth the "purposes" of sentencing as including the need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

    f. Do you believe that alternatives to incarceration such as drug court or diversionary programs can be effective in preventing recidivism?

    Please see my response to Question 8(a).

    g. Last year, Congress passed the FIRST STEP Act, which reformed our federal sentencing and prison systems. Are there any provisions of this law that you would not be willing to apply consistent with the plain language of the statute and congressional intent?

    If confirmed, I would faithfully apply the applicable laws and precedents governing

criminal sentencing, including the provisions of the First Step Act.

9. You have been a member of the Federalist Society since 1995 and served as Vice Chair for Publications of the Federalism and Separation of Powers Practice Group (1996-1999), where you edited the first three volumes of the Federalism and Separation of Powers News. You also indicated that you have been a member of the Federalist Society's James Madison Club since 2010, which indicates that you donate at least $1,000 annually.
    a. How much money have you donated to the Federalist Society?

    I have donated to a variety of organizations for many years. In 2010, I donated $1,000 to the Federalist Society. From 2011 to 2017, I matched the Munger, Tolles & Olson Foundation's $5,000 annual contribution to the Federalist Society. I again contributed $5,000 in 2018. I do not recall whether I donated money to the Federalist Society before 2010.

    b. If confirmed, do you plan to remain an active participant in the Federalist Society?

    If confirmed, I may decide to attend future Federalist Society conferences, and (if invited) to speak at such conferences, and I might likewise choose to attend or speak at conferences of other organizations, if appropriate.

    c. If confirmed, do you plan to continue to donate money to the Federalist Society?

    No.

    d. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

    In preparing for my confirmation hearing, I had contacts with government attorneys at the U.S. Department of Justice. I did not inquire, and do not know, whether they are members of the Federalist Society.

10. 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?

    Chief Justice Roberts' metaphor, while imperfect, properly captures the important ideas that judges must always strive to apply the rules fairly and impartially in the matters before them and that it is not their role to seek to advance the substantive positions of competing contenders within the political arena.

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

    There are some areas of the law, such as decisions concerning the propriety and scope of injunctive relief, in which a court's application of the relevant legal standards requires consideration of the practical consequences of a particular order. *See*, *e.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As a general matter, however, a court must apply the relevant legal standards faithfully and impartially, even if he or she might think that the practical consequences of following the law are undesirable as a policy matter. A judge should never lose sight of the fact that litigation is not an academic exercise, but has immediate and often profound consequences in the lives of real people.

    c. 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 judge to make a subjective determination?

No, I do not agree that the application of summary judgment standards calls for a judge to make a subjective determination.

11. 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?

A judge should never lose sight of the fact that litigation is not an academic exercise, but has immediate and often profound consequences in the lives of real people. At the same time, a judge takes an oath to "administer justice without respect to persons." 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?

A judge's life experiences will hopefully have prepared him or her to exercise the judicial office with understanding, diligence, integrity, and impartiality.

    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?

If confirmed, I would do my level best to fully comprehend the arguments and claims being asserted by any party to a matter, even if that party's life situation and experiences may be different from my own. My obligation would always be to apply the law fairly and impartially in the matters that might come before me.

12. 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 never appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to, an order from a superior court.

13. 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?

Because the right to a civil jury is explicitly enshrined in the Seventh Amendment, it is a critical component of the federal system of justice.

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

The enforceability *vel non* of pre-dispute arbitration clauses continues to be a subject of litigation in the courts. As a judicial nominee, I do not think that it would be appropriate for me to opine on abstract legal issues that might come before the courts.

    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 13(b).

14. What do you believe is the proper role of an appellate court with respect to fact-finding?

As a general matter, factual findings are made by the trier of fact in the district court or by administrative agencies acting in an adjudicative capacity, and any appellate review of such findings is limited to what is permitted under the applicable standards of review set forth in the relevant constitutional provisions, statutes, rules, or precedent.

15. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

As noted in my answer to Question 14, any appellate review of factual findings made in the lower courts or in administrative agencies must be limited to what is permitted under the applicable standards of review set forth in the relevant constitutional provisions, statutes, rules, or precedent. In situations in which an appellate court may be authorized under applicable law to make certain findings concerning specific questions (*e.g.*, its own jurisdiction over a matter), an appellate court must confine itself to the bounds of what is authorized.

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

The Supreme Court has addressed, in a variety of contexts, whether congressional findings have been sufficient to support particular exercises of Congress's enumerated powers. *See*, *e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I would faithfully follow the applicable precedent governing the consideration to be given to congressional findings in support of particular legislative provisions.

17. 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?

    Yes.

    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.

        If I am confirmed, then in determining whether to participate in any programs provided by the types of organizations covered by Advisory Opinion #116, I will abide by the Code of Conduct for United States Judges, taking into account the guidance provided by all applicable advisory opinions, including Advisory Opinion #116. That Advisory Opinion specifically cautions that "it is essential for judges to assess each invitation to participate or attend a seminar on a case-by-case basis," and it further states that "a judge's determination whether to attend a particular seminar should be made considering the totality of the circumstances." The Advisory Opinion identifies a number of factors that a judge should specifically consider, including the identity of the

seminar sponsor; the nature and source of seminar funding; whether a sponsor or a source of substantial funding is involved in litigation or likely to be involved; the subject matter of the seminar; the nature of the expenses paid; and any other relevant factor (such as whether the organization is involved in "political activity"). The Advisory Opinion specifically cautions that, "[w]hen the seminar or conference targets a narrow audience of incoming or current judicial employees or judges, the judge or employee must take care to ascertain that the program is not such that it could be seen to curry influence with the employee or judge or to impact the outcome of future cases." The Advisory Opinion further cautions that, "if there is insufficient information for the judge to decide whether to attend a seminar, then the judge should decline the invitation or take reasonable steps to obtain additional information."

ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my answer to Question 17(b)(i).

iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my answer to Question 17(b)(i).

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my answer to Question 17(b)(i).

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.

Please see my answer to Question 17(b)(i).

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 answer to Question 17(b)(i).

Question for Daniel Collins, Nominee to the Ninth Circuit Court of Appeals

While serving as Chief Privacy Officer at the Department of Justice, you made remarks before the Electronic Privacy Information Center's Advisory Board in 2002. You said that "while privacy is an important right, it is by no means the only important value."

- What are the other "important values" that you believe should be considered when balancing privacy and security?

In the cited remarks, I primarily focused on informational privacy, and I identified certain competing values that may lead to some loss of personal privacy. For example, I noted that certain technological advances that improve our lives may also, as a practical matter, have the effect of reducing the level of informational privacy that persons have in modern society as compared to earlier time periods. As I noted in the Committee hearing, however, the Supreme Court, in addressing certain questions concerning the protections of the Fourth Amendment, has taken account of the substantially different threats to informational privacy that are presented by modern technology related to cell phones. *See*, *e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2216, 2223 (2018) (declining to extend the "third-party doctrine" of *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976), and instead holding that, "[i]n light of the deeply revealing nature of CSLI [cell-site location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection"); *Riley v. California*, 573 U.S. 373, 386 (2014) (declining to extend to cell phones the search-incident-to-arrest "categorical rule" of *United States v. Robinson*, 414 U.S. 218 (1973), because modern "[c]ell phones … place vast quantities of personal information literally in the hands of individuals"; holding instead that "officers must generally secure a warrant before conducting such a search" of data on cell phones found on an arrestee). I also noted in my 2002 remarks that "competing concerns" relating to safety and security "may also justify particular intrusions on privacy," and I gave the example of "airport inspections."

If confirmed to the Ninth Circuit, I would faithfully apply all applicable constitutional provisions, statutes, regulations, and precedents governing the privacy of particular categories of information or records.

Nomination of Daniel P. Collins, to be United States Circuit Judge
for the Ninth Circuit
Questions for the Record
Submitted March 20, 2019

QUESTIONS FROM SENATOR COONS

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

If I were confirmed, then in addressing such questions, I would faithfully apply the standards set forth in applicable Supreme Court precedent, including as appropriate *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-2602 (2015), and *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Yes, I would do so in accordance with any applicable precedent of the Supreme Court. *See*, *e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (addressing whether the Fourteenth Amendment's Due Process Clause incorporates the enumerated protection of the Eighth Amendment's Excessive Fines Clause); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (same for Second Amendment).

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

Yes, I would do so in accordance with any applicable precedent of the Supreme Court. *See*, *e.g.*, *Timbs*, 139 S. Ct. at 687-89; *Obergefell*, 135 S. Ct. at 2599-2602; *Glucksberg*, 521 U.S. at 710-23.

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

Yes. I would faithfully apply any applicable precedent of the Supreme Court or the Ninth Circuit. In the absence of any such precedent, any relevant decisions of other circuits may be consulted for their persuasive value.

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

Yes.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"?

See Planned Parenthood v. Casey, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003), are binding precedents of the Supreme Court, and if confirmed, I would faithfully apply them.

f. What other factors would you consider?

I would consider any other relevant factors identified in the applicable precedent of the Supreme Court or the Ninth Circuit.

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

The Supreme Court has held that, under the Equal Protection Clause, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996). The Court explained that "[t]he State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id*. at 533 (citations and internal quotation marks omitted). If confirmed, I would faithfully apply *United States v. Virginia* and any other applicable Supreme Court precedents.

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

As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine on the correctness of the Supreme Court's decisions. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *United States v. Virginia* and any other applicable Supreme Court precedents.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

For any nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," it is an academic question whether *United States v. Virginia*, 518 U.S. 515 (1996), could also have rested on originalist arguments. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *United States v. Virginia* and any other applicable Supreme Court precedents.

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), the Supreme Court held that the "denial to same-sex couples of the right to marry works a grave and continuing harm" and that "the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry." And, as stated in *Lawrence v. Texas*, 539 U.S. 558, 574 (2003), the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), "struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause." *Romer*, *Lawrence*, and *Obergefell* are binding precedents of the Supreme Court, and if confirmed, I would faithfully apply them.

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

Related questions are the subject of litigation before the federal courts. As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to opine on matters that may be "pending or impending in any court." *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

The Supreme Court has extended constitutional protection to the use of contraceptives by married and unmarried persons. *See Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). *Eisenstadt* and *Griswold* are binding precedents of the Supreme Court, and if confirmed, I would faithfully apply them.

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

The Supreme Court has held that the Constitution protects a woman's right to terminate her pregnancy. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). *Casey* and *Roe* are binding precedents of the Supreme Court, and if confirmed, I would faithfully apply them.

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

In *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003), the Supreme Court held that "a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" was unconstitutional, because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." The Supreme Court has extended constitutional protection to the use of contraceptives by married and unmarried persons. *See Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). *Lawrence*, *Eisenstadt*, and *Griswold*

are binding precedents of the Supreme Court, and if confirmed, I would faithfully apply them.

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

Please see my responses to Questions 3(a) and 3(b) above.

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

   If confirmed, I would faithfully apply any relevant precedents of the Supreme Court and the Ninth Circuit governing the consideration of such evidence.

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

   If confirmed, I would faithfully apply any relevant precedents of the Supreme Court and the Ninth Circuit governing the consideration of such evidence. The admissibility of scientific, technical, or other specialized knowledge in the determination of adjudicative facts is governed by, *inter alia*, Federal Rule of Evidence 702 and the applicable precedent construing that rule.

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."
   a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

   Obergefell v. Hodges, 135 S. Ct. 2584 (2015), is a binding precedent of the Supreme Court, and if confirmed, I would faithfully apply it.

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

Please see my response to Question 5(a).

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

I am aware that this topic has been the subject of significant scholarly debate for some time. *See*, *e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 Va. L. Rev. 947, 1140 (1995) ("This Article shows … that school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment."). For any nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," it is an academic question whether *Brown v. Board of Education*, 347 U.S. 483 (1954), could also have rested on such originalist arguments. As I stated at the hearing, *Brown* is an important landmark decision of the Supreme Court that consigned the separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to the ash heap of American jurisprudence, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Brown v. Board of Education* and any other applicable Supreme Court precedents.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Mar. 18, 2019).

The respective contours of the constitutional rights guaranteed by the First Amendment's Free Speech Clause, the Fourteenth Amendment's Equal Protection Clause, and the Due Process Clauses of the Fifth and Fourteenth Amendments have been addressed in an extensive body of precedent in the Supreme Court and the Ninth Circuit. I would be bound to apply such precedent, without regard to whether that binding precedent did or did not comport with academic theories supporting or critiquing the concept of original public meaning. If confirmed, I would faithfully follow such precedent.

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

The Supreme Court on several occasions has considered the original public meaning of a constitutional provision in addressing that provision's scope. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004); *Wilson v. Arkansas*, 514 U.S. 927 (1995). If confirmed, then in considering the scope of any constitutional provision, I would faithfully apply all applicable precedent of the Supreme Court and the Ninth Circuit, without regard to whether that binding precedent did or did not comport with the original public meaning of that provision.

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

Please see my answer to Question 6(c).

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

If confirmed, then in considering the scope of any constitutional provision, I would faithfully apply all applicable precedent of the Supreme Court and the Ninth Circuit. If such precedent does not resolve the question, then it would be appropriate to consider the original public meaning, *i.e.*, what rule or rules would the contemporaneous legal community have attached to the words at the time of their adoption, and then to consider how those rules would apply to the contemporary circumstances presented by the particular matter.

7. You filed amicus briefs challenging the Affordable Care Act's contraception mandate and opt-out process. While the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), found that the contraception mandate, as applied to closely held corporations, violated the Religious Freedom Restoration Act, the Court stated that it "d[id] not hold . . . that for-profit corporations and other commercial enterprises can 'opt out of any law . . . they judge incompatible with their sincerely held religious beliefs.'" 134 S. Ct. at 2760. Can Congress pass a law mandating access to contraception that holds up to an individual business owner's claim based on religion, and what is the applicable standard?

As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to address abstract questions of law that might arises in future cases. If I were confirmed, then in evaluating any claim under the Religious Freedom Restoration Act or the Free Exercise Clause, I would faithfully apply any relevant precedent of the Supreme Court and the Ninth Circuit concerning the scope of those provisions.

8. Congress recently passed bipartisan criminal justice reform. When you testified before the House Judiciary Committee in 2005, you stated that "[c]ommon sense suggests that if you lock up criminals for longer periods of time and lock up the very worst for very long periods of time, there will be less crime." You further testified, "We simply cannot be sure that if we heed recent calls for less severity, for smaller prison populations, or for greater flexibility, we will not again see a spike in crime rates," calling this "an

irresponsible experiment that would literally gamble with the lives of this nation's citizens."

a. Do you believe that we have an over-incarceration problem in this country?

In making this comment during my 2005 testimony before the House Judiciary Committee, I relied on the premise that enhanced sentences for recidivists would reduce their opportunities to commit additional crimes. The desirability and efficacy of such enhanced sentencing laws have been questioned by many in recent years, including by many in Congress. Indeed, at the hearing, I briefly acknowledged my understanding of the recent bipartisan legislation that reformed certain sentencing provisions. Beyond that general observation, I do not think it would be appropriate for me to opine on whether the relevant data available today do or do not support any particular approach to sentencing policy. If confirmed, I would faithfully apply the applicable laws and precedents governing criminal sentencing.

b. Do judges abuse their discretion when sentencing defendants below the guidelines?

The applicable federal sentencing laws, federal sentencing guidelines, and the precedent of the Supreme Court construing such provisions allow district courts to impose a sentence below the guidelines range in certain circumstances. *See*, *e.g.*, *Chavez-Mesa v. United States*, 138 S. Ct. 1959, 1963 (2018). As a general matter, "the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 552 U.S. 38, 46 (2007).

9. Do you believe that the *Miranda v. Arizona*, 384 U.S. 436 (1966), regime is "illegitimate," as suggested in a 1995 book review you authored?

My 24-year-old review of Professor Grano's then-recent book on confessions and *Miranda* sets forth my views in 1995 as to whether Professor Grano was correct in arguing, as I put it, "for overruling *Miranda v. Arizona* and reinstating the 'voluntariness' test as the sole standard for determining the constitutional validity of a confession made during police interrogation" (footnote omitted). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and it therefore held that 18 U.S.C. § 3501, which sought "to overrule *Miranda*" by designating "voluntariness as the touchstone of admissibility," was unconstitutional. 530 U.S. at 436, 444. *Dickerson* and *Miranda* are binding precedents, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

Questions for the Record for Daniel P. Collins
from Senator Mazie K. Hirono

1. Chief Justice John Roberts has recognized that "the judicial branch is not immune" from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer two questions.

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

No.

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

No.

2. You have filed several amicus briefs opposing laws and regulations that seek to protect women's ability to access contraceptives and abortions. In these briefs, you relied on the Religious Freedom Restoration Act (RFRA) and the First Amendment. Both have been used as a sword to cut away at protections guaranteed by other laws or sections of the Constitution, such as protection from discrimination against LGBTQ individuals.

a. Do you believe that if the Religious Freedom Restoration Act conflicts with another law, including a civil rights law, RFRA overrides the other law?

As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to address abstract questions of law that might arises in future cases. If I were confirmed, then in evaluating any claim under the Religious Freedom Restoration Act (RFRA), I would faithfully apply any relevant precedent of the Supreme Court and the Ninth Circuit concerning the scope of that Act and how it relates to the provisions of other acts.

b. In *Sebelius v. Hobby Lobby*, you argued that RFRA should be construed to broadly protect religious exercise, "to the maximum extent permitted by [its] terms." Do you believe civil rights laws should be similarly read broadly?

The quoted phrase is from section 5(g) of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, § 5(g), 114 Stat. 803, 806 (2000). As explained in the referenced *amicus curiae* brief, RLUIPA adopted a broader definition of "religious exercise" than had previously been contained in RFRA, and RLUIPA expressly amended RFRA to make this same definition of "religious exercise" applicable to RFRA as well. In section 5(g), Congress stated that RLUIPA—including these amendments—"shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." Accordingly, the *amicus* brief argued that, under section 5(g), the scope of the religious exercise protected by RFRA, as

amended by RLUIPA, had to be construed "to the maximum extent permitted by [its] terms." To the extent that another statute contains a comparable provision concerning its construction, then it should likewise be given a broad reading in accordance with the terms of any such provision. If I am confirmed, then in all questions of statutory interpretation, I would faithfully apply the applicable precedent of the Supreme Court and the Ninth Circuit.

3. In *Sebelius v. Hobby Lobby*, you filed an amicus brief supporting a challenge to the Affordable Care Act's requirement that employers' health plans cover contraceptives. Your brief described the requirement as a "mandate . . . to coerce corporations" and argued that for-profit corporations, including Hobby Lobby, have religious rights protected under the First Amendment and Religious Freedom Restoration Act.

a. Do you think all 32,000 employees in Hobby Lobby's $4.6 billion company share the same religious views as the owners of Hobby Lobby?

The referenced *amicus* brief took the view that, in determining whether a particular corporation is "exercis[ing] … religion" within the meaning of RFRA, what matters is whether "the specific group of persons who possess the ultimate ability to control the overall actions of the corporation and to set policies for it" under the "applicable state corporate law" had "formally announc[ed] the corporation's adherence to a religious view" and "tak[en] steps to ensure that the corporation's actions are to be carried out in conformity with those religious principles." The brief further stated that "[t]he applicable state corporate law will neutrally determine who has authority to announce whether the corporation will adhere to a particular religious view, and if the requisite persons specified by state law cannot agree to do that (or decline to do that), then the corporation will have no religious beliefs and will be incapable of exercising religion."

If I am confirmed, then in addressing any matter concerning the rights of employees in a corporation, I would faithfully apply the applicable constitutional or statutory provisions and any relevant precedent from the Supreme Court and the Ninth Circuit.

b. In your view, if the owners of Hobby Lobby had a religious objection to same-sex marriage, could they refuse to hire gay employees?

As a nominee to a U.S. Court of Appeals, I do not think that it would be appropriate for me to opine on hypothetical legal issues that may be "pending or impending in any court." *See* Code of Conduct of U.S. Judges, Canon 3A(6).

c. In your view, if the owners of Hobby Lobby had a religious objection to pregnant employees who are not married, could Hobby Lobby refuse to cover pregnancy benefits for those employees?

Please see my answer to Question 3(b).

4. In *Dickerson v. United States*, you filed a Supreme Court amicus brief that argued that *Miranda*, which held that statements made during police interrogations are admissible only when a defendant is informed of the right to remain silent and to consult with an attorney and voluntary waived those rights, was "[o]verbroad" and of "[d]oubtful [v]alidity."

In your amicus brief, you discussed at length what you described as *Miranda*'s "heavy costs on the criminal justice system and the Nation as a whole." Specifically, you argued that *Miranda* "reduced the rate at which suspects confess and has resulted in a substantial increase in the number of unsolved crimes." You also pointed to the increase in the "likelihood of a disposition that is more favorable to the defendant" as an adverse effect of *Miranda*'s exclusionary rule.

a. Are you aware of the rate of false confessions in this country? Are you aware that based on the 1,810 exonerations recorded in the National Registry of Exonerations as of 2016, 19 percent of all exonerations—and in 34 percent of homicide exonerations—involved an innocent defendant who confessed or was implicated by a false confession of a co-defendant, or both?

The first two quoted phrases in the second paragraph are from the *amicus* brief's summary of the research of Professor Paul Cassell, and the brief cited five published articles from Professor Cassell and his co-authors that undertook to examine the effects of *Miranda* in the operation of the criminal justice system. The brief also cited an additional study and discussed some of the published critiques of Professor Cassell's work on this subject. The latest publication date of any of the cited studies is 1998, and the brief therefore does not discuss or take account of any research conducted in the ensuing two decades. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and it therefore held that 18 U.S.C. § 3501, which sought "to overrule *Miranda*" by designating "voluntariness as the touchstone of admissibility," was unconstitutional. 530 U.S. at 436, 444. *Dickerson* and *Miranda* are binding precedent, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

b. Can you please explain how advising criminal defendants of their rights exacts a "heavy cost[]" on our Nation by decreasing the rate of confessions?

Please see my response to Question 4(a).

Nomination of Daniel P. Collins
United States Court of Appeals for the Ninth Circuit Questions for the Record
Submitted March 20, 2019

QUESTIONS FROM SENATOR BOOKER

1. You testified before the House Judiciary Committee in 2005 about federal sentencing policy. You advocated for a strict sentencing regime and criticized decisions by judges to give lighter sentences than those mandated by the federal Sentencing Guidelines. You stated: "In my view, it is no accident that the unprecedented and historic declines in crime rates in America have coincided with the rise of determinate sentencing under the Federal sentencing guidelines and analogous systems at the State level. Common sense suggests that if you lock up criminals for longer periods of time and lock up the very worst for very long periods of time, there will be less crime."[1]

    a. Why do you believe that categorically putting people in prison for longer sentences, regardless of circumstances, will necessarily reduce crime?

    In making this comment during my 2005 testimony before the House Judiciary Committee, I relied on the premise that enhanced sentences for recidivists would reduce their opportunities to commit additional crimes. The desirability and efficacy of such enhanced sentencing laws have been questioned by many in recent years, including by many in Congress. Indeed, at the hearing, I briefly acknowledged my understanding of the recent bipartisan legislation that reformed certain sentencing provisions. Beyond that general observation, I do not think it would be appropriate for me to opine on whether the relevant data available today do or do not support any particular approach to sentencing policy. If confirmed, I would faithfully apply the applicable laws and precedents governing criminal sentencing.

    b. The War on Drugs has been a war on people—and, disproportionately, poor people and people of color. Shouldn't our sentencing policy be guided by data about what actually works to reduce crime, instead of simply imposing incredibly lengthy sentences on people across the board?

    Please see my response to Question 1(a).

    c. In the same testimony, you said that to "heed recent calls for less severity, for smaller prison populations, or for greater flexibility . . . would be to engage in an irresponsible experiment."[2] But last year, Congress finally *did* start to heed calls for sentencing reform. The First Step Act marked the beginning of an effort to mend our broken criminal justice system. Do you still think that implementing a more humane sentencing policy and working to reduce our long-expanding prison population

[1] *Implications of the* Booker/Fanfan *Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 24 (Feb. 10, 2005)
[2] *Id.*

would be "irresponsible"?

Please see my response to Question 1(a).

d. If you're confirmed to serve as a judge, would you fully and faithfully implement the letter and spirit of the First Step Act?

If I am confirmed, I will faithfully apply the provisions of the First Step Act and any applicable precedent construing its provisions.

2. It has been reported that, while you were at the Justice Department, you were one of the principal drafters of the Feeney Amendment of 2003, which sought to keep federal judges from engaging in downward departures from the federal Sentencing Guidelines.[3] Then-Chief Justice William Rehnquist, among many others, criticized this amendment as an affront to judicial independence.

   a. In retrospect, do you think this effort to keep federal judges from giving a lighter sentence when the circumstances warranted it was misguided?

The desirability and efficacy of such sentencing laws have been questioned by many in recent years, including by many in Congress. Indeed, at the hearing, I briefly acknowledged my understanding of the recent bipartisan legislation that reformed certain sentencing provisions. Beyond that general observation, I do not think it would be appropriate for me to opine on whether the relevant data available today do or do not support any particular approach to sentencing policy. I would also note that the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220, 245 (2005), by rendering the federal sentencing guidelines "effectively advisory," largely vitiated, as a practical matter, the PROTECT Act's provisions that had sought to limit downward departures from the guidelines. If confirmed, I would faithfully apply the applicable laws and precedents governing criminal sentencing.

   b. Another one of President Trump's circuit court nominees, Stephanos Bibas, previously wrote that the original Feeney Amendment, before congressional negotiators scaled it back and limited its scope, was "an unprecedented attempt by Congress to rewrite the Sentencing Guidelines by itself without the input or expertise of the Sentencing Commission."[4] Do you believe that sentencing policy should be based on careful deliberation and expertise from the Sentencing Commission and other authorities on this issue?

Please see my response to Question 2(a).

   c. Now-Judge Bibas also wrote that even the final version of the Feeney Amendment

[3] Laurie P. Cohen & Gary Fields, *Ashcroft Intensifies Campaign Against Soft Sentences by Judges*, WALL ST. J. (Aug. 6, 2003).

[4] Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. &. CRIMINOLOGY 295 (2004), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7149&context=jclc.

was likely to result in "many fewer Guideline departures, less judicial discretion, and more prosecutorial control."[5] Why would less judicial discretion and more prosecutorial control be expected to lead to more just outcomes in our criminal justice system?

Please see my response to Question 2(a).

3. You wrote an article strongly criticizing *Miranda v. Arizona*[6]—a landmark Supreme Court decision concerning the rights of criminal defendants. Reviewing a book about *Miranda*, you wrote that the author offered "a forceful, cogent, and ultimately persuasive argument for overturning" *Miranda*.[7] You talked about "the illegitimacy of the *Miranda* regime."[8] And you suggested that "*Miranda* should be jettisoned . . . in favor of the constitutional *text*."[9]

   a. You stated that this argument for "overturning" *Miranda* was "ultimately persuasive." Doesn't that mean you thought *Miranda* was wrong? Otherwise, please explain how else we should understand your arguments here.

   My 24-year-old review of Professor Grano's then-recent book on confessions and *Miranda* sets forth my views in 1995 as to whether Professor Grano was correct in arguing, as I put it, "for overruling *Miranda v. Arizona* and reinstating the 'voluntariness' test as the sole standard for determining the constitutional validity of a confession made during police interrogation" (footnote omitted). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and it therefore held that 18 U.S.C. § 3501, which sought "to overrule *Miranda*" by designating "voluntariness as the touchstone of admissibility," was unconstitutional. 530 U.S. at 436, 444. *Dickerson* and *Miranda* are binding precedents, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

   b. Do you believe that *Miranda* was rightly decided?

   As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine on the correctness of the Supreme Court's decisions. *Dickerson v. United States*, 530 U.S. 428 (2000), and *Miranda v. Arizona*, 384 U.S. 436 (1966), are binding precedents, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

   c. What assurances can you provide that, if you're confirmed, you will faithfully

[5] *Id.*
[6] 384 U.S. 436 (1966).
[7] Daniel Collins, Book Review, *Farewell* Miranda*?*, 1995 PUB. INTEREST L. REV. 185, *in* SJQ Attachment to Question 12(a), at 28.
[8] *Id.* at 45.
[9] *Id.* at 50.

adhere to the letter and spirit of *Miranda*—given your outspoken criticism of this landmark decision?

Please see my response to Question 3(a).

d. Why should a criminal defendant who raises an issue about exercising his or her *Miranda* rights expect to get a fair hearing in your courtroom?

The views I expressed many years ago in a 1995 article and in a 2000 *amicus* brief were rejected by the Supreme Court in *Dickerson v. United States*, 530 U.S. 428 (2000), which held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively." *Id*. at 444. *Dickerson* and *Miranda* are binding precedents, and if I am confirmed to the Ninth Circuit, I can and would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

e. What did you mean when you suggested that "*Miranda* should be jettisoned . . . in favor of the constitutional *text*"?

Please see my response to Question 3(a).

f. Why, in your view, would overturning *Miranda* make our criminal justice system fairer?

Please see my response to Question 3(a).

4. You've represented a number of energy companies in lawsuits involving injuries relating to the effects of climate change and allegations about your clients' role in contributing to it.

a. In your assessment, is climate change real?

As I noted at the hearing, I am currently among the counsel of record for certain defendants in currently pending litigation matters in which the defendants have been sued under various tort theories based on the allegation that they are liable for injuries caused by climate change. In view of those current representations, I do not think that it would be appropriate for me to make personal comments on factual matters related to that pending litigation.

b. In your assessment, what is the relationship between human activities, particularly greenhouse gas emissions, and climate change?

Please see my response to Question 4(a).

c. In your assessment, can efforts to reduce greenhouse gas emissions today have an impact on climate change?

Please see my response to Question 4(a).

d. If a corporation has contaminated the environment and jeopardized the public health of an American community, should residents of that community be able to seek justice in our courts?

Federal law and state law provide an array of remedies for addressing specified instances of environmental contamination and associated risks to public health. If confirmed, I would faithfully apply any such laws and the applicable precedents construing them.

e. How would you approach issues of recusal in cases involving alleged injuries relating to the effects of climate change, including cases in which clients you previously represented are the defendants?

As I stated at the hearing, I believe that both the appearance of impartiality and actual impartiality are important in maintaining public confidence in our system of justice. I would recuse myself from particular matters in which I was involved at any time during my practice. Possibly, some of my former clients may be involved in federal litigation, and I would recuse myself from those cases if required or appropriate. If confirmed, I will address all actual or potential conflicts of interest by reference to 28 U.S.C. § 455, the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

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

As I stated at the hearing, I would begin addressing any question of textual interpretation of a statute or the Constitution by applying any applicable precedent of the Supreme Court or the Ninth Circuit construing that provision. If such precedent does not resolve the question, then it would be appropriate to consider the original public meaning, *i.e.*, what rule or rules would the contemporaneous legal community have attached to the words at the time of their adoption, and then to consider how those rules would apply to the contemporary circumstances presented by the particular matter.

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

Please see my response to Question 5.

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

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

Reliance on legislative history is unnecessary when a statute's language is

unambiguous. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458 (2012); *see also Whitfield v. United States*, 543 U.S. 209, 215 (2005) (where the meaning of statutory text "is plain and unambiguous, we need not accept [a party's] invitation to consider the legislative history"). To the extent that legislative history may be properly considered, it "is meant to clear up ambiguity, not create it." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011). If confirmed, I would faithfully apply all relevant precedent of the Supreme Court and the Ninth Circuit concerning the use of legislative history, and I would consider any arguments raised by the parties concerning legislative history in accordance with such precedent.

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

Please see my response to Question 7(a).

8. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

A judge must follow the applicable constitutional and statutory provisions and any controlling precedent, without regard to whether he or she agrees with the policies reflected in those authorities and without regard to whether he or she thinks that such precedent was correctly decided. The principle of judicial restraint is a crucial component of the rule of law and of the constitutional separation of powers.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[10] Was that decision guided by the principle of judicial restraint?

District of Columbia v. Heller, 554 U.S. 570 (2008), is binding precedent from the U.S. Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Heller* and any other applicable Supreme Court precedents. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine as to whether the majority or the dissent was correct in *Heller*.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[11] Was that decision guided by the principle of judicial restraint?

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), is binding precedent from the U.S. Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Citizens United* and any other applicable Supreme

[10] 554 U.S. 570 (2008).
[11] 558 U.S. 310 (2010).

Court precedents. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine as to whether the majority or the dissent was correct in *Citizens United.*

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[12] Was that decision guided by the principle of judicial restraint?

Shelby County v. Holder, 570 U.S. 529 (2013), is binding precedent from the U.S. Supreme Court, and if I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Shelby County* and any other applicable Supreme Court precedents. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine as to whether the majority or the dissent was correct in *Shelby County*.

9. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[13] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[14] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[15] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[16]

a. Do you believe there is implicit racial bias in our criminal justice system?

As a human institution, the criminal justice system reflects the flaws and moral failings of the many people who operate within it, and in our society that regrettably includes instances of explicit and implicit racial bias. It is the obligation of all participants in the criminal justice system, especially judges, to be aware of the possibility of such bias and to endeavor to minimize it.

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

I am aware of disquieting statistics, including from the federal criminal justice system, suggesting that even after controlling for a wide variety of factors, criminal sentencing is statistically associated with demographic factors such as race. *See*, *e.g.*, U.S. Sentencing Comm'n, *Demographic Differences in Sentencing: An Update to the 2012* Booker *Report* (2017). The sources of such disparities, and the best means to address them, continue to be a topic of public debate. *See*, *e.g.*, Federal Defender Fact Sheet, *U.S.*

[12] 570 U.S. 529 (2013).
[13] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[14] *Id.*
[15] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[16] *Id.*

Sentencing Commission Report Suggesting that Increased Judicial Discretion Leads to Greater Racial Disparity is Based on a Flawed Analysis and is Being Misused to Support Calls for a Mandatory Sentencing System that Would Increase Racial Injustice (January 2018).

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

I recall that, within the last few years, and prior to my nomination, I read a report that analyzed federal sentencing disparities and that reached conclusions comparable to those discussed in the Sentencing Commission's 2017 report referenced in my response to Question 9(b). In connection with my work on the PROTECT Act while at the Justice Department, I reviewed a number of materials concerning sentencing statistics, which would have included materials concerning racial disparities.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[17] Why do you think that is the case?

As noted in my response to Question 9(b), the sources of such disparities, and the best means to address them, continue to be a topic of public debate.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[18] Why do you think that is the case?

Please see my response to Question 9(b).

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

It is the obligation of all participants in the criminal justice system, especially judges, to be aware of the possibility of such bias and to endeavor to minimize it.

10. During the century before President Trump came into office, the Senate had *never*

[17] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research- publications/2017/20171114_Demographics.pdf.
[18] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

confirmed a judicial nominee over the objections of *both* home-state Senators, according to the Congressional Research Service.[19] If you're confirmed, you would be part of a major break from that longstanding Senate tradition of respect for the views of home-state Senators through the blue slip process.

a. Do you think the Trump Administration meaningfully consulted with your home-state Senators about your nomination?

The nomination and confirmation of federal judges are matters committed to the judgment of the President and the Senate. As a judicial nominee, I do not think that it would be appropriate for me to opine on the President's or the Senate's exercise of its judgment on such matters.

b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

I interacted at some length with the judicial advisory committees of both Senator Feinstein and Senator Harris, as set forth in my response to Question 26.a of my Senate Questionnaire. Throughout that process, I expressed my hope to earn the endorsement of my home-state Senators.

11. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[20] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[21]

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

I do not think it would be appropriate for me to opine on whether the relevant data available today do or do not support any particular approach to sentencing policy. If confirmed, I would faithfully apply the applicable laws and precedents governing criminal sentencing.

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

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[19] BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), http://www.crs.gov/Reports/pdf/R44975; MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT 7-22 (2003), https://fas.org/sgp/crs/misc/RL32013.pdf.

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

[21] *Id.*

Please see my response to Question 11(a).

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

Yes.

13. Do you believe that *Brown v. Board of Education*[22] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I stated at the Committee hearing, *Brown v. Board of Education*, 347 U.S. 483 (1954), is an important landmark decision of the Supreme Court that consigned the separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to the ash heap of American jurisprudence. As a nominee to what Article III terms an "inferior" court to the "one [S]upreme Court," I do not think that it would be appropriate for me to opine on the correctness of the Supreme Court's decisions. If I am confirmed to the Ninth Circuit, I would faithfully follow and apply *Brown v. Board of Education* and any other applicable Supreme Court precedents.

14. Do you believe that *Plessy v. Ferguson*[23] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Please see my response to Question 13.

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

Prior to the hearing, I met with attorneys at the Department of Justice, who provided guidance on questions that have been asked of other nominees and on the provisions of the Code of Conduct for United States Judges. The answers that I have provided are my own.

16. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[24] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If I am confirmed, I would faithfully

[22] 347 U.S. 483 (1954).
[23] 163 U.S. 537 (1896).
[24] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

apply the relevant precedents of the Supreme Court and the Ninth Circuit in addressing the scope of the Due Process Clause.

Questions for the Record from Senator Kamala D. Harris
Submitted March 20, 2019
For the Nomination of

Daniel Collins, to the U.S. Court of Appeals for the Ninth Circuit

1. The U.S. Supreme Court ruled in *Miranda v. Arizona* that people held in custody must be informed of their right to an attorney and their right to remain silent before police questioning.

   In 1995, you published a book review, which commended the author for "persuasively" describing the "illegitimacy of the *Miranda* regime." In 2000, you filed an amicus brief in *Dickerson v. United States*, which argued that Congress should be able to pass laws that allow federal courts to admit confessions that are obtained in violation of *Miranda*.

   a. **Do you still believe that certain aspects of *Miranda* are "illegitimate"? If yes, please explain which aspects you find "illegitimate" and why.**

   The views I expressed many years ago in a 1995 article and in a 2000 *amicus* brief were rejected by the Supreme Court in *Dickerson v. United States*, 530 U.S. 428 (2000), which held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively." *Id*. at 444. *Dickerson* and *Miranda* are binding precedents, and if I am confirmed to the Ninth Circuit, I can and would faithfully follow and apply those decisions and any other applicable Supreme Court precedents.

2. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortion. After the law passed, the number of those abortion providers dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman's Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

   a. **When determining whether a law places an undue burden on a woman's right to choose, should courts consider whether the law would disproportionately affect poor women?**

   If I am confirmed, then in addressing any issue of whether a particular law places an undue burden on a woman's right to terminate her pregnancy, I would faithfully apply the relevant precedent of the Supreme Court and the Ninth Circuit, including *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

   b. **When determining whether a law places an undue burden on a woman's right to choose, should courts consider whether the law has the overall impact of reducing abortion access statewide?**

Please see my response to Question 2(a).

3. When Congress passed the Affordable Care Act (ACA), it determined that coverage for women's health services—including birth control—was critical to improving women's health and promoting equality because access to contraception gives women control over their lives and increases their access to opportunities. You filed two briefs in support of parties who opposed the ACA's requirement that health plans cover birth control with no out-of-pocket cost.

    a. **Do you believe that improving women's access to contraception advances equality?**

    The referenced *amicus* brief in the *Zubik* case agreed that the Government had a compelling interest in "the health of female employees" and in "gender equality." The applicability of particular regulations governing coverage of particular health services continues to be a subject of litigation in the courts, and I do not think that it would be appropriate for me to opine on matters that may be "pending or impending in any court." *See* Code of Conduct of U.S. Judges, Canon 3A(6).

    b. **Do you believe that the government has a compelling interest in promoting equality for women?**

    The Supreme Court has held that the government has a "compelling interest in eliminating discrimination against women." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

4. 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?**

    The task of building and maintaining public confidence in the fairness of judicial proceedings is the responsibility of each judge, who must always work to ensure both the reality and the perception of fairness in the administration of justice. A judge is obligated to faithfully apply the law as set forth in the Constitution, federal and state statutes, and applicable precedent in an impartial and principled manner. A judge should treat the attorneys and litigants with professionalism, ensuring proper decorum, and should be vigilant against any manifestation of bias in the legal system.

    b. **If confirmed, what steps will you take to help ensure that our justice system is a fair and equitable one?**

    Please see my response to Question 4(a).

c. **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 am aware of disquieting statistics, including from the federal criminal justice system, suggesting that even after controlling for a wide variety of factors, criminal sentencing is statistically associated with demographic factors such as race. *See*, *e.g.*, U.S. Sentencing Comm'n, *Demographic Differences in Sentencing: An Update to the 2012* Booker *Report* (2017). The sources of such disparities, and the best means to address them, continue to be a topic of public debate. *See*, *e.g.*, Federal Defender Fact Sheet, *U.S. Sentencing Commission Report Suggesting that Increased Judicial Discretion Leads to Greater Racial Disparity is Based on a Flawed Analysis and is Being Misused to Support Calls for a Mandatory Sentencing System that Would Increase Racial Injustice* (January 2018).