Nomination of William Mercer
To be District Judge on the U.S. District Court for the District of Montana
Questions for the Record
August 6, 2025

QUESTIONS FROM SENATOR GRASSLEY

1. At the hearing, Senator Whitehouse stated: "I've been told that Republican Members are telling witnesses that they actually don't need to answer questions for the record. And we've seen sham answers to questions for the record."

   a. Has any Member of Congress told you that you do not need to answer questions for the record? If so, who?

   Response: No.

Senator Dick Durbin
Ranking Member, Senate Judiciary Committee
Written Questions for William W. Mercer
Nominee to be U.S. District Judge for the District of Montana
August 6, 2025

1. During your tenure as U.S. Attorney, both of your home-state senators voiced concerns about your absence in the District of Montana while you were concurrently serving as a senior Justice Department official in Washington, D.C. According to the testimony you provided, you stated that you spent approximately three days a month in Billings during this time period. At the time, then-Senator Tester stated that you were "operating outside federal law" by not complying with residency requirements for U.S. Attorneys. Then-Senator Max Baucus stated said that it "reflects poorly on Montana and on Montanans."

Reports indicate you personally instructed a Republican Senate staffer to insert language into the *USA Patriot Act* reauthorization that would enable you to continue to neglect your duties in Montana by changing the U.S. Attorney residency requirements.

a. Why did you think it was appropriate to seek to change the law regarding residency requirements for U.S. Attorneys?

Response: At the request of the Attorney General, I assumed the role of Principal Associate Deputy Attorney General ("PADAG") in June 2005 and continued to serve as United States Attorney for the District of Montana. The Chief Judge of the U.S. District Court for the District of Montana wrote a letter to Attorney General Gonzales and asserted that my service as PADAG violated the residency requirement in 28 U.S.C. § 545. Justice Department attorneys reviewed the residency requirement language in 28 U.S.C. § 545 and concluded that I complied with it. The Department communicated its position on this question in a letter from Attorney General Gonzales to the Chief Judge.

The fact that the Department had me performing two roles was not novel. The Department had relied upon personnel from U.S. Attorneys' Offices, including Presidentially-appointed, Senate-confirmed United States Attorneys, to staff functions at DOJ Headquarters ("Main Justice"). For example, earlier in the Bush Administration, U.S. Attorney Mary Beth Buchanan of the Western District of Pennsylvania served concurrently as United States Attorney and the Director of the Executive Office of U.S. Attorneys. However, the mere allegation of a residency requirement violation confirmed that there were differences of opinion on whether the residency requirement could limit the Department's ability to utilize United States Attorneys in positions at Main Justice. The amendment in Section 501 of the USA Patriot Improvement and Reauthorization Act ensured that the Attorney General could deploy United States Attorneys to perform functions that he deemed necessary at Main Justice.

b. Did you have authorization from the Attorney General or Deputy Attorney General to seek to change the law regarding residency requirements for U.S. Attorneys to benefit yourself?

Response: The Department worked closely with Congress on many provisions of the USA Patriot Improvement and Reauthorization Act. The Department's Office of Legislative Affairs facilitated conversations with members of Congress and legislative staff. The Attorney General and Deputy Attorney General were aware of the residency requirement issue and the content of the Patriot Act reauthorization bill. As PADAG, I did not have authority to make ultimate decisions on legislation or legislative language.

c. If you are confirmed to the bench, would a U.S. Attorney who only spent three days per month in the district give you concerns about their ability to effectively run the office?

Response: Management and deployment of the Department's personnel is an Executive Branch function. If confirmed, I will endeavor to perform my duties and refrain from commenting on the manner in which the Executive Branch is executing its responsibilities.

2. While serving as the Acting Associate Attorney General under President George W. Bush, you played a key role in the U.S. Attorney firing scandal. Your name appeared 150 times in a report summarizing the investigation conducted by the Department of Justice's Office of Inspector General (OIG) and Office of Professional Responsibility (OPR) into these terminations. The report found "significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys."

Fired U.S. Attorney Daniel Bogden claimed you told him that his performance "did not enter into the equation" during the consideration of his dismissal and that you told him that the firings were done "so the Republican Party would have more future candidates for the federal bench and future political positions."

a. Do you still believe that firing U.S. Attorneys so that "the Republican Party would have more future candidates for the federal bench and future political positions" is appropriate?

Response: First, I respectfully disagree with the assertion that I "played a key role" in these events. In the joint OIG/OPR report referenced in the question (An Investigation Into the Removal of Nine U.S. Attorneys in 2006 (September 2008)). Regarding the decisions to terminate the nine United States Attorneys, on page 51 of the report, OIG/OPR state, "From the context of the e-mail [sent the night before calls were made to the United States Attorneys], it is clear that Mercer had not been involved in the process until then."

Presidential appointees serve at the pleasure of the President who has appointed them. The President has discretion to replace an appointee.

Your involvement in these firings, amongst others, led to President Bush withdrawing your nomination to be Associate Attorney General. Then-Chairman Leahy stated that your withdrawal allowed the Justice Department to "avoid having to answer more questions under oath" in a public setting regarding the firing scandal.

b. Was avoiding answering questions publicly under oath part of the deliberations related to the withdrawal of your nomination?

Response: No. I withdrew from consideration when it appeared that the Senate would not confirm me for the position.

c. Based on your involvement in these firings and your devotion to partisan politics, how can this Committee, and the American people, trust you to put the Constitution first?

Response: Once again, I respectfully disagree with the assertions in this subpart. In the joint OIG/OPR report referenced in the question (An Investigation Into the Removal of Nine U.S. Attorneys in 2006 (September 2008)). Regarding the decisions to terminate the nine United States Attorneys, on page 51 of the report, OIG/OPR state, "From the context of the e-mail [sent the night before calls were made to the United States Attorneys], it is clear that Mercer had not been involved in the process until then." In addition, the report concluded, "Charlton and Bogden contacted Mercer and asked why they were being removed. However, consistent with Sampson's plan, the U.S. Attorneys were given no explanation for the firings other than the Administration wanted to give someone else a chance to serve." *Id*. at 53-54. The report also stated that when interviewed in 2007 about whether I told U.S. Attorney Bogden that there was a window of opportunity for the Administration to build up the resumes of candidates for judgeships and political offices, I "did not recall making such a statement to Bogden." *Id*. at 214. I do not have a different recollection today.

I returned to Montana to complete my service as U.S. Attorney, which extended through the first year of the Obama Administration and concluded twenty-one years of public service in various Department of Justice roles as a civil servant and political appointee.

3. At the Justice Department, OIG and OPR conducted investigations into allegations of the politicized hiring for the Honors Program and legal internships between 2002 and 2006. The 2008 report issued by OIG and OPR criticized your actions and comments, finding that you "did not adequately address the concerns" about politicization and included several examples of you discussing partisan leanings as part of the hiring process.

In response to a colleague saying that an applicant was a strong candidate, you replied that you had been told "she's a big D[emocrat]."

a. Why did you factor in the potential partisan political leanings of a candidate during the hiring process?

Response: I do not recall the context for the discussion, but the OIG/OPR report makes clear that we extended her detail in the Office of the Deputy Attorney General where she remained for approximately two more years.

In hiring for an Honors Program position, you speculated that a candidate "is probably quite liberal...He is clerking for a very activist, ATLA-oriented justice" and had written a pro-environment law review article. You later claimed that you thought this individual was a candidate for a political appointment, even though you explicitly referenced the Honors Program in emails at the time.

b. Why did you factor in the partisan political leanings of a prospective employee for a non-political position at the Justice Department?

Response: I respectfully disagree with the assumptions and assertions in the question. The question pertains to an e-mail exchange that I had in 2002 with the Chief of Staff to the Attorney General, which is reported in An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program (June 24, 2008), a joint OIG/OPR report. The OIG/OPR report states that his inquiry pertained to an Honors Program applicant based in Montana. I advised the OIG/OPR investigators that I probably assumed that the Chief of Staff to the Attorney General was seeking input regarding the candidate's suitability for a political appointment. I included the following passage in my e-mail to the Chief of Staff: "I know of better candidates through our internship and clerkship programs who have applied to the honors program." I disagree with the assertion in the question that this "explicit reference" confirms the inquiry pertained to an applicant to the Honors Program, particularly when the inquiry came from the Chief of Staff to the Attorney General.

c. Should an individual's political beliefs preclude them from serving in a career position at the Justice Department or elsewhere in the federal government?

Response: No.

d. If confirmed, will you consider hiring qualified law clerks who do not necessarily share your political beliefs?

Response: I will not be in possession of that information because I will not inquire about partisan affiliation when evaluating clerkship candidates.

4. You were one of the first lawmakers in Montana to propose sending inmates to a private prison in another state, leading to a deal that transferred 120 inmates. Many private prisons have been found to have alarming inadequacies, including poor medical care, unsanitary conditions, and lack of oversight and accountability.

Do you support expanding the use of private prisons for the Bureau of Prisons?

Response: I have no knowledge of the current capacity of the Bureau of Prisons or need for more capacity. Moreover, as a nominee for judicial office, it would not be appropriate for me to opine on a public policy matter reserved for the political branches.

5. In response to President Trump criticizing then-Attorney General Jeff Sessions on social media, you stated that "it seems like it is more distraction than productive" and "the idea that a president would be calling out the Attorney General and potentially saying disparaging things about his Cabinet secretary, the chief federal law enforcement officer, that's uncharted territory."

Do you still believe that it is "more distraction than productive" for President Trump to criticize his cabinet officials?

Response: People are free to exercise their First Amendment rights to comment on public officials, including those in the Executive Branch. Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

6. Did President Trump lose the 2020 election?

Response: Pursuant to Article II and the Twelfth Amendment, Congress certified President Biden as the victor of the 2020 election.

7. Where were you on January 6, 2021?

Response: Helena, Montana.

8. Do you denounce the January 6 insurrection?

Response: As I noted in response to your question at the hearing on July 30th, the United States investigated the activities of a number of individuals involved in the events at the Capitol on January 6, 2021, which led to multiple convictions and sentences. It appears that the cases brought by the United States for acts on January 6th have been fully adjudicated.

The characterization of the conduct of persons located at the Capitol on January 6, 2021 is a matter subject to on-going litigation and that could arise in cases were I confirmed as a judge. As a judicial nominee, it would thus be inappropriate to provide comments that could implicate issues or parties that might come before me. I can say, as a general matter. that violence directed at law enforcement and innocent victims is never acceptable.

9. Do you believe that January 6 rioters who were convicted of violent assaults on police officers should have been given full and unconditional pardons?

Response: As I noted at the hearing on July 30th, the pardon power is vested exclusively in the President. For this reason and consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy.

10. The Justice Department is currently defending the Trump Administration in a number of lawsuits challenging executive actions taken by the Administration. Federal judges—both Republican and Democratic appointees—have enjoined some of these actions, holding that they are illegal or unconstitutional. Alarmingly, President Trump, his allies, and even some nominees before the Senate Judiciary Committee have responded by questioning whether the executive branch must follow court orders.

a. What options do litigants—including the executive branch—have if they disagree with a court order?

Response: A party may seek reconsideration. A party may also seek a stay of an order pending appeal. With respect to obtaining a stay, in most circumstances, the moving party must seek a stay of the judgment or order in the district court. If it would be impracticable to obtain relief in the district court or if the district court refuses to grant a stay, the party may seek a stay from the court of appeals. FRAP 8(a)(2). The moving party needs to make a showing under a well-established test, which includes four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A party may appeal the order without attempting to stay it. Finally, if the adverse order is the result of a statute or a regulation, a party may attempt to have the law revised.

b. Do you believe a litigant can ever lawfully defy an order from a lower federal court? If yes, in what circumstances?

Response: In thirty-one years of litigation practice, I recall being involved in only one case in which a district court believed a party defied its orders. *Forest Serv. Emples. for Envtl. Ethics v. United States Forest Serv.*, 530 F. Supp. 2d 1126 (D.

Mont. 2008). The court had issued three orders, but it concluded that the government agency "had no real intention to comply with the law or the Court's Orders." *Id*. at 1131.[1] The Court noted that "[t]he Forest Service suggests that if the Court concludes it did not comply with NEPA . . . it cannot be held in contempt because compliance was contingent upon an event beyond their control - - the Fish & Wildlife Service completing its end of the formal consultation process." The Court discussed two cases noting that a party cannot be held in contempt for failing to comply with an order if it is impossible to comply. *Id*. at 1130 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983); *United States v. Shillitani*, 384 U.S. 364, 371 (1966)). These cases suggest that a party will not be held in contempt for defying a district court order if compliance with it was a factual impossibility.

A party may elect "to defy a disclosure order and incur court-imposed sanctions" to "allow a party to obtain postjudgment review without having to reveal its privileged information." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009).

If a court issues an order in a case in which it lacks jurisdiction, it "may be disregarded without liability to process for contempt." *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947).

Finally, it has been asserted that the President and Congress could refuse to enforce a judgment suffering from constitutional infirmity when the "error is `so clear that it is not open to rational question.'" Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1325-26 (1996) (citation omitted).

c. Under the separation of powers, which branch of the federal government is responsible for determining whether a federal court order is lawful?

Response: Article III of the Constitution vests that authority in the Judicial Branch, although the exceptions noted in the response to subsection (b) may be applicable in a small number of cases.

11. District judges have occasionally issued non-party injunctions, which may include "nationwide injunctions" and "universal injunctions."

a. Are non-party injunctions constitutional?

Response: In *Trump v. CASA, Inc.*, 145 S.Ct. 2540, 2548 (2025), the Supreme Court held that universal injunctions "likely exceed the equitable authority that Congress has granted to federal courts."

[1] The Court issued an order which stated, "Secretary Ray, on further notice, shall be prepared to appear and show cause why he should not be held in contempt, and jailed until the contempt has been purged by compliance with the laws enacted by the Congress of the United States, including NEPA and ESA." *Id*. at 1128.

b. Are non-party injunctions a legitimate exercise of judicial power?

Response: Please see my response to Question 11(a).

c. Is it ever appropriate for a district judge to issue a non-party injunction? If so, under what circumstances is it appropriate?

Response: Please see my response to Question 11(a).

d. As a litigator, have you ever sought a non-party injunction as a form of relief? If so, please list each matter in which you have sought such relief.

Response: I do not recall pursuing injunctive relief in which non-parties would be subject to the injunction.

12. At any point during your selection process, did you have any discussions with anyone—including individuals at the White House, the Justice Department, or any outside groups—about loyalty to President Trump? If so, please provide details.

Response: No.

13. Does the U.S. Constitution permit a president to serve three terms?

Response: The 22nd Amendment to the Constitution states that "[n]o person shall be elected to the office of the President more than twice…."

14. On May 26, 2025, in a Truth Social post, President Trump referred to some judges whose decisions he disagrees with, as "USA HATING JUDGES" and "MONSTERS", who "…SUFFER FROM AN IDEOLOGY THAT IS SICK, AND VERY DANGEROUS FOR OUR COUNTRY…"[2]

a. Do you agree that these federal judges are "USA HATING" and "MONSTERS" "…SUFFER FROM AN IDEOLOGY THAT IS SICK, AND VERY DANGEROUS FOR OUR COUNTRY…"?

Response: Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

b. Do you believe this rhetoric endangers the lives of judges and their families?

Response: Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the

[2] Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (May 26, 2025, 7:22AM), https://truthsocial.com/@realDonaldTrump/posts/114573871728757682.

statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

15. In addition to the President's own attacks on judges, his adviser Stephen Miller took to social media to call a federal trade court's ruling against President Trump's tariffs a "judicial coup"[3] and later reposted the images of the three judges who decided the case and wrote, "we are living under a judicial tyranny."[4]

a. Do you agree that these judges are engaged in a "judicial coup" and that "we are living under a judicial tyranny"?

Response: Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

b. Do you believe this rhetoric endangers the lives of judges and their families?

Response: Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

c. Would you feel comfortable with any politician or their adviser sharing a picture of you on social media if you issue a decision they disagree with?

Response: Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

16. When, if ever, may a lower court depart from Supreme Court precedent?

Response: It is not permissible. Lower courts must follow Supreme Court precedent that directly controls an issue presented. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

17. When, in your opinion, would it be appropriate for a circuit court to overturn its own precedent?

[3] Stephen Miller (@StephenM), X, (May 28, 2025, 7:48PM), https://x.com/StephenM/status/1927874604531409314.
[4] Stephen Miller (@StephenM), X, (May 29, 2025, 8:25AM), https://x.com/StephenM/status/1928065122657845516.

Response: I have no opinions on the question, but I am familiar with the case law and rules applicable to it. If intervening authority from the Supreme Court is "clearly irreconcilable" with prior circuit precedent, "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*); *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1141-43 (9th Cir. 2022). In addition, a circuit court may overturn its own precedent by hearing cases *en banc*. The reasons for consideration of a case by a circuit court sitting *en* banc are described in Federal Rule of Appellate Procedure 40(b)(2).

18. When, in your opinion, would it be appropriate for the Supreme Court to overrule its own precedent?

Response: I have no opinions on this question nor will I be confronted with it if confirmed. However, the Supreme Court has articulated the bases for overruling its precedent. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268-90 (2022); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

19. Please answer yes or no as to whether the following cases were correctly decided by the Supreme Court:

a. *Brown v. Board of Education*

Response: In general, it is not appropriate for judicial nominees to offer views on whether particular Supreme Court cases were correctly decided. For nominees who are confirmed, the cases constitute binding authority that they must apply regardless of their personal views. Other nominees have agreed that there is an exception to the general rule against offering views on the Supreme Court's reasoning for two cases, *Brown* and *Loving.* As stated in response to a question from Senator Blumenthal at the hearing on my nomination, I believe that *Brown* and *Loving* were correctly decided.

b. *Plyler v. Doe*

Response: Please see my response to Question 19(a).

c. *Loving v. Virginia*

Response: Please see my response to Question 19(a).

d. *Griswold v. Connecticut*

Response: Please see my response to Question 19(a).

e. *Trump v. United States*

Response: Please see my response to Question 19(a).

f. ***Dobbs v. Jackson Women's Health Organization***

Response: Please see my response to Question 19(a).

g. ***New York State Rifle & Pistol Association, Inc. v. Bruen***

Response: Please see my response to Question 19(a).

h. ***Obergefell v. Hodges***

Response: Please see my response to Question 19(a).

i. ***Bostock v. Clayton County***

Response: Please see my response to Question 19(a).

j. ***Masterpiece Cakeshop v. Colorado***

Response: Please see my response to Question 19(a).

k. ***303 Creative LLC v. Elenis***

Response: Please see my response to Question 19(a).

l. ***United States v. Rahimi***

Response: Please see my response to Question 19(a).

m. ***Loper Bright Enterprises v. Raimondo***

Response: Please see my response to Question 19(a).

20. With respect to constitutional interpretation, do you believe judges should rely on the "original meaning" of the Constitution?

Response: The Supreme Court has addressed this in cases, including *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Crawford v. Washington*, 541 U.S. 36 (2004), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). I would adhere to these precedents by construing the language in question based upon the ordinary meaning of the text at the time of adoption.

21. How do you decide when the Constitution's "original meaning" should be controlling?

Response: Please see my response to Question 20.

22. Does the "original meaning" of the Constitution support a constitutional right to same-sex marriage?

Response: In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court held that the Constitution provides a right of marriage to people of the same sex. As noted in my response to Question 16, if confirmed, I would faithfully apply Supreme Court precedent.

23. Does the "original meaning" of the Constitution support the constitutional right to marry persons of a different race?

Response: In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court invalidated a Virginia statute prohibiting interracial couples from marrying. As noted in my response to Question 16, if confirmed, I would faithfully apply Supreme Court precedent.

24. What is your understanding of the Equal Protection and Due Process clauses of the Fourteenth Amendment?

Response: I am familiar with the text of the Fourteenth Amendment to the Constitution, which precludes a state from (1) enacting or enforcing a law that would "abridge the privileges and immunities of U.S. citizens", (2) "depriving any person of life, liberty, or property, without due process", and (3) denying a person in its jurisdiction "equal protection of the laws." Under the Equal Protection Clause, states may not classify individuals in a manner which lacks a rational basis, and a court must apply heightened scrutiny to laws when classifications are based upon a protected characteristic. However, the right "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *United States v. Skrmetti*, 145 S. Ct. 1816, 1828 (2025). The Due Process Clause provides protections for liberty interests to the extent they are "fundamental" or "deeply rooted". *Timbs v. Indiana*, 586 U.S. 146, 155 (2019).

25. How do these clauses apply to individuals that the Framers of the amendment likely did not have in mind, such as women? Or LGBTQ+ individuals?

Response: The provisions have been applied by the Supreme Court to discrimination based on sex, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996), and sexual orientation, *see, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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

Response: Please see my response to Question 20.

27. 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?

Response: Please see my response to Question 20.

28. Under the U.S. Constitution, who is entitled to First Amendment protections?

Response: The First Amendment applies broadly because it prohibits enactment of laws "respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The extent to which the protections apply depends upon the right at issue. The Supreme Court's decision in *Ginsberg v. New York*, 390 U.S. 629 (1968) is an example of the how the rights may be limited.

29. How would you determine whether a law that regulates speech is "content-based" or "content-neutral"? What are some of the key questions that would inform your analysis?

Response: The initial question to resolve is "whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citation omitted). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id*. (citations omitted). "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id*. (citations omitted). The Supreme Court has decided a number of more recent cases on this question, including *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), *City of Austin, Texas v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61 (2022), and *TikTok Inc. v. Garland*, 145 S. Ct. 57 (2025). If the law "draws distinctions based on the message a speaker conveys" or based upon the "particular subject matter" of the speech or by "its function or purpose", it is subject to strict scrutiny review. *Reed*, 576 U.S. at 163-64.

30. What is the standard for determining whether a statement is protected speech under the true threats doctrine?

Response: Under the true threats doctrine, speech that conveys through "serious expression" an intention of the speaker to "commit an unlawful act of violence" is not protected speech. *Countryman v. Colorado*, 600 U.S. 66, 74 (2023) (citation omitted).

31. Is every individual within the United States entitled to due process?

Response: The Supreme Court has held 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). I

would look to precedent established by the Supreme Court and the Ninth Circuit to determine what process is due given the facts and procedural posture of each case.

32. Can U.S. citizens be transported to other countries for the purpose of being detained, incarcerated, or otherwise penalized?

Response: This question is the subject of on-going litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

33. The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

a. Is every person born in the United States a citizen under the Fourteenth Amendment?

Response: This question is the subject of on-going litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

b. Is the citizenship or immigration status of the parents of an individual born in the United States relevant for determining whether the individual is a citizen under the Fourteenth Amendment?

Response: This question is the subject of on-going litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

34. Do you believe that demographic and professional diversity on the federal bench is important? Please explain your views.

Response: I am reluctant to opine on how Presidents should evaluate potential judicial nominees and how Senators should carry out their advise and consent function. In my view, the most important consideration should be the qualifications of potential nominees. No potential nominee should be excluded from consideration due to gender, race, or other immutable characteristics.

35. The bipartisan *First Step Act of 2018*, which was signed into law by President Trump, is one of the most important pieces of criminal justice legislation to be enacted during my time in Congress. At its core, the Act was based on a few key, evidence-based principles. First, incarcerated people can and should have meaningful access to rehabilitative programming and support in order to reduce recidivism and help our communities prosper. Second, overincarceration through the use of draconian mandatory minimum sentences does not serve the purposes of sentencing and ultimately causes greater, unnecessary harm to our communities. With these rehabilitative principles in mind, one

thing Congress sought to achieve through this Act was giving greater discretion to judges—both before and after sentencing—to ensure that the criminal justice system effectively and efficiently fosters public safety for the benefit of all Americans.

a. How do you view the role of federal judges in implementing the *First Step Act*?

Response: Federal judges need to consider how to apply their discretion as created through the First Step Act at sentencing (and in subsequent proceedings) just as they must consider how to fashion a sentence that complies with 18 U.S.C. § 3553 and advances the purposes of punishment.

b. You have previously said that the movement to reduce the prison population is not your "philosophy." If confirmed, the sentences you issue will directly impact our prison population. Are you still opposed to safely reducing the population in our jails and prisons?

Response: It is not clear whether this question pertains to the First Step Act. I do not recall making a statement about the First Step Act. I have commented on Montana's criminal justice system, including its correctional facilities, on many occasions and noted that it has lacked adequate capacity to incarcerate offenders. The question appears to be asking about my view on sentencing. The starting point in considering what constitutes a reasonable sentence is an accurate calculation of the Sentencing Guidelines. In addition, if confirmed, I would fashion sentences that comply with 18 U.S.C. § 3553 and advance the purposes of punishment.

c. Will you commit to fully and fairly considering the individualized circumstances of each defendant who comes before you when imposing sentences to ensure that they are properly tailored to promote the goals of sentencing and avoid terms of imprisonment in excess of what is necessary?

Response: I would fashion sentences that comply with 18 U.S.C. § 3553 and advance the purposes of punishment, which is what the question asks. A judge must impose a sentence which is sufficient, but not greater than necessary, to (1) reflect the seriousness of the offense, (2) promote respect for the law, (3) provide just punishment for the offense, (4) afford adequate deterrence to criminal conduct, (5) protect the public from further crimes of the defendant, and (6) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a). Every sentence must be individualized and evaluate "the nature and circumstances of the offense [and] the history and characteristics of the defendant." *Id*.

36. 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."

a. In your Questionnaire, you state that you are currently or were previously a member of the Federalist Society. What is your understanding of "traditional values"?

Response: I am not familiar with the quoted material or what its author intended to convey by including it.

b. President Trump wrote on Truth Social that the Federalist Society gave him "bad advice" on "numerous Judicial Nominations." He also wrote that Leonard Leo is a "sleazebag" who "probably hates America." If you are not familiar with this post, please refer to it in the footnote.[5]

i. Do you agree with President Trump that the Federalist Society provided President Trump with bad advice during his first term? Why or why not?

Response: I am not aware of advice provided by the Federalist Society to the President during his first term. Therefore, even if it were permissible to respond to the question, I have no basis upon which a response could be formed.

ii. Do you agree with President Trump that Leo is a sleazebag who probably hates America? Why or why not?

Response: Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy.

iii. If you are confirmed, do you plan to remain affiliated with the Federalist Society?

Response: I am not a member of the Federalist Society at present nor have I been for a number of years.

c. During your selection process, have you spoken to or corresponded with any individuals associated with the Federalist Society, including Leonard Leo or Steven G. Calabresi? If so, please provide details of those discussions.

Response: During the period of time after the 2024 election and before the President announced his intent to nominate me, I did not speak with or correspond with Mr. Leo, Mr. Calabresi, anyone who identified themselves as associated with

[5] Donald J. Trump (@realDonaldTrump), Truth Social (May 29, 2025, 8:10 PM), https://truthsocial.com/@realDonaldTrump/posts/114593880455063168.

the Federalist Society, or anyone who I knew to be associated with the Federalist Society.

d. Have you ever been asked to and/or provided services to the Federalist Society, including research, analysis, advice, speeches, or appearing at events?

Response: As noted in the appendix to my response to Question 12(d) in the Senate Judiciary Questionnaire, I participated in a Federalist Society podcast in 2007 **(***Discussion of the Supreme Court's Opinions in Kimbrough v. United States, 552 U.S. 85 (2007) and Gall v. United States, 552 U.S. 38 (2007)*, The Federalist Society's SCOTUScast, Washington, D.C. Recording available at (https://fedsoc.org/contributors/william-mercer-1)).

e. Have you ever been paid honoraria by the Federalist Society? If so, how much were you paid, and for what services?

Response: No.

37. The Teneo Network states that its purpose is to "Recruit, Connect, and Deploy talented conservatives who lead opinion and shape the industries that shape society."

a. During your selection process, have you spoken to or corresponded with any individuals associated with the Teneo Network, including Leonard Leo? If so, please provide details of those discussions.

Response: I am not familiar with the Teneo Network or any of the individuals associated with it. During the period of time after the 2024 election and before the President announced his intent to nominate me, I did not speak with or correspond with Mr. Leo or anyone who identified themselves as associated with the Teneo Network.

b. Have you ever been asked to and/or provided services to the Teneo Network, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by the Teneo Network? If so, how much were you paid, and for what services?

Response: No.

38. The Heritage Foundation states that its mission is to "formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." Heritage Action,

which is affiliated with the Heritage Foundation, seeks to "fight for conservative policies in Washington, D.C. and in state capitals across the country."

a. During your selection process, have you spoken to or corresponded with any individuals associated with the Heritage Foundation or Heritage Action, including Kevin D. Roberts? If so, please provide details of those discussions.

Response: During the period of time after the 2024 election and before the President announced his intent to nominate me, I did not speak with or correspond with Mr. Roberts, anyone who identified themselves as associated with the Heritage Foundation or Heritage Action, or anyone who I knew to be associated with the Heritage Foundation or Heritage Action.

b. Have you ever been asked to and/or provided services to the Heritage Foundation or Heritage Action, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Were you ever involved in or asked to contribute to Project 2025 in any way?

Response: No.

d. Have you ever been paid honoraria by the Heritage Foundation or Heritage Action? If so, how much were you paid, and for what services?

Response: No.

39. The America First Policy Institute (AFPI) states that its "guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do."

a. During your selection process, have you spoken to or corresponded with any individuals associated with AFPI? If so, please provide details of those discussions.

Response: I am not familiar with the America First Policy Institute or any of the individuals associated with it. During the period of time after the 2024 election and before the President announced his intent to nominate me, I did not speak with or correspond with anyone who identified themselves as associated with the America First Policy Institute.

b. Have you ever been asked to and/or provided services to AFPI, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by AFPI? If so, how much were you paid, and for what services?

Response: No.

40. The America First Legal Institute (AFLI) states that it seeks to "oppose the radical left's anti-jobs, anti-freedom, anti-faith, anti-borders, anti-police, and anti-American crusade."

a. During your selection process, have you spoken to or corresponded with any individuals associated with AFLI, including Stephen Miller, Gene Hamilton, or Daniel Epstein? If so, please provide details of those discussions.

Response: I am not familiar with the America First Legal Institute or any of the individuals associated with it. During the period of time after the 2024 election and before the President announced his intent to nominate me, I did not speak with or correspond with anyone who identified themselves as associated with the America First Legal Institute or the individuals listed in the question.

b. Have you ever been asked to and/or provided services to AFLI, including but not limited to research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by AFLI? If so, how much were you paid, and for what services?

Response: No.

41. The Article III Project is an organization which claims that, "The left is weaponizing the power of the judiciary against ordinary citizens."

a. During your selection process, have you spoken to or corresponded with any individuals associated with the Article III Project, including Mike Davis, Will Chamberlain, or Josh Hammer? If so, please provide details of those discussions.

Response: During the period of time after the 2024 election and before the President announced his intent to nominate me, I did not speak with or correspond with anyone who identified themselves as associated with Article III Project or the individuals listed in the question.

b. Have you ever been asked to and/or provided services to the Article III Project, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by the Article III Project? If so, how much were you paid, and for what services?

Response: No.

42. The Alliance Defending Freedom (ADF) states that it is "the world's largest legal organization committed to protecting religious freedom, free speech, the sanctity of life, marriage and family, and parental rights."

a. During your selection process, have you spoken to or corresponded with any individuals associated with ADF? If so, please provide details of those discussions.

Response: During the period of time after the 2024 election and before the President announced his intent to nominate me, I had conversations with ADF's registered lobbyists in Montana during the 2025 Montana Legislature. However, those conversations did not include any discussions regarding my interest in the judgeship for which I have been nominated or the judicial selection and nomination process in general. Other than the aforementioned lobbyists, I have not spoken or corresponded with anyone who identified themselves as "associated with ADF" during the period of time after the 2024 election and before the President announced his intent to nominate me. I know an attorney in Montana who formerly worked for ADF. We have spoken and corresponded on multiple occasions after the 2024 election and before the President announced his intent to nominate me.

b. Have you ever been asked to and/or provided services to ADF, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by ADF? If so, how much were you paid, and for what services?

Response: No.

43. The Concord Fund, also known as the Judicial Crisis Network, states that it is committed "to the Constitution and the Founders' vision of a nation of limited government; dedicated to the rule of law; with a fair and impartial judiciary." It is affiliated with the 85 Fund, also known as the Honest Elections Project and the Judicial Education Project.

a. During your selection process, have you spoken to or corresponded with any individuals associated with these organizations, including Leonard Leo or Carrie Severino? If so, please provide details of those discussions.

Response: No.

b. Have you ever been asked to and/or provided services to these organizations, including research, analysis, advice, speeches, or appearing at events?

Response: No.

c. Have you ever been paid honoraria by these organizations? If so, how much were you paid, and for what services?

Response: No.

d. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Concord Fund or 85 Fund 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.

Response: I am unaware of any activities undertaken by private groups or individuals in support of my nomination.

e. 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 this information when you make decisions about recusal in cases that these donors may have an interest in?

Response: If confirmed, I will utilize different sources of information to evaluate actual or potential conflicts by evaluating facts against 28 U.S.C. § 455, the Code of Conduct for United States Judges, and other applicable laws.

f. Will you condemn any attempt to make undisclosed donations to the Concord Fund or 85 Fund on behalf of your nomination?

Response: I am unaware of any activities undertaken by private groups or individuals in support of my nomination.

Nomination of William Mercer
Nominee to the United States District Court for the District of Montana
Questions for the Record
Submitted August 6, 2025

QUESTIONS FROM SENATOR WHITEHOUSE

Please answer each question and sub-question individually and as specifically as possible.

1. In 2006 and 2007, the Bush administration fired nine U.S. Attorneys in the middle of their terms, a decision the Department of Justice Inspector General concluded was "fundamentally flawed," and "raised doubts about the integrity of Department prosecutive decisions." You were the Acting Associate Attorney General at the time.

    a. Were you involved in discussions related to the decision to fire the U.S. Attorneys?

    Response: The question pertains to an issue addressed in An Investigation Into the Removal of Nine U.S. Attorneys in 2006 (September 2008)), a joint report published by the Office of Inspector General and Office of Professional Responsibility ("OIG/OPR Report"). In the fall of 2005, I discussed the performance of certain U.S. Attorneys with Kyle Sampson, Chief of Staff to the Attorney General. *See* OIG/OPR Report, p. 23. Regarding the decisions to terminate the nine United States Attorneys, the report stated, "From the context of the e-mail [sent the night before calls were made to the United States Attorneys], it is clear that Mercer had not been involved in the process until then." *Id*. at 51.

    b. Did you advise the Attorney General or Deputy Attorney General regarding the firings? What did you advise them?

    Response: Please see the response to Question 1(a).

    c. Did you have a role in choosing or approving which U.S. Attorneys to fire? Describe that role and the criteria you used to determine who would be terminated.

    Response: Please see the response to Question 1(a).

    d. Did you tell one fired U.S. Attorney that "Republicans had a short, 2-year window and wanted to take advantage of it by getting future Republican Party candidates on board as U.S. Attorneys"?

    Response: This issue is discussed in the OIG/OPR report. The report concluded, "Charlton and Bogden contacted Mercer and asked why they were being removed. However, consistent with Sampson's plan, the U.S. Attorneys were given no explanation for the firings other than the Administration wanted to give someone else a chance to serve." *Id*. at 53-54. The report also stated that when interviewed in 2007 about whether I told U.S. Attorney Bogden that there was a

window of opportunity for the Administration to build up the resumes of candidates for judgeships and political offices, I "did not recall making such a statement to Bogden." *Id*. at 214. I do not have a different recollection today.

Nomination of William Mercer to the
United States District Court for the District of Montana
Questions for the Record
Submitted August 5, 2025

QUESTIONS FROM SENATOR COONS

1. At any point during the process that led to your nomination, did you make any representations or commitments to anyone—including but not limited to individuals at the White House, at the Justice Department, or at outside groups—as to how you would handle a particular case, investigation, or matter, if confirmed? If so, explain fully.

   Response: No.

   a. At any point during the process that led to your nomination, were you asked about your opinion on any cases that involve President Trump or the Trump administration?

   Response: No.

2. How would you describe your judicial philosophy?

   Response: My judicial philosophy is informed by practicing in Federal courts and Montana courts for 31 years, serving as an executive branch official, and serving as a state legislator. It is essential that judicial officers exercise their authority without usurping or assuming the roles of officials in the other branches. If confirmed, I would approach the work with appreciation for the tasks for me to perform and the limits of that authority. A fundamental principle to apply to achieve this end is statutory interpretation focused on the plain language of the law without inserting words that are not present when the plain language is clear. This judicial modesty also counsels against criticizing policy or management decisions of the political branches if I would have reached different conclusions as a legislator or as an executive branch official. My judicial philosophy includes respect for the rule of law, which will limit my legal conclusions to the facts and applicable law presented regardless if they align with what I perceive as the preferred outcome. This principle requires an impartial and neutral application of the law.

3. 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?

   Response: The Due Process Clause provides protections for liberty interests to the extent they are "fundamental" or "deeply rooted". *Timbs v. Indiana*, 586 U.S. 146, 155 (2019). I would review and apply the factors discussed in Supreme Court and Ninth Circuit precedent, including *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

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

Response: Yes.

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

Response: Yes. I would consult the type of sources noted in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237-40 (2022) and other Supreme Court cases pertaining to this issue.

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?

Response: Yes. I would review and consider Supreme Court and Ninth Circuit precedent. If additional review is necessary, I would review cases from other Courts of Appeals.

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

Response: Yes.

e. What other factors would you consider?

Response: Please see my response to Question 3 and its subparts.

4. 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 higher court? Please explain.

Response: If intervening authority from the Supreme Court is "clearly irreconcilable" with prior circuit precedent, "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*); *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1141-43 (9th Cir. 2022).

5. Under 28 U.S.C. § 455, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify [themself] in any proceeding in which [their] impartiality might reasonably be questioned."

a. If confirmed, would you recuse yourself from future cases involving challenges to Montana laws on which you voted affirmatively in the state legislature?

Response: I will evaluate the provisions of 28 U.S.C. § 455, the Code of Judicial Conduct for United States Judge, and any other applicable laws or rules on recusal decisions on a case-by-case basis. House Bill 342, which I sponsored and became law in 2025, illustrates why a blanket response to the question is not prudent. The bill does one thing with respect to the duty of care in medical malpractice cases. Under current law, "the foreseeability of risks or a specific risk does not change or heighten the duty owed beyond the reasonable standard of care applicable to a medical provider." Under the Federal Tort Claims Act, in general, state law applies to medical malpractice cases ("the United States, shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674), which are litigated in federal court. The fact that I voted in favor of the new law on the rearticulated standard of care does not mean that my impartiality in applying it in Federal Tort Claims Act could "reasonably be questioned."

b. Would you recuse yourself from future cases involving challenges to Montana laws you voted against while in the state legislature?

Response: Please see my response to Question 5(a).

6. 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*, 576 U.S. 644, 668 (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 a court to consider evidence that sheds light on our changing understanding of society?

Response: If confirmed, I would review precedent of the Supreme Court and the Ninth Circuit to determine whether and how to apply the changing understanding of society.

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

Response: The admissibility of scientific, technical, or other specialized knowledge at trial is governed by Federal Rule of Evidence 702 and the cases discussing the rule. Scientific information and data are often considered by federal agencies in their decision making. In turn, district courts are often asked to review administrative records compiled by the agencies, including scientific information and data, in lawsuits challenging the decisions of the agencies.

7. I have been proud to co-lead the bipartisan *Safer Supervision Act*, a bill to reform our federal supervised release system that has received substantial conservative and law enforcement support. The premise of the bill is that our federal supervision system has strayed far from how Congress designed it, as courts impose it mechanically in essentially every case, which means that probation officers do not have time to properly supervise those who most need it. The bill reinforces courts' existing obligations under 18 U.S.C. §§ 3553 and 3583 to impose supervision as warranted by the individual facts of the case and encourages more robust use of early termination when warranted to provide positive incentives encouraging rehabilitation. At the encouragement of a bipartisan group of members of Congress, the U.S. Sentencing Commission recently finalized an amendment to supervision guidelines implementing certain parts of the bill; this amendment will go in effect in November.

   a. As a sentencing judge, would you endeavor to impose supervision thoughtfully and on the basis of the individual facts of the case consistent with 18 U.S.C. § 3553 and 18 U.S.C. § 3583?

      Response: Yes. With respect to each defendant, district judges are required to consider a number of statutory provisions listed in 18 U.S.C. § 3583(c) "in determining whether to include a term of supervised release" and, if so, the length and conditions of the supervised release term.

   b. Would you agree that the availability of early termination under 18 U.S.C. § 3583(e)(1) can provide individuals positive incentives to rehabilitate?

      Response: After fifteen years in the U.S. Attorney's Office in the District of Montana, I concluded that individuals convicted of crimes respond in different ways. Some defendants may be incentivized to take rehabilitation seriously given the potential for early termination. A similar incentive has existed for offenders committed to the Bureau of Prisons who are eligible for a percentage reduction in the term of incarceration for good behavior.

   c. Will you commit if confirmed to reviewing the *Safer Supervision Act* and the recent Sentencing Commission amendment and considering them as you develop your approach to sentencing of supervised release?

Response: If confirmed, I will review the amendment promulgated by the Commission and consider it in conjunction with other authority at sentencing with respect to decisions on supervised release. I will review the Safer Supervision Act if it is enacted.

8. What is the remedy if the President violates his constitutional duty to faithfully execute the laws?

   Response: I am not aware of a case that addresses this subject.

9. Is President Trump eligible to be elected President for a third term?

   Response: No. The 22nd Amendment to the Constitution states that "[n]o person shall be elected to the office of the President more than twice…."

10. Who won the 2020 U.S. Presidential Election? I am not asking who Congress certified as the President.

    Response: I have responded to a similar question in responses to Ranking Member Durbin and Senator Booker. With respect to this question, consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

11. Would it be constitutional for the President of the United States to punish a private person for a viewpoint that person expresses in a newspaper op-ed?

    Response: The hypothetical is silent with respect to potentially important details, in particular what constitutes punishment. Without knowing more, it is difficult to answer and subject to misinterpretation.

12. Do you agree with me that the attack at the U.S. Capitol on January 6, 2021, was an insurrection? Why or why not?

    Response: No. A provision of the U.S. Code makes it a crime for an individual who "incites, . . . assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto." 18 U.S.C. § 2383. However, it does not appear that any of the defendants who were convicted for acts at the Capitol on January 6, 2021 were convicted under 18 U.S.C. § 2383.

13. Would it be constitutional for the President of the United States to terminate government contracts with a private person specifically because that person donated to members of the opposite political party?

Response: This question pertains to a current dispute that may be the subject of litigation in federal court. As a judicial nominee, I do not believe it would be appropriate to address the question. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

14. Would it ever be appropriate for the President of the United States to punish a law firm for taking on a client that the President did not like?

    Response: This question is the subject of on-going litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

15. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives? If you do not agree, please explain whether this right is protected or not and which constitutional rights or provisions encompass it.

    Response: *Griswold*, 381 U.S. 479 (1965) is binding precedent. The Supreme Court held that a Connecticut law banning the use of contraceptives violated Griswold's right to privacy under the Fourteenth Amendment.

16. Do you agree that the constitutional right to travel across state lines is fundamental and well established?

    Response: Yes.

    a. Do you think it is constitutional for a state to restrict the interstate travel of its citizens?

       Response: This question pertains to a current dispute that may be the subject of litigation in federal court. As a judicial nominee, I do not believe it would be appropriate to address the question. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

17. Do you believe that the Constitution protects a fundamental right to privacy?

    Response: In *Griswold v. Connecticut*, 381 U.S. 479, 485-86, the Supreme Court held that Connecticut's statute violated a right to privacy, which it interpreted to be within the Constitution.

    a. Does that right extend to information about your health care and medical history?

       Response: This question pertains to a current dispute that may be the subject of litigation in federal court. As a judicial nominee, I do not believe it would be appropriate to address the question. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

b. Do you agree that it is a violation of that right for states to surveil people's health care and medical history?

Response: This question pertains to a current dispute that may be the subject of litigation in federal court. As a judicial nominee, I do not believe it would be appropriate to address the question. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

18. Do you agree that there is a constitutional right to privacy that protects the right to in vitro fertilization (IVF)? If you do not agree, please explain whether this right is protected or not and which constitutional rights or provisions encompass it.

Response: In *Morrissey v. United States*, 871 F.3d 1260, 1270 (11th Cir. 2017), the declined to "confer `fundamental' status on [the plaintiff's] asserted right to IVF-and-surrogacy -assisted reproduction." Although this precedent would not be binding on me if confirmed, I am unaware of other cases on the issue. It would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

19. Do you believe that immigrants, regardless of legal status, are entitled to due process and fair adjudication of their claims?

Response: The Supreme Court has held 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). I would look to precedent established by the Supreme Court and the Ninth Circuit to determine what process is due given the facts and procedural posture of each case.

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

Response: Yes. The Supreme Court has addressed this in cases, including *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Crawford v. Washington*, 541 U.S. 36 (2004), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). I would adhere to these precedents by construing the language in question based upon the ordinary meaning of the text at the time of adoption.

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

Response: Please see my response to Question 20.

22. What role does morality play in determining whether a challenged law or regulation is unconstitutional or otherwise illegal?

Response: Please see my response to Question 2. A judge is to decide cases based upon the applicable fact and law A judge's orders may not be based upon his views on

morality or policy preferences. Judges are not policymakers and need to leave that function to the political branches.

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

    Response: Please see my responses to Questions 2 and 22. The practical consequences of a decision should not influence a judge's decision, which should flow from the applicable facts and law. One exception to this observation is when courts resolve motions for injunctive relief. In that context, a judge must weigh the public interest and balance the equities.

24. What role, if any, should empathy play in a judge's decision-making process?

    Response: Please see my response to Question 2. Empathy is a positive attribute, but empathy for a crime victim, a criminal defendant, a plaintiff in a tort case, or any other party involved in the administration of justice cannot be the basis for a judge to decide a case due to personal views or the preference for a party or other stakeholder. *See* 28 U.S.C. § 453 (the oath requires a judge to "administer justice without respect to persons, and do equal right to the poor and the rich, and … faithfully and impartially discharge and perform all the duties incumbent upon me….").

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

    Response: Please see my responses to Questions 2 and 24.

26. Should you be confirmed, would you ever inform parties before you that they do not need to comply with your orders?

    Response: A party appealing an adverse judgment or order may move for a stay pending appeal. A defendant may move for a stay under Fed. R. Crim. P. 38. Parties in civil cases may seek stays pursuant to Fed. R. Civ. P. 62. If confirmed, any order granting a stay motion under these authorities would relieve a party of the obligation to comply with an order.

    a. Under what circumstances would you tell a party they could decide not to comply with your orders?

       Response: If confirmed, I would except parties to comply with orders that I issued. I cannot envision a scenario in which I would advise counsel for a party that the party could decide whether to comply with an order.

    b. What would you do if a party refuses to comply with one of your orders?

Response: A hearing should be held to establish a factual record to determine whether the individual willfully violated the order or engaged in bad faith. *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1090 (9th Cir. 2021). Depending upon the factual record, sanctions, including civil and criminal contempt, may be considered. I would also consider compliance mechanisms, including written status reports and status hearings.

27. When it comes to conducting yourself ethically, who in the legal profession do you see as a role model?

Response: In general, I would consider any judge who meets the standards in subsections A and B of Canon 3 of the Code of Conduct for United States Judges to be a role model, but particularly those are "patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." When I consider the entirety of Canon 3, Associate Justice Beth Baker of the Montana Supreme Court stands out as a role model even though the Canons are not binding on her as a Montana Supreme Court Justice.

28. Discuss your proposed hiring process for law clerks.

    a. Do you think law clerks should be protected by Title VII of the Civil Rights Act?

    Response: Policy questions related to the application of Title VII to Judicial Branch employees to whom the protections do not presently extend is a matter for the political branches. It would be inappropriate for me, as a pending judicial nominee, to comment on the question. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

29. In the past year, multiple studies have revealed ongoing problems with workplace conduct policies and outcomes in the federal judiciary. In a national climate survey, hundreds of judiciary employees reported that they experienced sexual harassment, discrimination, or other forms of misconduct on the job. A study by the Federal Judicial Center and the National Academy of Public Administration found the branch has failed to set up trusted reporting systems for employees who experience misconduct or ensure those handling complaints are adequately trained.

    a. If confirmed, what proactive steps would you take to ensure that the clerks and judicial assistants who work in your chambers are treated with respect and are not subject to misconduct?

    Response: The U.S. District Court for the District of Montana has adopted and utilizes the Ninth Circuit's Employee Dispute Resolution Policy. If confirmed, I will familiarize myself with the policy and ensure that those who work in my chambers are aware of the policy. I will ask these employees to report workplace misconduct to me, the Chief Judge, or another designee under the policy.

b. What proactive steps would you take to ensure that any workplace-related concerns that your clerks and judicial assistants may have are fully addressed?

Response: If concerns are brought to my attention, I would ensure that the appropriate process is followed to address the concerns.

c. If you are confirmed and you later hear from a colleague or your chambers staff that another judge is acting inappropriately, what steps would you take to help ensure the problem is addressed?

Response: I would disclose the report to the Chief Judge or a designee under the Employee Dispute Resolution Policy.

30. Some district court judges have issued standing orders indicating that the court will favor holding an oral argument when there is a representation that the argument would be handled by a junior lawyer. Such efforts are intended to provide more speaking opportunities in court for junior lawyers. Would you consider issuing a standing order that would encourage more junior lawyers to handle oral arguments? Why or why not?

Response: The U.S. District Court for the District of Montana does not have a standing order on this subject. I am not aware of the contours of standing orders adopted in other districts to expand oral argument opportunities for junior attorneys. I am aware of a statement from judge in another district who has provided notice to parties that she encourages them "to afford opportunities for junior attorneys of all backgrounds to argue before the Court." I would like to learn more about the perceptions of judges and practitioners in districts with either a standing order or other policy. Although the potential benefits are obvious, I am also interested in learning more about potential problems. First, if a district court will hear argument from a junior attorney on a motion not meriting a hearing, the parties will be incurring costs for oral argument preparation and participation for a motion that could be resolved on briefs without argument. In addition, courts should also be reluctant to set policy that may be perceived as suggesting to a party who should argue on its behalf.

a. How else would you support the skills development of junior lawyers appearing before you?

Response: If confirmed, I will participate in State Bar programming offered by the New Lawyers Section.

31. Do you think the individuals convicted of assaulting law enforcement officers at the Capitol on January 6, 2021, deserved to be pardoned?

Response: As I noted at the confirmation hearing on July 30th, the pardon power is vested exclusively in the President. For this reason and consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee,

to comment on the statements of political figures or political controversy. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

32. If you were the President on January 20, 2025, would you have pardoned the individuals convicting of assaulting law enforcement officers at the Capitol on January 6, 2021?

    Response: Please see my response to Question 31.

Nomination of William W. Mercer
Nominee to be U.S. District Judge for the District of Montana
Questions for the Record
Submitted August 6, 2025

QUESTIONS FROM SENATOR CORY A. BOOKER

1. A 2008 report by the Office of Inspector General of the Department of Justice (DOJ) found that you failed to address politicized hiring concerns brought to your attention during your tenure at DOJ.[1]

   According to the Inspector General, you described a candidate for the DOJ Honors Program as "probably quite liberal. He is clerking for a very activist, [American Trial Lawyers]-oriented justice" and noted the candidate had written a pro-environment article.[2]

   a. If you are confirmed to the federal bench, will you consider a law clerk candidate's political affiliation when making hiring decisions?

      Response: I will not inquire about partisan affiliation when evaluating clerkship candidates. I respectfully disagree with the assumptions and assertions in the question. The question pertains to an e-mail exchange that I had in 2002 with the Chief of Staff to the Attorney General, which is reported in An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program (June 24, 2008), a joint OIG/OPR report. The OIG/OPR report states that his inquiry pertained to an Honors Program applicant based in Montana. I advised the OIG/OPR investigators that I probably assumed that the Chief of Staff to the Attorney General was seeking input regarding the candidate's suitability for a political appointment. I included the following passage in my e-mail to the Chief of Staff: "I know of better candidates through our internship and clerkship programs who have applied to the honors program." I disagree with the assertion in the question that this "explicit reference" confirms the inquiry pertained to an applicant to the Honors Program, particularly when the inquiry came from the Chief of Staff to the Attorney General.

2. The American Bar Association (ABA) Standing Committee on the Federal Judiciary has conducted extensive peer evaluations of the professional qualifications of a president's nominees to become federal judges for seven decades. This practice has endured through 18 presidential administrations, under Republican and Democratic presidents.

   On May 29, 2025, Attorney General Pam Bondi ended this longstanding practice when she informed the ABA that, "[T]he Office of Legal Policy will no longer direct nominees to provide waivers allowing the ABA access to nonpublic information, including bar

[1] AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM 97, DEP'T OF JUSTICE (2008), https://www.justice.gov/sites/default/files/opr/legacy/2008/06/24/oig-opr-investigation-hire-slip.pdf.
[2] *Id.* at 18.

records. Nominees will also not respond to questionnaires prepared by the ABA and will not sit for interviews with the ABA."[3]

a. Do you agree with AG Bondi that "the ABA no longer functions as a fair arbiter of nominees' qualifications and its ratings invariably and demonstrably favor nominees put forth by Democratic administrations"?

Response: I have not studied this issue to a great enough extent to have a foundation to form an opinion.

3. How would you characterize your judicial philosophy?

Response: My judicial philosophy is informed by practicing in Federal courts and Montana courts for 31 years, serving as an executive branch official, and serving as a state legislator. It is essential that judicial officers exercise their authority without usurping or assuming the roles of officials in other branches. If confirmed, I would approach the work with appreciation for the tasks for me to perform and the limits of that authority. A fundamental principle to apply to achieve this end is statutory interpretation focused on the plain language of the law without inserting words that are not present when the plain language is clear. This judicial modesty also counsels against criticizing policy or management decisions of the political branches if I would have reached different conclusions as a legislator or as an executive branch official. My judicial philosophy requires respect for the rule of law, which will limit my legal conclusions to the facts and applicable law presented regardless if they align with what I perceive as the preferred outcome.

4. What do you understand originalism to mean?

Response: Originalism describes a method of interpreting the U.S. Constitution by focusing on the original meaning of its words as understood at the time of the provision's adoption by an ordinary person.

5. Do you consider yourself an originalist?

Response: Yes.

6. What do you understand textualism to mean?

Response: To determine what the legislative and executive branches intended to enact, textualists focus on the words in a statute and what the meaning of the words would have been to a reasonable person at the time of enactment of the statute.

7. Do you consider yourself a textualist?

Response: Yes.

[3] Letter from Attorney General Pam Bondi to William R. Bay, President, American Bar Association (May 29, 2025), https://www.justice.gov/ag/media/1402156/dl?inline.

8. 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. Some federal judges consider legislative history when analyzing the meaning of a statute.

    a. If you are confirmed to serve on the federal bench, would you consult and cite legislative history to analyze or interpret a federal statute?

    Response: If confirmed, there would likely be occasions in which I would look to legislative history to construe statutory language. However, if the text approved by a legislative body and approved by a President or Governor is unambiguous, the analysis of the meaning of the legislation should be confined to its plain language. By approaching statutory interpretation in this manner, one minimizes the risk that legislative power is usurped by the judiciary. Moreover, after seven years as a legislator, I have an appreciation for focusing the meaning of a statute on what all legislators voted on as opposed to testimony in a committee hearing or floor speeches. Legislative history may be useful if the language utilized in the bill is ambiguous, *see Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011), or if the bill contained an obvious scrivener's error.

    b. Do you believe that congressional intent matters when interpreting a statute? Why or why not.

    Response: Please see my response to Question 8(a).

9. According to an academic study, Black men were 65 percent more likely than similarly-situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[4]

    a. What do you attribute this to?

    Response: I have not studied this issue and, therefore, lack an adequate foundation to form an opinion.

10. A recent report by the United States Sentencing Commission observed demographic differences in sentences imposed during the five-year period studied, with Black men receiving federal prison sentences that were 13.4 percent longer than white men.[5]

    a. What do you attribute this to?

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

[5] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING 2 (Nov. 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf.

Response: I have not reviewed the report by the Commission to which you cite. However, the reemergence of racial disparities in sentencing has been observed by different analysts, including me during my time in DOJ leadership, over the last twenty years since the Supreme Court converted the United States Sentencing Guidelines from mandatory to advisory.

One of the goals that motivated Congress to enact the Sentencing Reform Act of 1984, which created the United States Sentencing Commission and authorized the creation of sentencing guidelines for federal cases, was the reduction of disparities in sentences based upon race. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 5 (1988). Both judicial officers and legislators recognized this concern. *Blakely v. Washington*, 542 U.S. 296, 315 (O'Connor, dissenting) ("This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race."); *Blakely v. Washington and the Future of Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary,* 108th Cong. 8573 (2004)(Sen. Leahy) ("Unfortunately, Justice Scalia's decision in *Blakely* threatens a return to the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence."); *Id*. (Sen. Kennedy) ("[Before the Sentencing Reform Act], [s]imilarly situated defendants received dramatically different sentences. Sentences were subject to personal philosophies and biases of individual judges. As a result, substantial disparities based on race, ethnicity, geography, and improper factors were prevalent."); *Id*. (Sen. Sessions) ("There was great disparity. There was racial disparity in the system, as Justice O'Connor mentions in her dissent to this *Blakely* case.").

Subsequent Supreme Court authority converted the guidelines from mandatory to advisory. *United States v. Booker*, 543 U.S. 220 (2005). During my tenure as a Department of Justice official, we were concerned that advisory guidelines were leading to disparate treatment of similarly situated defendants. In testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee in March 2006, I noted that "[t]he Sentencing Commission's data just released similarly shows that black defendants are now [post-*Booker*] receiving longer sentences than their white counterparts, a result not observed after passage of the PROTECT Act." At that time, the Commission found black defendants had received sentences 4.9% greater than white defendants. See United States Department of Justice, *Fact Sheet: The Impact of United States v. Booker on Federal Sentencing*, March 15, 2006.

11. What role do you think federal judges, who review difficult, complex criminal cases, can play in ensuring that a person's race did not factor into a prosecutor's decision or other instances where officials exercise discretion in our criminal justice system?

Response: If a defendant seeks relief from a charge due to selective prosecution, the court would need to hold a hearing, receive evidence and consider the standard established in *United States v. Armstrong*, 517 U.S. 456 (1996).

12. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? Why or why not.

    Response: I am reluctant to opine on how Presidents should evaluate potential judicial nominees and how Senators should carry out their advise and consent function. In my view, the most important consideration should be the qualifications of potential nominees. No potential nominee should be excluded from consideration due to gender, race, or other immutable characteristics.

13. Please indicate whether you have ever published written material or made any public statements relating to the following topics. If so, provide a description of the written or public statement, the date and place/publication where the statement was made or published, and a summary of its subject matter. Mere reference to the list of publications and statements provided in your Senate Judiciary Questionnaire is insufficient; provide specific responses.

    If you have not disclosed a copy of the publication or a transcript of the statement to the Judiciary Committee, please attach a copy or link to the materials and explain why you have not previously disclosed them.

    a. Abortion

       Response: *Voter Guide (for House District 46): 2022 General Election*, Billings Gazette, October 21, 2022. I responded to a question posed by our local newspaper regarding abortion law.

    b. Affirmative action

       N/A.

    c. Contraceptives or birth control

       N/A.

    d. Gender-affirming care

       N/A.

    e. Firearms

       Response: *Meet the Candidates (House District 46) for Montana Legislature Series*, Billings Gazette, October 1, 2018. I responded to a question posed by our local newspaper pertaining to firearms laws.

Meet (House District 46) Candidates in Eastern Montana's Legislative Races, Billings Gazette, May 13, 2018. I responded to a question posed by our local newspaper pertaining to firearms laws.

2018 Candidate Questionnaire, National Rifle Association of America, April 20, 2018. I responded to the NRA's candidate survey.

f. Immigration

Response: The following articles describe legislation that I sponsored in 2021 to require local law enforcement to honor ICE detainers and statements that I made on the bill.

Shari Rendall, *Montana Passes Anti-Sanctuary Bill*, Federation for American Immigration Reform, April 2, 2021.

Erica Zurek, *Bill Would Require Local Law Enforcement Cooperation With ICE*, Montana Public Radio, March 24, 2021.

Seaborn Larson, *Bills Would Bind State, Local Police to Honor Federal Immigration Detainers*, Billings Gazette, February 18, 2021.

Kevin Trevellyan, *Bill Requiring Police to Honor Federal Immigration Requests Draws Opposition*, Yellowstone Public Radio, January 27, 2021.

The following document was presented to the Montana Legislature in 2009 to describe enforcement priorities in Montana for the U.S. Attorney's Office during the Bush Administration, including prosecutions of illegal aliens:

Federal Law Enforcement Priorities in Montana and Characteristics of the Federal Criminal Justice System, 2001 – 2008

g. Same-sex marriage

Response: N/A.

h. Miscegenation

Response: N/A.

i. Participation of transgender people in sports

Response: N/A.

j. Service of transgender people in the U.S. military

Response: N/A.

k. Racial discrimination

Response: N/A.

l. Sex discrimination

Response: N/A.

m. Religious discrimination

Response: N/A.

n. Disability discrimination

Response: N/A.

o. Climate change or environmental disasters

Response: N/A.

p. "DEI" or Diversity Equity and Inclusion

Response: N/A.

14. Under what circumstances would it be acceptable for an executive branch official to ignore or defy a federal court order?

a. If an executive branch official ignores or defies a federal court order, what legal analysis would you employ to determine whether that official should be held in contempt?

Response: A hearing should be held to establish a factual record to determine whether the individual willfully violated the order or engaged in bad faith. *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1090 (9th Cir. 2021). It would be important to determine whether the non-compliance is attributable to any of the situations described in the response to Question 14(b).

b. Is there any legal basis that would allow an executive branch official to ignore or defy temporary restraining orders and preliminary injunctions issued by federal district court judges? Please provide each one and the justification.

Response: In thirty-one years of litigation practice, I recall being involved in only one case in which a district court believed a party defied its orders. *Forest Serv.*

Emples. for Envtl. Ethics v. United States Forest Serv., 530 F. Supp. 2d 1126 (D. Mont. 2008). The court had issued three orders, but it concluded that the government agency "had no real intention to comply with the law or the Court's Orders." *Id*. at 1131.[6] The Court noted that "[t]he Forest Service suggests that if the Court concludes it did not comply with NEPA . . . it cannot be held in contempt because compliance was contingent upon an event beyond their control - - the Fish & Wildlife Service completing its end of the formal consultation process." The Court discussed two cases noting that a party cannot be held in contempt for failing to comply with an order if it is impossible to comply. *Id*. at 1130 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983); *United States v. Shillitani*, 384 U.S. 364, 371 (1966)). These cases suggest that a party will not be held in contempt for defying a district court order if compliance with it was a factual impossibility.

> A party may elect "to defy a disclosure order and incur court-imposed sanctions" to "allow a party to obtain postjudgment review without having to reveal its privileged information." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009).
>
> If a court issues an order in a case in which it lacks jurisdiction, it "may be disregarded without liability to process for contempt." *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947).
>
> Finally, it has been asserted that the President and Congress could refuse to enforce a judgment suffering from constitutional infirmity when the "error is `so clear that it is not open to rational question.'" Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1325-26 (1996) (citation omitted).

15. Does the president have the power to ignore or nullify laws passed by Congress?

Response: The President may veto legislation passed by Congress pursuant to the Presentment Clause in Article I. For laws that are enacted, the Take Care Clause in Article II of the Constitution directs that the President "shall take Care that the Laws be faithfully executed." Under the Take Care Clause and the Vesting Clause, also in Article II of the Constitution, has inherent authority to use discretion to prioritize enforcement of laws. *United States v. Texas*, 599 U.S. 670, 679 (2023); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

16. Does the president have the power to withhold funds appropriated by Congress?

Response: I have some understanding of the Impoundment Control Act of 1974. I have not had the opportunity to litigate its provisions and, therefore, have not considered its reach under any particular fact pattern. In addition, this question is the subject of on-going

[6] The Court issued an order which stated, "Secretary Ray, on further notice, shall be prepared to appear and show cause why he should not be held in contempt, and jailed until the contempt has been purged by compliance with the laws enacted by the Congress of the United States, including NEPA and ESA." *Id*. at 1128.

litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

17. Does the president have the power to discriminate by withholding funds against state or local jurisdictions based on the political party of a jurisdiction's elected officials?

    Response: The question of the President's authority to impound or withhold funds is the subject of on-going litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

18. Does the Supremacy Clause of the U.S. Constitution establish that federal laws supersede conflicting state laws?

    Response: Yes.

19. Does the Fifth Amendment of the U.S. Constitution apply to non-citizens present in the United States?

    Response: The Supreme Court has held 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). I would look to precedent established by the Supreme Court and the Ninth Circuit to determine what process is due given the facts and procedural posture of each case.

20. Is it constitutional for Congress to delegate to federal agencies the power to implement statutes through rulemaking?

    Response: There are a number of Supreme Court cases which address the constitutional limits of legislative delegation of rulemaking authority. *See Gundy v. United States*, 588 U.S. 128, 135-36 (2019). The question is the subject of on-going litigation. For this reason, it would be improper for me as a judicial nominee to opine on it. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

21. Was *Brown v. Board of Education*, 347 U.S. 483 (1954), correctly decided?

    Response: Yes.

22. Is *Griswold v. Connecticut*, 381 U.S. 479 (1965), binding precedent? Please describe the facts and holding of this case.

    Response: *Griswold* is binding precedent. The Supreme Court held that a Connecticut law banning the use of contraceptives violated Griswold's right to privacy under the Fourteenth Amendment.

23. Is *Lawrence v. Texas*, 539 U.S. 558 (2003), binding precedent? Please describe the facts and holding of this case.

Response: *Lawrence* is binding precedent. The Supreme Court held that a Texas statute criminalizing sexual conduct by members of the same sex violated the Fourteenth Amendment.

24. Is *Obergefell v. Hodges*, 576 U.S. 644 (2015), binding precedent? Please describe the facts and holding of this case.

    Response: *Obergefell* is binding precedent. The Supreme Court held that the Fourteenth Amendment requires states to issue marriage licenses to same sex couples and recognize same-sex marriages.

25. Do you believe that President Biden won the 2020 election? Note that this question is not asking who was certified as president in the 2020 election.

    a. Did Biden win a majority of the electoral vote in the 2020 election?

       Response: Pursuant to Article II and the Twelfth Amendment, Congress certified President Biden as the victor of the 2020 election. The 2020 election led to legal challenges about the Presidential election. This question attempts to generate a response with respect to those challenges and the election. Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversies. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

    b. Do you believe that the results of the 2020 election, meaning the vote count, were accurate? If not, please provide why not and examples.

       Response: Please see my response to Question 25(a).

26. The 22nd Amendment says that "no person shall be elected to the office of the President more than twice."[7]

    a. Do you agree that President Trump was elected to the office of the President in the 2016 election?

       Response: Pursuant to Article II and the Twelfth Amendment, Congress certified President Trump as the victor of the 2016 election.

    b. Did Trump win a majority of the electoral vote in the 2016 election?

       Response: Pursuant to Article II and the Twelfth Amendment, Congress certified President Trump as the victor of the 2016 election.

[7] U.S. CONST. amend. XXII.

c. Do you agree that President Trump was elected to the office of the President in the 2024 election?

Response: Pursuant to Article II and the Twelfth Amendment, Congress certified President Trump as the victor of the 2024 election.

d. Did Trump win a majority of the electoral vote in the 2024 election?

Response: Pursuant to Article II and the Twelfth Amendment, Congress certified President Trump as the victor of the 2024 election.

e. Do you agree that the 22nd Amendment, absent a constitutional amendment, prevents President Trump from running for a third presidential term?

Response: Yes. The 22nd Amendment to the Constitution states that "[n]o person shall be elected to the office of the President more than twice…."

27. 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?

Response: In advance of the confirmation hearing on July 30th, I met with Department of Justice attorneys. They provided information on the responses provided by other nominees and the limiting factors set forth in the Canons of Judicial Ethics. However, the answers that I provided in response to the questions in the hearing and in response to the questions for the record are my own.

28. Have you spoken or corresponded with Elon Musk since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

29. Have you spoken or corresponded with any member of the Department of Government Efficiency (DOGE) since November 2024? If yes, identify the member(s) and provide the dates, mode, and content of those discussions and communications.

Response: No.

30. Have you spoken or corresponded with Stephen Miller since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

31. Have you spoken or corresponded with Chad Mizelle since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

32. Have you spoken or corresponded with Pam Bondi since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

33. Have you spoken or corresponded with Todd Blanche since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

34. Have you spoken or corresponded with Emil Bove since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

35. Have you spoken or corresponded with Leonard Leo since November 2024? If yes, provide the dates, mode, and content of those discussions and communications.

Response: No.

36. Have you—personally or through any of your affiliated companies or organizations, agents, or employees—provided financial support or other resources to any members of the Proud Boys or of the Oath Keepers for their legal fees or for other purposes? If yes, state the amount of financial support provided, dates provided, and for what purposes.

Response: No.

37. Have you ever spoken or corresponded with any of the following individuals? If yes, provide the dates, mode, and content of those discussions and communications.
    a. Enrique Tarrio
    b. Stewart Rhodes
    c. Kelly Meggs
    d. Kenneth Harrelson
    e. Thomas Caldwell
    f. Jessica Watkins
    g. Roberto Minuta
    h. Edward Vallejo
    i. David Moerschel
    j. Joseph Hackett
    k. Ethan Nordean
    l. Joseph Biggs
    m. Zachary Rehl
    n. Dominic Pezzola
    o. Jeremy Bertino

p. Julian Khater

Response: I have not spoken with any of the 16 individuals identified in the question.

38. Have you ever spoken or corresponded with any individuals convicted and later pardoned of offenses related to the January 6, 2021 attack on the U.S. Capitol? If yes, identify the individual(s) and provide the dates, mode, and content of those discussions and communications.

Response: No.

39. Have you ever been demoted, terminated, or experienced any other adverse employment action?

Response: No.

a. If yes, please describe the events that led to the adverse employment action.

b. If no, please affirm that, since becoming a legal adult, you have left each place of employment voluntarily and not subject to the request or suggestion of any employer.

Response: My only resignations as an adult have been from federal employment. I left those positions voluntarily.

40. Federal judges must file annual financial disclosure reports and periodic transaction reports. If you are confirmed to the federal bench, do you commit to filing these disclosures and to doing so on time?

Response: Yes.

41. Article III Project (A3P) "defends constitutionalist judges and the rule of law." According to Mike Davis, Founder & President of A3P, "I started the Article III Project in 2019 after I helped Trump win the Gorsuch and Kavanaugh fights. We saw then how relentless—and evil—too many of today's Democrats have become. They're Marxists who hate America. They believe in censorship. They have politicized and weaponized our justice systems."[8]

a. Do you agree with the above statement?

This question asks me to comment on the conduct of political figures and related political controversies, including the conduct of political figures surrounding the nominations and confirmations of Justice Gorsuch and Justice Kavanaugh. Consistent with the positions taken by other nominees, it would be inappropriate for me, as a pending judicial nominee, to comment on the statements of political figures or political controversies. *See* Code of Conduct of U.S. Judges, Canons 3(A)(6), 5.

[8] https://www.article3project.org/about

b. Have you discussed any aspect of your nomination to the federal bench with any officials from or anyone directly associated with A3P, or did anyone do so on your behalf? If yes, identify the individual(s) and provide the dates, mode, and content of those discussions and communications.

Response: No.

c. Are you currently in contact with anyone associated with A3P? If so, who?

Response: No.

d. Have you ever been in contact with anyone associated with A3P? If so, who?

Response: No.

42. Since you were first approached about the possibility of being nominated, did anyone associated with the Trump Administration or Senate Republicans provide you guidance or advice about which cases to list on your Senate Judiciary Questionnaire (SJQ)?

Response: No.

a. Who?

N/A.

b. What advice did they give?

N/A.

c. Did anyone suggest that you omit or include any particular case or type of case in your SJQ?

43. During your selection process did you talk with any officials from or anyone directly associated with the Article III Project, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

44. During your selection process did you talk with any officials from or anyone directly associated with the Federalist Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: No.

45. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding your nomination.

Response: On April 21, 2025, I interviewed with the White House Counsel's Office in Washington, D.C. regarding the nomination. Beginning on April 29th, I had regular communication with personnel in the Justice Department's Office of Legal Policy ("OLP") for the next three months to complete all necessary documents and prepare for the hearing on July 30th. I met with OLP attorneys on July 28th and 29th to prepare for the hearing. I have had additional communications with OLP attorneys regarding the questions for the record forwarded to me to complete.

46. Please explain, with particularity, the process whereby you answered these written questions.

Response: I reviewed responses from other nominees, conducted research on case law, and wrote the responses. After receiving feedback from persons at the Office of Legal Policy in the U.S. Department of Justice, I finalized my answers and authorized them to be submitted to this Committee. My answers are my own.

Questions for the Record from Senator Alex Padilla
Senate Judiciary Committee
"Nominations"

July 30, 2025

Questions for Mr. Mercer:

1. Please identify any and all situations where it is permissible for a party, including the Executive Branch or one of its officers, departments, or agencies, to defy a court order.

   Response: In thirty-one years of litigation practice, I recall being involved in only one case in which a district court believed a party defied its orders. *Forest Serv. Emps. for Envtl. Ethics v. United States Forest Serv.*, 530 F. Supp. 2d 1126 (D. Mont. 2008). The court had issued three orders, but it concluded that the government agency "had no real intention to comply with the law or the Court's Orders." *Id*. at 1131. The Court noted that "[t]he Forest Service suggests that if the Court concludes it did not comply with NEPA . . . it cannot be held in contempt because compliance was contingent upon an event beyond their control - - the Fish & Wildlife Service completing its end of the formal consultation process." The Court discussed two cases noting that a party cannot be held in contempt for failing to comply with an order if it is impossible to comply. *Id*. at 1130 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983); *United States v. Shillitani*, 384 U.S. 364, 371 (1966)). These cases suggest that a party will not be held in contempt for defying a district court order if compliance with it was a factual impossibility.

   A party may elect "to defy a disclosure order and incur court-imposed sanctions" to "allow a party to obtain postjudgment review without having to reveal its privileged information." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 111 (2009).

   If a court issues an order in a case in which it lacks jurisdiction, it "may be disregarded without liability to process for contempt." *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947).

   Finally, it has been asserted that the President and Congress could refuse to enforce a judgment suffering from constitutional infirmity when the "error is 'so clear that it is not open to rational question.'" Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1325-26 (1996) (citation omitted).

2. Please identify any and all situations in which you would advise a client to ignore or defy a court order.

   Response: Please see my response to Question 1.

3. Is it appropriate for the President of the United States to threaten or harass a judge when he disagrees with the outcome of a case over which that judge is presiding, or disagrees with aspects of a judge's decision or order?

   Response: Litigants generally enjoy a First Amendment right to criticize court rulings so long as they do not engage in unprotected speech. To the extent that this question asks me to comment on the political statements of any political figure, it would be inappropriate for me to do so under the Code of Conduct for United States Judges.

4. In the process of applying to become a judge, did you have any conversations with President Trump, a member of his staff, or a member of an outside group about policy or personal positions or beliefs you would have on the bench, or decisions you would make on the bench?

   Response: No.