Nomination of Michael Brennan to the U.S. Court of Appeals for the Seventh Circuit
Questions for the Record
January 31, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. At your nominations hearing, you described your approach to constitutional interpretation as "originalist." What does it mean that you are an originalist?

   Response: It means that, in the absence of binding precedent, I would look to the original public meaning of constitutional provisions to control their interpretation.

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

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

   Response: Never. Lower courts should always apply binding Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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

   Response: It is proper only in very rare circumstances in which an appellate judge's question may lead to improvement in the law by bringing the question to the Supreme Court's attention. *E.g., Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (critique of procedure to deal with qualified immunity led to Supreme Court revision) (citing *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

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

   Response: In the Seventh Circuit, a three-judge panel is bound by published decisions of prior panels within the circuit. The court may overturn its own precedent upon rehearing pursuant to Fed. R. App. P. 40, or when the court sits *en banc* pursuant to Fed. R. App. P. 35, but it generally "require[s] a compelling reason" to do so. *See United States v. Kendrick*, 647 F.3d 732, 734 (7th Cir. 2011).

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

   Response: As a nominee for a lower federal court, it is not appropriate for me to opine on what circumstances might be sufficient for the Supreme Court to overturn its own precedent. The Supreme Court determines when it is appropriate to overturn its precedent.

3. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

   a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?

   Response: I have not heard the term "superprecedent" used other than during hearings on federal Supreme Court nominees. From the perspective of a circuit judge, any Supreme Court precedent, including *Roe v. Wade*, is binding on the lower federal courts, and it would be my duty as a federal judge to apply that binding precedent faithfully.

   b. Is it settled law?

   Response: Yes, *Roe v. Wade* is settled precedent.

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

   Response: Yes, *Obergefell v. Hodges* is settled precedent.

5. At your nominations hearing, I asked you about your defense of Wisconsin's informed consent law in a case called *Karlin v. Foust*. According to the Seventh Circuit's opinion, the Milwaukee County District Attorney, Mr. McCann, cross-appealed the plaintiffs' appeal, "arguing that the informed consent information must be provided in *all* circumstances involving rape and incest." (*Karlin v. Foust*, 188 F.3d 446, 489 (7th Cir. 1999) (emphasis added)) I specifically asked you about this argument, noting that the Seventh Circuit — and not the district court below — had held that there must be an exception to providing the information required by the state's informed consent law if providing the information would cause severe psychological harm to a woman or, as the court phrased it, "psychological harm sufficient to rise to the level of a medical emergency." (*Id.* at 490) Your response focused on a different provision of the informed consent law — commonly referred to as the "fetal heartbeat provision" — and not on your argument, on Mr. McCann's behalf, that the informed consent law should apply irrespective of whether the pregnancy was the result of rape or incest. Focusing on your argument that there should be no rape or incest exception, I have the following questions:

   a. Did you consider the possibility that providing the information mandated by the Wisconsin informed consent law to survivors of rape or incest would cause them severe

psychological harm?

Response: I have looked for, but have not located, the briefs filed in the Seventh Circuit almost 20 years ago in this case. I do not recall the arguments the parties offered on this question before that Court. My review of the published decision in the case, 183 F.3d 446 (7th Cir. 1999), including the section of the opinion on this topic does not refresh my recollection as to those arguments, including what was or was not considered.

b. What information did you rely on, if any, to determine that psychological harm to survivors should *not* be considered?

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

6. At your nomination hearing, several Senators addressed your selection process, focusing on the fact that Wisconsin's Senators have traditionally used a bipartisan, merit-based nominating commission to recommend names of potential nominees to fill federal judicial vacancies. According to your Senate Judiciary Questionnaire, the White House interviewed you on March 15, 2017 — the same day that the bipartisan Wisconsin commission began accepting applications for the seat to which you have been nominated.

a. During your March 15 interview with the White House Counsel's Office and the Justice Department's Office of Legal Policy, did anyone from either of those offices discuss with you the role of Wisconsin's bipartisan nominating commission?

Response: No.

b. In interviewing with the Wisconsin federal nominating commission, did you disclose that you had already been interviewed by the White House Counsel's Office and Office of Legal Policy? If not, why not?

Response: In my interview with the Wisconsin federal nominating commission, I do not believe I was asked that question, and I do not recall if I mentioned that during the interview with that commission.

7. At your nomination hearing, Senator Coons asked you whether you had considered withdrawing your nomination, in light of Senator Baldwin's decision not to return her blue slip, much like Victoria Nourse had to do when Senator Johnson refused to return a blue slip on her nomination. Senator Coons also asked you about the letter to the editor you authored in 2011, defending Senator Johnson's decision not to return a blue slip on Victoria Nourse. You drew a distinction between the circumstance of your nomination and Ms. Nourse's nomination by noting that Ms. Nourse had been renominated by President Obama just days after Senator Johnson took office.

a. In your original letter to the editor, you wrote "There are now two senators from Wisconsin from different political parties, so to exclude Johnson and those citizens who voted for him would be a purely political move.... Neutrality comes from applying the

same procedures to all." Do you believe that a Republican President's judicial nominees should be treated differently than a Democratic President's judicial nominees when it comes to honoring a home-state senator's blue slip?

Response: The distinction I drew at the hearing was between Professor Nourse's re-nomination after the end of a Congressional term in which Senator Johnson had not participated, and Senator Baldwin's participation in the selection process through her commission appointees in 2017, and possibly in other ways with which I am not familiar. I understand the treatment of blue slips to be a prerogative of the Chairman.

b. I would like to follow up on Senator Coons' question. Please explain further why you were willing to have your nomination proceed, despite Senator Baldwin's decision regarding her blue slip, in light of your prior strong defense of a Republican Senator's blue slip, and your earlier concern for "exclud[ing]" a Senator from one political party "and those citizens who voted for him [or her]" from the nomination process?

Response: I can speak only to my involvement in the selection process. I submitted an application to the Wisconsin Federal Nominating Commission, I interviewed with that Commission, and I also interviewed with the White House Counsel's office. I am humbled that I am the only applicant interviewed by the Wisconsin Federal Nominating Commission for this seat who received bi-partisan support, as well as that I received more votes than did any of the other seven applicants interviewed.

8. At your nomination hearing, you were asked by Senator Flake if filling the vacancy you have been nominated to fill would help strenghten the Seventh Circuit ability to handle its case backlog. You answered "yes." Would confirming either Victoria Nourse or Donald Schott to this same seat also have helped reduce the Seventh Circuit's case backlog?

Response: Confirmation of any judge to the Seventh Circuit would help with its workload. In addition to the seat for which I have been nominated I understand that there are currently three other vacancies.

9. At your nominations hearing, I asked you about a 2004 letter to the editor you published in the *Wall Street Journal*. Our exchange focused on whether you continue to believe that enemy combatants who are U.S. citizens should be given habeas corpus rights. Your letter to the editor addressed more than just habeas rights; rather, you addressed the overarching balance between civil liberties and national security. You wrote that "[t]he greater threat a war poses to domestic order . . . the greater deference exists to the executive's suspension of civil liberties." And you wrote that "[i]n wartime, the balance [between freedom and order] shifts toward order, in favor of the government's ability to confront conditions that threaten the nation." (*A Citizen's Freedom Is Bound by Allegiance*, WALL ST. J., May 3, 2004)

a. What is the proper role of a judge in reviewing the Executive Branch's claim that a foreign or domestic threat is so grave that a response to that threat should

override the promotion or protection of civil liberties?

Response: In the letter to the editor you reference, and in the previous 1999 review of Chief Justice Rehnquist's book *All The Laws But One* from which its ideas were taken, the point was to note the tension between civil liberties and government measures that might be taken when a country is at war. In neither the letter to the editor nor the book review did I intend to take a position for or against such measures.

In terms of the question you pose, the proper role of a judge depends in part on that judge's place in the judicial system. In broad terms, a district court may find facts and apply all applicable law to reach a reasoned conclusion on the parties' arguments. The appellate court is to employ the appropriate standard of review, and then faithfully apply the applicable precedent to the facts found in the district court. If fortunate enough to be confirmed as a circuit judge, I would do my best to fulfill that appellate court function pursuant to my judicial oath.

It would be improper for me to discuss how I would resolve any particular case, as Canon 3A(6) of the Code of Conduct of U.S. Judges prohibits a judicial nominee from making public comment on the merits of any matter that could come before them as a judge.

b. If confirmed and confronted with a case in which the Executive argued for the need to suspend civil liberties, how would you assess whether the "balance" "between freedom and order" favors such a suspension?

Response: Please see my response to Question 9.a. above.

10. In a 2004 law review article entitled *The Lodestar of Personal Responsibility*, you discussed a book written by Thomas Sowell, *The Vision of the Anointed*, and wrote the following, apparently in reference to arguments that Sowell himself made: "Watch out for the use of ex ante words or expressions to describe ex post results. Another example is that a certain group was denied an opportunity to advance by a 'glass ceiling.' Implicit in that phrase is the notion that rules were rigged against some individual or group. But whether, and to what extent, this is true is the issue to be argued, not circumvented by verbal sleight-of-hand." (*The Lodestar of Personal Responsibility*, 88 MARQUETTE L. REV. 365, 373 (2004))

a. Do you believe that the term "glass ceiling" is a "verbal sleight-of-hand" that incorrectly suggests the "rules were rigged against some individual or group," such as women?

Response: No. I do not think encouraging personal responsibility is incompatible with recognizing that women face a glass ceiling. There is no question that women face numerous barriers, including in the workplace, which men do not face.

b. Do you believe that there is a pay gap for women in which women are paid less for doing substantially similar or the same work as men?

Response: I am generally aware that there are pay discrepancies between men and women.

c. Do you believe that women and minorities, in general, face discrimination and bias in the workplace and society?

Response: I do believe that discrimination and bias continue to exist in the workplace and in society.

d. If confirmed, how will your views on personal responsibility inform or influence your jurisprudence or your approach to judging?

Response: My personal views would have no influence. I would be bound by the judicial oath of 28 U.S.C. § 453 to set aside any personal views and faithfully apply the law impartially to the facts before me.

11. At your nominations hearing, I, along with several other Senators, asked you about a 2001 article you wrote entitled *Bush's Judiciary*. You claimed that your article distinguished between horizontal stare decisis — where a circuit court follows precedent of the same circuit — and vertical stare decisis — where a circuit court follows precedent of the Supreme Court. The latter, you testified, was required, whereas the former was, in your words, a judge's "north star." You testified that "in rare circumstances," a judge could reexamine horizontal precedent to determine if it was correct.

Your article, however, made no such distinctions between horizontal and vertical stare decisis—the words "horizontal" and "vertical" do not even appear. Further, your article never suggests that only the Supreme Court can disregard precedent that it views as incorrect. Instead, you wrote: "If, after reexamination of a legal decision, a court concludes that the ruling was incorrect, *stare decisis* does not require that the rule of that case be followed. To do so would violate a judge's oath." And you write that "*[s]tare decisis* does not dictate slavish adherence to poorly reasoned precedent, nor does it transform originalist interpretation of a constitutional or statutory provision into judicial activism. Bush-appointed judges cannot accurately be labeled as activists for reexamining and following only correct precedent." (*Bush's Judiciary*, NAT'L REV. ONLINE (Jan. 5, 2001))

a. If confirmed, do you believe it would be a violation of your "oath" to follow a Seventh Circuit decision that you believe was "incorrect"? What about a Supreme Court precedent that you believed was "incorrect"?

Responses: As set forth above in response to Questions 2.a and 2.c, I would faithfully apply all applicable Supreme Court and Seventh Circuit precedent. I do not believe it would be a violation of the judicial oath to do so.

b. With respect to a circuit court, who decides whether precedent is "correct"? Individual judges? A three-judge panel? The circuit sitting en banc?

Response: As set forth in my response to Question 2.c, the Seventh Circuit may overturn its own precedent upon rehearing pursuant to Fed. R. App. P. 40, or when the court sits *en banc* pursuant to Fed. R. App. P. 35.

12. Rev. Javier Bustos of the Archdiocese of Milwaukee published a document in 2011 titled "Our Lives on a Bright-Colored Form: A Statement on the *Physician Orders for Life- Sustaining Treatment (POLST)* Paradigm in the State of Wisconsin." The document is available here: http://www.archmil.org/ArchMil/Resources/COMM/OurLivesonaBright- ColoredForm.pdf. The first footnote of this document acknowledges the "special contribution of the members of the Archidiocesan Heathcare and Bioethics Committee, Hon. Michael B. Brennan...."

a. Were you, in fact, a member of this Committee?

Response: Yes.

b. If you were a member of this Committee, why didn't you disclose it in response to Question 11a of your Senate Judiciary Committee Questionnaire?

Response: My failure to disclose this information was inadvertent, and I apologize for the oversight. I have sent a letter addressed to you and to Chairman Grassley noting my membership on this committee.

c. You were thanked for contributing to this document. Why did you not disclose this document in response to either Question 12b or 12c of your Senate Judiciary Committee Questionnaire?

Response: I did not, and do not, recall contributing to this document. I believe all committee members were listed in the footnote because they were members of the committee.

d. Did you serve on any other committees, commissions, boards or other institutions that you have not yet disclosed to the Committee?

Response: No.

e. Did you author or contribute any other reports, policy statements, official statements or other documents that you did not disclose to the Committee?

Response: No.

f. Do you believe states can constitutionally allow physician-assisted suicide?

Response: Canon 3A(6) of the Code of Conduct for U.S. Judges prohibits judges and judicial nominees from making public comments on the merits of a matter pending or impending in any court. Because a case concerning this topic could come before me, it would be improper for me to offer personal views on the

question you pose.

g. Would you have any problem applying the Supreme Court precedent *Gonzales v. Oregon*?

Response: No, I would faithfully apply all applicable Supreme Court precedent, including *Gonzales v. Oregon.*

13. You served for six years as chairman of Governor Scott Walker's Judicial Selection Advisory Committee. According to your Questionnaire, as chair of this Committee, you reviewed applications, interviewed candidates, and then made recommendations to Governor Walker regarding state court vacancies in Wisconsin.

a. In your time as chairman of the Judicial Selection Advisory Committee, what materials did the Committee require those seeking judicial appointments to provide? For id your Committee to provide all articles they had written, speeches they had made, or interviews they had given? If yes, did the Committee review those materials once they had been provided?

Response: Yes, applicants were asked in Question 28 of the judicial application to "[l]ist any published books or articles, giving citations and dates," and the Committee reviewed submitted materials.

b. While serving as chairman, did you recommend that Governor Walker appoint Rebecca Bradley to the Wisconsin Supreme Court in 2015?

Response: No. The Committee interviewed and sent all three applicants for the position, including Rebecca Bradley, to Governor Walker to interview, but did not make recommendations among the three candidates.

c. After Justice Bradley was nominated to the Wisconsin Supreme Court, it was publicly revealed that she had written offensive statements about LGBT individuals and those living with HIV/AIDS. In one article that she published in college, for instance, now-Justice Bradley wrote the following about people living with HIV/AIDS: "How sad that the lives of degenerate drug addicts and queers are valued more than the innocent victims of prevalent ailments." Were you aware of these past statements when you recommended Justice Bradley?

Response: No. Those comments were brought to light approximately six months after she was appointed, and approximately one month before that judicial election. Again, Rebecca Bradley was not recommended by the Committee. Instead, the Committee sent all three applicants forward for Governor Walker to interview.

d. If you were not aware of these statements, would you have recommended Justice Bradley to serve as a Wisconsin Supreme Court Justice if you had known about them in advance?

Response: To reiterate, the Committee did not recommend Rebecca Bradley for appointment. The Committee sent all three applicants forward for Governor Walker to interview. If those articles had been revealed to the Committee, the Committee would have brought those comments to Governor Walker's attention.

14. At your nomination hearing, Senator Booker asked you a series of questions about implicit racial bias. In one question, he asked whether you believe that "racial bias exists in the criminal justice system." You responded that under "the canons of ethics," you were not in a position to answer Senator Booker's question. Later, when Senator Booker posed the same question, you responded that you might be able to answer if you "could take a look at all those statistics and studies" that Senator Booker had cited.

a. Which provision in the Code of Conduct for United States Judges prevents you from answering whether you believe racial bias, implicit or otherwise, exists in the criminal justice system?

Response: Canon 3A(6) prohibits judges from making public comments on the merits of a matter pending or impending in any court. Commentary to Canon 1 makes the Code of Conduct applicable to nominees for judicial office. Should a criminal defendant challenge a segment or process of the criminal justice system based on implicit racial bias in a case brought before me, I would not want that defendant or the government to believe that I have prejudged the case.

b. In a May 2016 *New York Times* op-ed entitled "To Save Our Justice System, End Racial Bias in Jury Selection," Second Circuit Senior Judge Jon O. Newman addressed the impact of peremptory challenges on racial discrimination in jury pools. He wrote in part that using peremptory challenges to exclude African American jurors is not only "unconstitutional, but all-white juries risk undermining the perception of justice in minority communities, even if a mixed-race jury would have reached the same verdict or imposed the same sentence." Do you believe that Judge Newman, in addressing the issue of racial bias in the criminal justice system, violated the Code of Conduct for United States Judges?

Response: I am not familiar with Judge Newman's op-ed piece. Moreover, I do not believe it would be appropriate for me to comment on whether Judge Newman did or did not violate the Code of Conduct for United States Judges. Each judge and judicial nominee must read and apply the Canons for himself or herself.

c. Since your hearing, have you reflected on the statistics that Senator Booker referenced and done any additional research into the issue of racial bias in the criminal justice system? If you have, please explain whether and why you agree or disagree with his conclusion that implicit racial bias exists in the criminal justice system. If you have not yet reflected on the statistics Senator Booker referenced or done any additional research into this issue, please do so and then explain why you agree or disagree with his conclusion.

Response: I have reflected on this issue and what I may say consistent with the Canons. Based on that review, I would state the following: Numerous credible studies show racial disparities and biases in the criminal justice system. Sadly, the studies reflect disparities and biases in our society as a whole. These are very broad and entrenched social problems, which I recognize. I have been nominated to be a judge as part of a multi-member Court that has a limited but important set of tools to deal with those disparities and biases. For example, if peremptory challenges in jury selection are used in a racially discriminatory way, under *Batson v. Kentucky*, the court can address that discrimination. Numerous other tests and precedents apply to address discriminatory intent and impact. I am committed to using and applying those judicial tools, tests, authorities, and applicable precedent to ensure that the law is applied equally and without respect to persons, as required by the judicial oath at 28 U.S.C. § 453.

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

Response: Courts differ in their approach to this question, and I would follow applicable Supreme Court and Seventh Circuit precedent. Most courts agree that if the meaning of a statute is ambiguous in its terms or its context, and the statutory canons of construction do not indicate a single meaning, statements by legislators can assist in the interpretation process when they demonstrate the manner in which the public used or understood a particular word or phrase.

16. According to your Senate Questionnaire, you have been involved with the Milwaukee Lawyers Chapter of the Federalist Society since 1999, serving as its co-president from 1991 to 1999 and an advisor from 2000 to the present. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

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

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

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

c. As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.

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

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

Response: I received eight questionnaires from Senators on the Senate Judiciary Committee in the evening of January 31, 2018. I reviewed each of the questions, researched or reviewed matters referenced in those questions, and then I personally drafted all the answers. I submitted my responses to the questionnaires to the U.S. Department of Justice Office of Legal Policy. After receiving suggestions from the Office of Legal Policy, I made any edits I considered appropriate. I then authorized the submission of my responses.

Senator Dick Durbin
Written Questions for Michael Brennan, Daniel Domenico and Adam Klein
January 31, 2018

For questions with subparts, please answer each subpart separately.

Questions for Michael Brennan

1. Mr. Brennan, when President Obama re-nominated Victoria Nourse to the 7th Circuit in 2011, Senator Ron Johnson refused to return a blue slip for Ms. Nourse. Because Chairman Leahy respected the blue slip tradition, Ms. Nourse did not receive a hearing in the Judiciary Committee and her nomination was withdrawn.

   At the time, you argued strongly that Senator Johnson should have a role in selecting the nominee for this 7th Circuit seat. You were the lead author of an op-ed in the *Milwaukee Journal-Sentinel* on July 23, 2011 in support of Senator Johnson's decision not to submit his blue slip for Ms. Nourse. The op-ed was entitled "Senator Johnson only wants to have his say on Nourse nomination," and in it you wrote:

   > There are now two senators from Wisconsin from different political parties, so to exclude Johnson and those citizens who voted for him would be a purely partisan move. Johnson represents millions of Wisconsin citizens, just as Sen. Herb Kohl does and as Feingold did. In the same way those Senators had their say in Nourse's first nomination, Johnson should have his say.

   Now we come to your nomination. As Senator Baldwin's January 23 letter to the Committee makes clear, she was cut out of playing any meaningful role in the process that led to your selection. You say in your questionnaire that you were interviewed by the White House for this seat in March 2017, before the bipartisan Wisconsin Federal Nomination Commission had even reviewed applications for the vacancy. And you were nominated even though you did not get the requisite supermajority needed for approval from the Commission.

   Now you are receiving consideration by the Senate Judiciary Committee, even though Senator Baldwin has not submitted a blue slip for your nomination.

   a. **Senator Baldwin represents millions of Wisconsin citizens. Why shouldn't she receive the exact same "say" that you advocated for Senator Johnson?**

      Response: The July 24, 2011 article from which you quote noted that Senator Johnson did not have any input into the nomination of Professor Victoria Nourse in 2010 for this vacancy, as Senator Johnson was not seated until 2011, and the article suggested that Senator Johnson should be afforded a voice in the selection process. Senator Baldwin participated in the 2017 selection process through her appointees

to the Wisconsin Federal Nominating Commission, and possibly in other ways with which I am not familiar.

b. **Do you agree that Senator Baldwin's prerogative to submit or withhold a blue slip should be respected just as Senator Johnson's prerogative to submit or withhold a blue slip was respected?**

Response: I understand the treatment of blue slips to be a prerogative of the Chairman.

c. **Is the exclusion of Senator Baldwin, and those citizens who voted for her, from meaningful participation in the process that led to your nomination a "purely partisan move" according to the standard you laid out in your 2011 op-ed?**

Response: Please see my responses to Questions 1.a and 1.b.

d. You also wrote in your op-ed "[w]hy can't Johnson, elected by the citizens of Wisconsin, participate in the selection of a judge for a Wisconsin seat on the 7th Circuit, as Kohl did?" **I'll ask that same question to you- why can't Senator Baldwin, elected by the citizens of Wisconsin, participate in the selection of this Wisconsin seat on the 7th Circuit, as Senator Johnson did?**

Response: Please see my responses to Questions 1.a and 1.b.

2. In 2001 you wrote an op-ed in the *National Review Online* entitled "Bush's Judiciary: They Can Be Good Without Being Activist." In this piece, you claim that activist legal decisions are on the books already, and you ask whether George W. Bush's judicial appointments should ignore those decisions or reverse them.

You note that "a federal judiciary that ignores precedent transforms itself into the imperial judiciary warned of by Judge Robert Bork, the Federalist Society, and others." But then you claim that judges have a duty to reexamine precedent to ensure that the "correct" law is applied. You wrote:

> *Stare decisis* does not dictate slavish adherence to a poorly reasoned precedent, nor does it transform originalist interpretation of a constitutional or statutory provision into judicial activism. Bush-appointed judges cannot accurately be labeled as activists for reexamining and following only correct precedent.

a. **Please define "poorly reasoned" precedents and "correct" precedents as you articulated them in your op-ed. Note that I am not asking whether you would follow any particular precedents if you are confirmed - I am specifically asking you to explain the terms you used in your writing.**

Response: A poorly reasoned precedent is a decision where the conclusion reached by a court does not follow from the reasoning set forth in the decision or where the reasoning is not clearly set forth. All judges have an obligation to write clearly and articulately so that litigants to whom the decision is addressed can understand how and why the court reached its conclusion, and so other judges and other litigants can understand how the decision does or does not apply in future circumstances.

b. **Please provide examples of "poorly reasoned" precedents and "correct" precedents as you articulated them in your op-ed. Note that I am not asking whether you would follow any particular precedents if you are confirmed - I am specifically asking you to provide examples of the terms you used in your writing.**

Response: As a nominee for federal judicial office, I believe it would be inappropriate for me to provide specific examples of poorly reasoned, correct, or incorrect precedents. In general, and as noted above, a poorly reasoned precedent is a decision where the conclusion reached by a court does not follow from the reasoning set forth in the decision, or where the reasoning is not clearly set forth.

c. **Please explain how a judge is supposed to distinguish between "poorly reasoned" and "correct" precedents. Note that I am not asking whether you would follow any particular precedents if you are confirmed - I am specifically asking you to explain how a judge is supposed to distinguish between the terms you used in your writing.**

Response: Please see my response to Question 2.a.

3. In 2001 you wrote an article for the Federalist Society entitled "Conservative Judicial Activism: More than Whose Ox is Being Gored." In this article you wrote:

> Judicial conservatives should never legitimize the activism engaged in by judicial liberals, either in the past or should they come to power again, by engaging in the same behavior. That being true, justices and judges faced with activist legislatures are not required to roll over in the name of judicial restraint. This would leave in place a one-way ratchet of constantly expanding government.

a. **What did you mean by the phrase "the activism engaged in by judicial liberals"?**

Response: I believe judicial activism can be accurately defined as a court exercising its authority outside of that court's appropriate judicial role.

b. **In your view, when is a legislature acting as an "activist legislature"?**

Response: When a legislature goes beyond it constitutionally prescribed limits.

c. **Do you believe judges should set aside judicial restraint when a legislature is expanding government, such as by trying to make health care available for more people?**

Response: I cannot express a personal view on a subject of controversy that may result in litigation per Canon 3(A)6 of the Code of Conduct for U.S. Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

d. **If a judge is not exercising judicial restraint, is the judge exercising judicial activism?**

Response: No, not necessarily. There is a wide spectrum of actions by a court properly within the judicial role.

4. In 2008, the Supreme Court decided the *D.C. v. Heller* case 5 to 4 and found, for the first time, that the Second Amendment protects an individual right to possess guns as opposed to a right related to militia activity.

Conservative 4th Circuit Judge J. Harvie Wilkinson described the *Heller* decision in a 2008 law review article as "a form of judicial activism." He wrote about how the *Heller* majority grounded its opinion in originalism, but employed "the subjective choices that originalism allows," such as cherrypicking historical evidence and cutting loose the preamble of the Second Amendment even though that preamble also reflected the Framers' views. He said of the *Heller* decision:

> The majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in the more than two hundred years since the amendment's enactment. The majority then used that same right to strike down a law passed by elected officials acting, rightly or wrongly, to preserve the safety of the citizenry.

a. **Do you think the *Heller* majority used a form of judicial activism to reach its result?**

Response: I have read the *Heller* opinions, but as a nominee bound by the Code of Conduct for U.S. Judges, it would be improper for me to express my personal views on whether specific cases, including *Heller*, were correctly decided, including because cases involving this topic may come before me.

If confirmed I would faithfully apply the controlling precedent of *Heller* and other Supreme Court and Seventh Circuit opinions, without regard to my personal views as to the merits of those opinions.

b. **Do you think *Heller* was rightly decided?**

Response: As a nominee bound by the Code of Conduct for U.S. Judges, it would be improper for me to express my personal views on whether specific cases, including *Heller*, were correctly decided.

5. **Can you cite any example of a decision that represents conservative judicial activism?**

   Response: As a nominee bound by the Code of Conduct for U.S. Judges, it would be improper for me to express my personal views on whether specific cases were correctly decided.

   If confirmed I would faithfully apply the law and any controlling precedent of the Supreme Court and the Seventh Circuit, without regard to my personal views as to the merits of those opinions.

6. **What is your favorite Supreme Court dissent, and why?**

   Response: I do not believe it would be appropriate for a nominee to a federal court to identify a "favorite" dissent. I can state that as a general matter, I appreciate dissents (and also opinions and concurrences) that are articulate, clearly written, and well-reasoned.

7. In your 2004 article for the *Marquette Law Review* entitled "The Lodestar of Personal Responsibility," you wrote that "many of the words and phrases used in the media and in the academy suggest that things simply happen to people, rather than being caused by their own choices or behavior."

   You went on to say:

   > Watch out for the use of ex ante words or expressions to describe ex post results. Another example is that a certain group was denied an opportunity to advance by a "glass ceiling." Implicit in that phrase is the notion that rules were rigged against some individual or group. But whether, and to what extent, this is true is the issue to be argued, not circumvented by verbal sleight-of-hand.

   a. **What did you mean by this statement about glass ceilings?**

      Response: I meant that whether a glass ceiling is the source of a particular problem has to be demonstrated and should not just be assumed in every case. There is no question that women face numerous barriers, including in the workplace, which men do not face. I do not think encouraging personal responsibility is incompatible with recognizing that women face a glass ceiling.

   b. **Do you believe that the glass ceiling that women face when it comes to advancing in the workplace is "caused by their own choices or behavior"?**

Response: No and nothing in my 2004 essay or elsewhere suggests otherwise.

8. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

   Response: As a purely personal matter, any human being, including any judge, should always strive to have empathy for all persons, including all persons who may come before a court.

   Empathy does not play a legal role. That does not mean, however, that a judge cannot consider the personal history and characteristics of the party before the court. *See, e.g.*, 18 U.S.C. § 3553(a)(1) (court to consider history and characteristics of a criminal defendant at the time of criminal sentencing); 18 U.S.C. § 3552 (probation officer to prepare a presentence report to inform the court about a criminal defendant's history and characteristics).

9. In 2004, you wrote a letter to the editor of the *Wall Street Journal* in which you argued against habeas corpus protections for enemy combatants – a view rejected by the Supreme Court in the *Hamdi* case. In this letter you wrote:

   > Government imposition on individual liberties is related to the country's strength and stability. The greater threat a war poses to domestic order – for example, the Civil War - the greater deference exists to the executive's suspension of civil liberties.

   You went on to say:

   > Civilized society seeks to achieve a proper balance between freedom and order. In wartime, the balance shifts toward order, in favor of the government's ability to confront conditions that threaten the nation. Law functions only within the constructs of order.

   a. **Please explain what you meant by these statements.**

      Response: In the letter to the editor you reference, and in the previous 1999 review of Chief Justice Rehnquist's book *All The Laws But One* from which its ideas were taken, the point was to note the tension between civil liberties and government measures that might be taken when a country is at war. In neither the letter to the editor nor the book review did I intend to take a position for or against such measures.

   b. **Do you stand by these views today?**

Response: I believe it is a statement of fact that historically a tension has existed between civil liberties and government measures in times of war and national emergencies.

c. **Do you believe that torture is justified in times of war?**

Response: No. Activities that meet the definition of torture are always illegal and never justified. Congress has so provided.

10. You say in your questionnaire that you have been a member of the Federalist Society since 1991. In the materials you provided to this Committee, you supplied a number of speeches that you gave to law students entitled "What is the Federalist Society?" In those speech presentations, you said: "The Society is about ideas; it does not lobby, take policy positions, or endorse nominees."

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

Response: I cannot comment on the remarks quoted above. I was generally aware of them, but I understand that the Federalist Society does not take any political positions and that the Society does not recommend any Supreme Court candidates or other judicial nominees.

b. **Given that you have said that the Federalist Society does not endorse nominees, do you think it was appropriate for the Federalist Society to recommend Supreme Court and other judicial nominees to the White House?**

Response: I am not aware that the Federalist Society has recommended any Supreme Court or other judicial nominees to the White House.

c. **Is your statement in your speech presentations that the Federalist Society "does not...endorse nominees" still accurate?**

Response: As far as I understand, I believe it is.

d. **Should those speaking on behalf of the Federalist Society now admit and inform others that the Federalist Society actually does endorse nominees?**

Response: Not if my understanding is correct that the Federal Society does not endorse Supreme Court and other judicial nominees.

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

Response: I estimate that I have attended the annual convention approximately 15 times since the mid-1990's. I do not have precise information as to each year I attended, but I do know I attended in 1997, 1998, 2000, 2011, 2013, 2015, 2016, and 2017.

f. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

Response: I did attend that speech, but I do not recall hearing this remark, so I do not recall I had any reaction to it.

11.

a. **Is waterboarding torture?**

Response: I have not had any occasion to study this specific legal question. I understand that under 18 U.S.C. § 2340, waterboarding would constitute torture if it were "intended to inflict severe physical or mental pain or suffering" upon a detainee. Waterboarding may also constitute "cruel, inhuman, or degrading treatment" within the meaning of Section 1003 of the Detainee Treatment Act of 2005. Beyond those broad statements, I cannot express a personal view on a subject of controversy that may result in litigation per Canon 3(A)6 of the Code of Conduct for U.S. Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

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

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

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

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

12. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

Response: Because this question calls for my opinion on a political matter, I must refrain from answering the question under Canon 5 of the Code of Conduct for U.S. Judges.

13. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on "political questions"?**

    Response: Please see my response to Question 12.

14. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

    The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's nominees, including Joan Larsen, David Stras, and others.

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

       Response: As a federal judicial nominee, I would not presume to comment on the political aspects of the confirmation process, including under Canon 5 of the Code of Conduct of U.S. Judges ("A judge should refrain from political activity.") I am not aware of any such donations connected to my nomination.

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

       Response: Please see my response to Question 5.a. If I am confirmed as a federal judge, I would consider the provisions of 28 U.S.C. § 455, the Code of Conduct for U.S. Judges, and all other considerations bearing on the issue of recusal.

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

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

15.

    a. **Can a president pardon himself?**

Response: I have not had any occasion to study this specific legal question. The question also may be the subject of litigation before the federal courts, which precludes me from commenting under Canon 3(A)(6) of the Code of Conduct for U.S. Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

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

Response: Please see my response to Question 15.a.

c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

Response: Please see my response to Question 15.a. In general, a judge should look for guidance to precedent of the U.S. Supreme Court, precedent of the federal courts of appeals, and other relevant and persuasive authorities.

16. The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

> ...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

a. **What is your understanding of what the Founding Fathers intended this clause to mean? To the extent you may be unfamiliar with this provision of the Constitution, please familiarize yourself with it before answering.**

Response: I have not had any occasion to study this specific legal question. The question also may be the subject of litigation before the federal courts, which precludes me from commenting under Canon 3(A)(6) of the Code of Conduct for U.S. Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.")

b. **Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?**

Response: Please see my response to Question 16.a.

17. In 1886, the Supreme Court noted that the right to vote "is regarded as a fundamental political right, because [it is] preservative of all rights," a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

a. **Do you believe that the right to vote is fundamental?**

Response: Yes, and the Supreme Court has so held. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

b. **Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?**

Response: That question is currently the subject of litigation before the federal courts, including the court to which I have been nominated, which precludes me from commenting under Canon 3(A)(6) of the Code of Conduct for U.S. Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.")

c. **Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?**

Response: Please see my response to Question 17.b.

18. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor's statement, or are your views closer to Chief Justice Roberts' statement in *Parents Involved*?

Response: This question may be the subject of litigation before the federal courts, which precludes me from commenting under Canon 3(A)(6) of the Code of Conduct for U.S. Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

Nomination of Michael B. Brennan to the United States Court of Appeals
For the Seventh Circuit Questions for the Record Submitted January 31, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

   a. Do you agree with Justice Roberts' metaphor? Why or why not?

   Response: Yes. Under our constitutional framework it is a judge's responsibility to interpret rather than to make the law.

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

   Response: The branch of government in the best position to consider the practical consequences of the law is the legislature, which enacts the law, rather than the judiciary. In some limited circumstances, the law requires a judge to consider the practical consequences of a decision. For example, when ruling on a motion for preliminary injunction, a judge must consider, among other factors, whether the moving party would suffer "irreparable injury" if the court does not issue the requested injunction. *See, e.g., Winter v. Nat'l Res. Defense Council*, 555 U.S. 7 (2008).

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

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

   Response: As a purely personal matter, any human being, including any judge, should always strive to have empathy for all persons, including all persons who may come before a court.

   Empathy does not play a legal role. That does not mean, however, that a judge cannot consider the personal history and characteristics of the party before the court. *See, e.g.*, 18 U.S.C. § 3553(a)(1) (a court should consider history and characteristics of a criminal defendant at the time of criminal sentencing); 18 U.S.C. § 3552 (directing a probation officer to prepare a presentence report to inform the court about a criminal defendant's history and characteristics).

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

   Response: A judge's rulings should be based on the law. If by "personal life

experience" the question inquires about that judge's legal education, legal training, and professional legal experience, then the judge should do that judge's best to fulfill his or her judicial oath using all of those to correctly resolve a case or controversy.

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

   Response: No.

4. You have spoken out against judicial activism and of the importance of judicial restraint. In your view, was *Brown v. Board of Education* an example of judicial activism at the time it was decided? What about *Obergefell v. Hodges*?

   Response: As a nominee for federal judicial office I do not believe it is appropriate for me to offer my personal opinion as to whether any Supreme Court decision was properly decided. If I am confirmed I would faithfully apply *Brown*, *Obergefell*, and all other Supreme Court precedent.

5. During your nomination hearing, you appeared unfamiliar with the concept of implicit racial bias when questioned about it by Senator Booker, and stated you could not answer his questions due to the canon of judicial ethics. You stated further that you would look at data on racial bias to develop a more complete answer.

   a. Which ethical canon prevents you from stating your views on whether implicit racial bias exists in the justice system?

   Response: Canon 3A(6) prohibits judges from making public comments on the merits of a matter pending or impending in any court. Commentary to Canon 1 makes the Code of Conduct applicable to nominees for judicial office. Should a criminal defendant challenge a segment or process of the criminal justice system based on implicit racial bias in a case brought before me, I would not want that defendant or the government to believe that I have prejudged the case.

   b. Since your confirmation hearing, have you reviewed data on implicit racial bias in the justice system, as you indicated that you would?

   Response: I have reflected on this issue and what I may say consistent with the Canons. Based on that review, I would state the following: Numerous credible studies show racial disparities and biases in the criminal justice system. Sadly, the studies reflect disparities and biases in our society as a whole. These are very broad and entrenched social problems, which I recognize.

   c. If you have reviewed data on implicit racial bias, please explain your view on

implicit racial bias in the justice system, including whether you believe it exists.

Response: Please see my response to Question 5.b.

Nomination of Michael B. Brennan,
to be United States Circuit Judge for the Seventh Circuit
Questions for the Record Submitted January 31, 2018

QUESTIONS FROM SENATOR COONS

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

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

Response: I would faithfully apply Seventh Circuit and Supreme Court precedent regarding what role the express enumeration of a right plays in constitutional interpretation.

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: I would faithfully apply Seventh Circuit and Supreme Court precedent regarding whether to consider a right's roots in this nation's history and tradition and would rely on sources used by the Supreme Court.

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: If the right has previously been recognized by Supreme Court or Seventh Circuit precedent, I would be obligated to follow such precedent. Although I would not be bound by the precedent of another court of appeals, I would certainly consider that precedent in arriving at a decision.

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

Response: Yes.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Response: I will faithfully follow all Supreme Court precedent including *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

f. What other factors would you consider?

Response: I would consider all other factors as set forth in relevant precedent of the Supreme Court and the Seventh Circuit.

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

Response: The Supreme Court has held that "statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*. 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

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

Response: As a federal judicial nominee I do not believe it is appropriate for me to offer my personal opinion as to this issue. If I am confirmed, I would faithfully apply Supreme Court and Seventh Circuit precedent regarding the application of the Equal Protection Clause.

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

Response: I do not know the answer to this question. If I am confirmed, I would faithfully apply Supreme Court and Seventh Circuit precedent regarding the application of the Equal Protection Clause

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

Response: In *Lawrence v. Texas* the Supreme Court held that there is a right to intimate relations between two consenting adults, and in *Obergefell v. Hodges* the Supreme Court held that there is a right to same-sex marriage. If confirmed, I would follow these precedents as I would all Supreme Court and Seventh Circuit precedents.

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

Response: I understand that cases concerning this issue are pending in the federal courts. As a federal judicial nominee, I do not believe it is appropriate for me to offer my personal opinion as to this issue.

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

Response: In *Griswold v. Connecticut*, and *Eisenstadt v. Baird*, the Supreme Court has held that the use of contraceptives is protective by the right to privacy. If confirmed, I would follow these and any other applicable precedents.

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

Response: In *Roe v. Wade,* and *Casey v. Planned Parenthood*, the Supreme Court held that obtaining an abortion is protected by the right to privacy. If confirmed I would follow these and any other applicable precedents.

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

Response: In *Lawrence v. Texas*, the Supreme Court held that there is a right to intimate relations between two consenting adults, and in *Obergefell v. Hodges*, the Supreme Court held that there is a right to same-sex marriage. If confirmed, I would follow these and any other applicable precedents.

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

Response: Please see my responses to Question 3, 3.a, and 3.b above.

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

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

Response: As I mentioned in response to questions from Ranking Member Feinstein at my January 24, 2018 Senate Judiciary Committee hearing, the Constitution must be applied to our changing society and courts must consider evidence relevant to those circumstances to the extend allowable under the rules of evidence and judicial notice. *See, e.g., Riley v. California*, 134 S. Ct. 2473 (2014) (warrantless searches incident to arrest does not apply to cell phones).

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

Response: Scientific and related expert evidence is often considered as part of the analysis as to whether or not an opinion witness may testify under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its related cases and progeny. As a trial judge, I considered the admissibility of, and admitted,

scientific evidence in numerous cases.

5. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

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

Response: Although I have not had an opportunity to consider this issue, some scholars have concluded that it is. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism (last visited January 31, 2018).

Response: That the terms are broad does not make them incapable of definition or devoid of meaning. Federal and state courts have worked hard to define and apply these terms accurately, and if confirmed, I would faithfully apply that precedent in cases and controversies that would come before me.

6. Statistics consistently show that African Americans are arrested and incarcerated at higher rates than their white peers. Do you believe that there is implicit racial bias in the criminal justice system?

Response: I have reflected on this issue and what I may say consistent with the Canons. Based on that review, I would state the following: Numerous credible studies show racial disparities and biases in the criminal justice system. Sadly, the studies reflect disparities and biases in our society as a whole. These are very broad and entrenched social problems, which I recognize.

7. At your nomination hearing, you testified that *stare decisis* is the "North Star" for the federal judiciary. However, you authored a 2001 piece for the *National Review* online, which stated, "*Stare decisis* does not dictate slavish adherence to poorly reasoned precedent, nor does it transform originalist interpretation of a constitutional or statutory provision into judicial activism.

Bush-appointed judges cannot accurately be labeled as activists for reexamining and following only correct precedent."

a. How do you reconcile your position with the Supreme Court's command that "[r]especting *stare decisis* means sticking to some wrong decisions" and reversing course requires some "'special justification' – over and above the belief 'that the precedent was wrongly decided.'"? *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)).

Response: I do not believe my guest comment and the quote above are in conflict.

b. If confirmed, how would you treat a decision made by another panel within the Seventh Circuit that you believe to be wrongly decided, and what circumstances would justify overturning it?

Response: In the Seventh Circuit, a three-judge panel is bound by published decisions of prior panels within the circuit. The court may overturn its own precedent upon rehearing pursuant to Fed. R. App. P. 40, or when the court sits *en banc* pursuant to Fed. R. App. P. 35, but it generally "require[s] a compelling reason" to do so. *See United States v. Kendrick*, 647 F.3d 732, 734 (7th Cir. 2011).

c. If confirmed, would you follow the holding of a Supreme Court decision that you believe to be wrongly decided, and under which, if any, circumstances would it be acceptable to deviate from such a holding?

Response: Yes, I would apply all decisions of the Supreme Court regardless of my personal beliefs. Lower courts should always apply binding Supreme Court precedent.

8. You served as the chairman of Governor Walker's Judicial Selection Advisory Committee from 2011 to 2017. In that capacity, you recommended Rebecca Bradley, who was eventually appointed to fill a Wisconsin Supreme Court vacancy. Bradley had referred to LGBT persons as "degenerates," and she argued that "homosexuals and drug addicts who do essentially kill themselves and others through their own behavior deservedly receive none of my sympathy." In a college newspaper column, she wrote, "One would be better off contracting AIDS than developing cancer, because those afflicted with the politically correct disease will be getting all of the funding. How sad that the lives of degenerate drug addicts and queers are valued more than the innocent victims of more prevalent ailments."

a. Did you know about these statements by Bradley before you recommended her for nomination to serve on the Wisconsin Supreme Court?

Response: As an initial matter, it is incorrect to state that I or the Committee recommended that Governor Walker appoint Rebecca Bradley to the Wisconsin Supreme Court. For each vacancy on the Wisconsin Supreme Court the Committee forwarded multiple applications to the Governor for his consideration and took no position with regard to which applicant the Governor should select from amongst

those the Committee forwarded.

In the case of Justice Bradley, three individuals filed applications with the Committee and all three applications were forwarded to the Governor. The application used by the Committee required each applicant to "[l]ist any published books or articles, giving citations and dates." Justice Bradley did not submit any of the articles from which you quote to the Committee. These articles were not disclosed until after Justice Bradley had been appointed.

b. Do you agree with me that these statements should have been disqualifying for her nomination?

Response: The decision to appoint Rebecca Bradley was not mine to make. If the articles in which the comments were included had been revealed to the Committee, the Committee would have brought those comments to Governor Walker's attention.

c. Do you agree that a critical aspect of being a judge is having the faith of the people that you will decide matters without prejudice to any race, gender, or sexual orientation?

Response: Yes. The judicial oath at 28 U.S.C. § 453 makes express that a judge is to do justice without respect to persons.

Questions for the Record for Mr. Michael Brennan
Submitted by Senator Richard Blumenthal
January 31, 2018

1. In a 2001 op-ed in the National Review, you wrote: "If, after reexamination of a legal decision, a court concludes that the ruling was incorrect, stare decisis does not require that the rule of that case be followed. ... Bush-appointed judges cannot accurately be labeled as activists for reexamining and following only correct precedent."

   a. In your view, when is it appropriate for a judge to disregard precedent?

   Response: A lower court should always follow the precedent of a higher court. A court may re-address its own precedent in accordance with the rules of that court. The rules applicable to the Seventh Circuit permit the court to overturn its own precedent upon rehearing pursuant to Fed. R. App. P. 40, or when the court sits *en banc* pursuant to Fed. R. App. P. 35.

   b. What, in your view, constitutes "correct precedent"?

   Response: Correct precedent is precedent which is clearly articulated, well-reasoned, and resolves only the issue or issues before the court.

   c. When is it appropriate for a circuit court judge to overturn Supreme Court precedent?

   Response: Never. Lower courts should always apply binding Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

   d. Do you believe that judges should only follow precedent with which they agree?

   Response: No. Judges should follow and faithfully apply all applicable precedent.

2. In a 2011 opinion piece in the Milwaukee Journal Sentinel, you defended Senator Ron Johnson, who had objected to President Obama's nomination of Victoria Nourse for this very Seventh Circuit seat, because he had just been elected and therefore not been consulted. Because Senator Johnson objected, then-Chairman Leahy did not hold a hearing for Ms. Nourse. In that op-ed, you wrote: "There are now two senators from Wisconsin from different political parties, so to exclude Johnson and those citizens who voted for him would be a purely partisan move. ... Johnson should have his say. ... He just wants to be heard and fulfill his constitutional duty of 'advice and consent.' Why can't Johnson, elected by the citizens of Wisconsin, participate in the selection of a judge for a Wisconsin seat on the 7th Circuit?"

   a. Applying your own logic, don't you find it troubling that Senator Baldwin was not meaningfully consulted by the White House?

Response: The July 24, 2011 article from which you quote noted that Senator Johnson did not have any input into the nomination of Professor Victoria Nourse in 2010 for this vacancy, as Senator Johnson was not seated until 2011, and the article suggested that Senator Johnson should be afforded a voice in the selection process. Senator Baldwin participated in the 2017 selection process through her appointees to the Wisconsin Federal Nominating Commission, and possibly in other ways with which I am not familiar.

b. To paraphrase your own words, "Why can't [Baldwin], elected by the citizens of Wisconsin, participate in the selection of a judge for a Wisconsin seat on the 7th Circuit?"

Response: I can speak only to my involvement in the selection process. I submitted an application to the Wisconsin Federal Nominating Commission, I interviewed with that Commission, and I also interviewed with the White House Counsel's office. I am humbled that I am the only applicant interviewed by the Wisconsin Federal Nominating Commission for this seat who received bi-partisan support, as well as that I received more votes than did any of the other seven applicants interviewed.

c. Do you believe you should have had a hearing without a positive blue slip from Senator Baldwin?

Response: I understand the treatment of blue slips to be a prerogative of the Chairman.

3. In a 2004 article in the Marquette Law Review, you wrote about personal responsibility as a crucial human virtue. You suggest that the term "glass ceiling" reduces our collective sense of personal responsibility because—quote—"implicit in that phrase is the notion that rules were rigged against some individual or group."

a. Do you agree with me that there are pervasive and entrenched social structures that make it hard for women to advance in the professional world—in other words, that there is a "glass ceiling"?

Response: Yes.

b. Is it your position that women should take responsibility for the existence of a glass ceiling on their professional advancement?

Response: No.

4. You served as the chairman of Governor Scott Walker's Judicial Selection Advisory Committee from 2011 to August 2017. You participated in the selection of 75 judges to Wisconsin's courts. Two particular nominees, Rebecca Bradley and Daniel Kelly, were both appointed to fill

Wisconsin Supreme Court vacancies. Rebecca Bradley has referred to LGBT individuals as "degenerates" and "queers." In a column about AIDS and HIV, Bradley wrote, "The homosexuals and drug addicts who do essentially kill themselves and others through their own behavior deservedly receive none of my sympathy." Daniel Kelly, meanwhile, has argued that affirmative action is "morally, and as a matter of law… the same" as slavery. He also called marriage equality "coerced dignity."

a. Did you know about Rebecca Bradley's or Daniel Kelly's comments when you recommended her to be appointed to the Supreme Court?

Response: As an initial matter, it is incorrect to state that I, or the Committee, recommended that Governor Walker appoint Rebecca Bradley or Daniel Kelly to the Wisconsin Supreme Court. For each vacancy the Committee forwarded multiple applications to the Governor for his consideration and took no position with regard to which applicant the Governor should select from amongst those the Committee forwarded.

In the case of Justice Bradley, three individuals filed applications with the Committee and all three applications were forwarded to the Governor. The application used by the Committee required each applicant to "[l]ist any published books or articles, giving citations and dates." Justice Bradley did not submit any of the articles from which you quote to the Committee. These articles were not disclosed until after Justice Bradley had been appointed.

In the case of Justice Kelly, 11 individuals filed applications for the vacancy and, as I recall, the Committee forwarded 5 applications, including Daniel Kelly's, to the Governor.

The statements by Justice Kelly you reference above were included in the writings he submitted to the Committee or in response to other questions in the application. I do not, however, recall reading the statements you quoted above.

- **If not—if you had known that they had made these abhorrent comments, would you have recommended them to a spot on the state Supreme Court?**

Responses: With regard to Justice Bradley, if the articles in which the comments were included had been revealed to the Committee, the Committee would have brought those comments to Governor Walker's attention.

With regard to Justice Kelly, as I noted above, I do not recall being aware of the quoted statements, or the Committee discussing Mr. Kelly's writing sample. If those statements had been noted, the Committee would have brought them to Governor Walker's attention.

b. Do you think affirmative action is "morally, and as a matter of law, the same" as slavery?

Response: No.

c. Do you think marriage equality is "coerced dignity"?

Response: No.

d. Do you believe that gay people and drug addicts deserve your sympathy?

Response: I believe all people are entitled to dignity and respect.

Questions for the Record for Michael B. Brennan From Senator Mazie K. Hirono

1. In 2011, you were very outspoken about Sen. Johnson's right to object to a judicial nomination by President Obama. You wrote that he should "have his say" about the nominee, and you asked, "Why can't Johnson, elected by the citizens of Wisconsin, participate in the selection of a judge for a Wisconsin seat on the 7th Circuit, as Kohl did? Lady Justice is blindfolded, which represents her neutrality. Neutrality comes from applying the same procedures to all."

Do you believe Senator Baldwin is due the same consideration?

Response: The July 24, 2011 article from which you quote noted that Senator Johnson did not have any input into the nomination of Professor Victoria Nourse in 2010 for this vacancy, as Senator Johnson was not seated until 2011, and the article suggested that Senator Johnson should be afforded a voice in the selection process. Senator Baldwin participated in the 2017 selection process through her appointees to the Wisconsin Federal Nominating Commission, and possibly in other ways with which I am not familiar.

2. From all accounts, it appears the White House decided on you as the nominee even before the state commission started its process, disregarded the process once it was over, and ignored Senator Baldwin's views.

How is that the neutral process you touted in 2011?

Response: I can speak only to my involvement in the selection process. I submitted an application to the Wisconsin Federal Nominating Commission, I interviewed with that Commission, and I also interviewed with the White House Counsel's office. I am humbled that I am the only applicant interviewed by the Wisconsin Federal Nominating Commission for this seat who received bi-partisan support, as well as that I received more votes than did any of the other seven applicants interviewed.

3. You also wrote in 2011 that, because Wisconsin had two senators from different political parties, "exclud[ing Senator] Johnson and those citizens who voted for him would be a purely partisan move."

a. **Now that the senator excluded from the consultation process is from a different political party, would you still say that excluding Senator Baldwin's views and disregarding her role to provide advice and consent here was a "purely partisan move"?**

Response: Please see my response to Questions 1 and 2 above.

b. **Do you still believe that those citizens who voted for a senator should have their voices heard by having the President consult with that senator, even if he or she is of a different political party?**

Response: Please see my response to Question 1 and 2 above.

4. In your 2001 *National Review Online* piece, "Bush's Judiciary. They can be good without being activist", you wrote about when you believe precedent does and does not need to be followed. Specifically you wrote:

"The oath of a federal justice or judge ... makes express that his or her duty is first to the Constitution and the laws of the United States, not to other judges' interpretation thereof. That duty includes reexamination of precedent to ensure that the correct law is applied."

And

"Stare decisis does not dictate slavish adherence to poorly reasoned precedent, nor does it transform originalist interpretation of a constitutional or statutory provision into judicial activism. Bush-appointed judges cannot accurately be labeled as activists for reexamining and following only correct precedent."
You explained to Senator Feinstein that even though the words appear nowhere in the piece, you were referring to "horizontal precedent" not "vertical precedent," and you gave three examples of United States Supreme Court cases that overturned other United States Supreme Court precedent.

a. Is your testimony that you were only writing about whether and how *Justices* of the United States Supreme Court should follow precedent or were you also advocating that lower court *judges* on the federal district courts and federal circuit courts also reexamine and follow only correct "horizontal" precedents?

Response: No, I was not advocating that lower court federal judges re-examine and follow only correct precedent. The point of the article was to note a few well-established incidents when *stare decisis* is not followed, which I noted at the hearing. The article did not apply to vertical *stare decisis*, as it is always the obligation of an intermediate or lower court to follow the precedent of a higher court. Wisconsin has similar vertical *stare decisis* rules in its judicial system and I did my best to faithfully follow them on the bench in the thousands of cases over which I presided. If given the opportunity to serve as a federal judge, I would faithfully follow controlling precedent.

b. If you advocate this approach for the lower courts (district and circuit), are you planning to also reexamine "horizontal" precedent that applies to your court and only follow what you believe to be "correct" precedent?

Response: No, I do not advocate the approach you mention above.

c. How will you go about determine which precedents are correct?

Response: I do not advocate the approach you mention above. If given the opportunity to serve as a federal judge, I would faithfully follow controlling precedent.

5. You suggest in the 2001 op-ed that judges appointed by President Bush could never be labeled as 'activist' because their duty includes "reexamination of precedent to ensure that the correct law is applied."

Does that mean judges appointed by Democratic presidents are always wrong, whereas Republican appointed judges are always doing what is right in interpreting the law?

Response: No.

6. In a May 2004 Wall Street Journal Letter, you said: "The greater threat a war poses to domestic order . . . the greater deference exists to the executive's suspension of civil liberties."

Can you give me an example of a war or civil emergency that would in fact justify the executive suspending civil liberties?

Response: In the letter to the editor you reference, and in the previous 1999 review of Chief Justice Rehnquist's book *All The Laws But One* from which its ideas were taken, the point was to note the tension between civil liberties and government measures that might be taken when a country is at war. In neither the letter to the editor nor the book review did I intend to take a position for or against such measures.

In terms of the question you pose, Canon 3A(6) of the Code of Conduct for U.S. Judges prohibits judges from making public comments on the merits of a matter pending or impending in any court. Because a case concerning this topic could come before me, it would be improper for me to commit to discuss my beliefs related to this topic. If confirmed I would apply applicable law faithfully pursuant to the judicial oath.

7. **You mentioned that the *Korematsu* case was part of the anticanon. Do you believe *Lochner v. New York* is part of the anticanon?**

Response: I understand the phrase "anti-canon" to come from a New York Times article by law professor Noah Feldman, *Why Korematsu is Not a Precedent*, N.Y. Times, Nov. 18, 2016. He attributes the phrase to legal scholar Richard Primus, and notes *Plessy v. Ferguson* as another example of bad legal decision making. I have not researched and do not know whether those professors place the *Lochner* case in that group.

8. From 2011 to 2017, you served as the chair of Wisconsin's state Judicial Selection Advisory Commission. Under your leadership, the Commission selected Rebecca Bradley as the nominee for the state Supreme Court justice in 2015. During the nomination process, Ms. Bradley referenced college term papers that she wrote to the committee. Ms. Bradley, however, failed to mention her newspaper writings that were published in the Marquette Tribune while she was at the university. These writings include the following statements about LGBT people and people living with HIV/AIDS:

- "How sad that the lives of degenerate drug addicts and queers are valued more than the

innocent victims of more prevalent ailments."

- "Perhaps AIDS Awareness should seek to educate us with their misdirected compassion for the degenerates who basically commit suicide through their behavior."
- "This brings me to my next point – why is a student government on a Catholic campus attempting to bring legitimacy to an abnormal sexual preference?"
- "But the homosexuals and drug addicts who do essentially kill themselves and others through their own behavior deservedly receive none of my sympathy."
- I will certainly characterize whomever transferred their infected blood (to a transfusion recipient) a homosexual or drug-addicted degenerate and a murderer.
- "Heterosexual sex is very healthy in a loving marital relationship. Homosexual sex, however, kills."

a. Were you aware of these statements made by Ms. Bradley that were published in in the Marquette Tribune in 1992 during the nomination process?

Response: No. The application used by the Committee required each applicant to "[l]ist any published books or articles, giving citations and dates." Justice Bradley did not submit any of the articles from which you quote to the Committee. These articles were not disclosed until after Justice Bradley had been appointed.

b. If you were aware of Ms. Bradley's newspaper writings, explain how you analyzed this information on the commission in determining that Ms. Bradley would be able to administer impartial justice.

Response: Please see my response to Question 8.a above.

9. You also supported the appointment of Daniel Kelly to the Wisconsin state Supreme Court. In a chapter Mr. Kelly wrote for a textbook, he referred to court-ordered accommodation of same sex marriage "coerced dignity." Furthermore, on his nomination application, Mr. Kelly cited former U.S. Supreme Court Justice Antonin Scalia's dissent in the 2015 decision finding that same-sex couples have a fundamental right to marriage as one of the best opinions in the last 30 years.

a. Were you aware of Mr. Kelly's statement that court-ordered accommodation of same sex marriage "coerced dignity"?

Response: The statements by Justice Kelly you reference above were included in the writings he submitted to the Committee or in response to other questions in the application. I do not, however, recall reading the statements you quoted above.

b. If you were aware of Mr. Kelly's statement, explain how you analyzed this information on the commission in determining that Mr. Kelly would be able to administer impartial justice.

Response: I do not recall being aware of the quoted statement, or the Governor's Judicial Selection Advisory Committee discussing Mr. Kelly's writing sample.

Nomination of Michael B. Brennan to the
United States Circuit Court for the Seventh Circuit
Questions for the Record
Submitted January 31, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey and your home state of Wisconsin, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4] In the hearing on your nomination, you were unable to state whether there is implicit racial bias in our criminal justice system.

   a. Based on this information, do you believe there is implicit racial bias in our criminal justice system?

   Response: I have reflected on this issue and what I may say consistent with the Canons. Based on that review, I would state the following: Numerous credible studies show racial disparities and biases in the criminal justice system. Sadly, the studies reflect disparities and biases in our society as a whole. These are very broad and entrenched social problems, which I recognize. Moreover, as a prosecutor and as a state court judge I saw first-hand the evidence of racial disparities and biases in the Milwaukee criminal justice system. I did my best as a prosecutor and then as a state court judge to ensure that everyone with whom I interacted – lawyers, defendants, victims, law enforcement, and court personnel – were treated fairly and equally, without qualification.

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

   Response: In my role as a prosecutor, staff counsel to the Wisconsin Criminal Penalties Study Committee, and as a state trial judge I saw such disproportionate racial representation. In the Criminal Penalty Study Committee's work, the issue of over-representation of minority populations in the prison system was discussed at

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.

[2] *Id.*

[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[4] *Id.* at 8.

length and in detail. A copy of that Committee's report was produced with my Senate Judiciary Committee Questionnaire.

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

Response: As staff counsel to the Wisconsin Criminal Penalties Study Committee, during my work on that Committee the issue of race and the criminal justice system was discussed at length and in detail. A copy of that Committee's report was produced with my Senate Judiciary Committee Questionnaire.

2. During your hearing, I asked you about the link between incarceration and crime rates. My question was based on this statement from you: "I often hear discussion—now that the incarceration rate is down, can't sentencing policies be adjusted. What I personally have found remarkable is what James Taranto of The Wall Street Journal calls the 'Fox Butterfield' effect. Fox Butterfield is a New York Times reporter who wrote a series of articles with the general theme: *'We have more inmates despite the drop in crime.'* It never dawned on Mr. Butterfield that the two might be related. That because we have more inmates, we may have a drop in crime. I am not here suggesting that is always true. There are many variables. But the Fox Butterfield effect is out there—'An expression of a supposed paradox when the causal relationship should be obvious.' Including on the topic of crime rate and sentencing policy." This statement seems to suggest that incarcerating more people can lead to less crime. However, according to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

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

Response: I believe that there are a number of factors which influence crime rates. In the statement you quote, I stated that "I am not here suggesting that is always true" that there is a causal relationship between incarceration rates and crime rates. I also noted that "[t]here are many variables."

The relationship between Wisconsin's transition from indeterminate to determinate sentencing and incarceration rates was part of the work of the Wisconsin Criminal Penalties Study Committee, which I served as staff counsel to in the late 1990's. A copy of that Committee's report was produced with my Senate Judiciary Committee Questionnaire.

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[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*

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

Response: Please see my response to Question 2.a.

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

Response: The Constitution vests the responsibility for nominating judicial officers with the President and the responsibility for providing advice and consent for such nominees with the United States Senate. I believe it would be inappropriate for me as a nominee for federal judicial office to opine as what goals the President or the Senate should set for nominating and confirming judges.

4. In 2011, in regards to President Obama's nomination of Victoria Nourse to the same seat you are nominated to today, you wrote, "Why can't Johnson, elected by the citizens of Wisconsin, participate in the selection of a judge for a Wisconsin seat on the 7th Circuit, as Kohl did? Lady Justice is blindfolded, which represents her neutrality. Neutrality comes from applying the same procedures to all. These critics would do well to get beyond finger-pointing and let Johnson participate in the process just as his predecessor did."

a. Do you stand by these words even though it appears Senator Baldwin was not able to participate in *your* nomination to this vacancy on the Seventh Circuit? If not, what has changed?

Response: The distinction I drew at the hearing was between Professor Nourse's re-nomination after the end of a Congressional term in which Senator Johnson had not participated, and Senator Baldwin's participation in the selection process through her commission appointees in 2017, and possibly in other ways with which I am not familiar. I understand the treatment of blue slips to be a prerogative of the Chairman.

b. Do you believe it is important for both home-state senators to be consulted by the White House regarding judicial nominees from their state?

Response: I can speak only to my involvement in the selection process. I submitted an application to the Wisconsin Federal Nominating Commission, I interviewed with that Commission, and I also interviewed with the White House Counsel's office. I am humbled that I am the only applicant interviewed by the Wisconsin Federal Nominating Commission for this seat who received bi-partisan support, as well as that I received more votes than did any of the other seven applicants interviewed.

Further comments could implicate Canon 5, prohibiting nominees from political activity.

c. Do you believe two phone calls between the White House and a senator is adequate consultation?

Response: Please see my response to Question 4.b.

5. According to your Judiciary Questionnaire, the White House interviewed you for the seat to which you are nominated to fill on March 15, 2017. That is the same day the Wisconsin Federal Nominating Commission began accepting applications for the spot. Notably, you did not receive the requisite support from the Wisconsin Federal Nominating Commission Senator Rob Johnson (R-WI) required for President Obama's judicial nominees.

a. Do you believe the Wisconsin Federal Nominating Commission plays an important role in selecting nominees from your home state?

Response: Please see my response to Question 4.b.

6. In a 2001 article published in the *National Review Online*, you wrote about the principle of *stare decisis* and stated that if a judge disagreed with another judge's interpretation of the Constitution he or she may disregard that precedent and apply his or her own interpretation. You stated, "*Stare decisis* does not dictate slavish adherence to poorly reasoned precedent, nor does it transform originalist interpretation of a constitutional or statutory provision into judicial activism."

a. Keeping in mind that you mentioned nothing in the article about vertical versus horizontal *stare decisis* as you did in your hearing, how is breaking from precedent and reinterpreting the law not judicial activism in your opinion?

Response: As I used the term in that article and as I understand how the term is generally used, judicial activism does not mean the revisiting of prior precedent.

b. Do you believe *Obergefell v. Hodges* is an example of judicial activism? If so, how is it distinguishable from *Citizens United v. FEC*?

Response: As a nominee for federal judicial office I do not believe it is appropriate for me to offer my personal opinion as to whether any Supreme Court decision was properly decided. If I am confirmed I would faithfully apply *Obergefell*, *Citizens United*, and all other Supreme Court precedent.

Questions for the Record from Senator Kamala D. Harris
Submitted January 31, 2018
For the Nomination of Michael B. Brennan, to be
United States Circuit Judge for the Seventh Circuit

1. Racial disparities are laced throughout our criminal justice system. More than 60% of the people in the carceral state are people of color.[1] Black men are almost six times more likely to be incarcerated than white men while Hispanic men more are more than two times more likely to be incarcerated than white men.[2] In plea bargaining, white defendants are twenty-five percent more likely than black defendants to have their principal charge dropped or reduced to a lesser crime.[3] These statistics, and a myriad of others, speak to the issue of whether racial bias is endemic in our judicial system.

a. During your January 24, 2018 Senate Judiciary Committee hearing you stated that if you had an opportunity to look at the "studies" pertaining to racial disparities in the criminal justice system, you would speak to the presence of racial bias in the criminal justice system. In light of the additional time since the hearing, which should have allowed more time to examine studies and statistics, do you now believe that implicit racial bias exists in the criminal justice system?

Response: I have reflected on this issue and what I may say consistent with the Canons. Based on that review, I would state the following: Numerous credible studies show racial disparities and biases in the criminal justice system. Sadly, the studies reflect disparities and biases in our society as a whole. These are very broad and entrenched social problems, which I recognize. Moreover, as a prosecutor and as a state court judge I saw first-hand the evidence of racial disparities and biases in the Milwaukee criminal justice system. I did my best as a prosecutor and then as a state court judge to ensure that everyone with whom I interacted – lawyers, defendants, victims, law enforcement, and court personnel – were treated fairly and equally, without qualification.

b. You served as a state court judge for 8 years, and also for a few years as an Assistant District Attorney. Based on your experience and observations—and regardless of the studies—do you believe racial disparities exist in the justice system?

Response: Please see my response to Question 1.a. Please also note, I served as a state trial judge for nine years.

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[1] Bonczar, T. (2003). Prevalence of Imprisonment in the U.S. Population, 1974-2001. Washington, DC: Bureau of Justice Statistics.
[2] Bonczar, T. (2003). Prevalence of Imprisonment in the U.S. Population, 1974-2001. Washington, DC: Bureau of Justice Statistics.
[3] Berdejo, C. (2017) Criminalizing Race: Racial Disparities in Plea Bargaining. Boston College Law Review.

c. During your January 24, 2018 Senate Judiciary Committee hearing you committed to ensuring that "no bias comes" into your courtroom, please list the affirmative steps you will take to fulfill this promise.

Response: I have been nominated to be a judge as part of a multi-member Court that has a limited but important set of tools to deal with disparities and biases. For example, if peremptory challenges in jury selection are used in a racially discriminatory way, under *Batson v. Kentucky*, the court can address that discrimination. Numerous other tests and precedents apply to address discriminatory intent and impact. If I am confirmed, I am committed to using and applying those judicial tools, tests, authorities, and applicable precedent to ensure that the law is applied equally and without respect to persons, as required by the judicial oath at 28 U.S.C. § 453.

d. Do you believe that judges have a role in addressing racial disparities?

Response: Yes and I did my best as a state trial court judge to administer justice without respect to persons, pursuant to the Wisconsin judicial oath, Wis. Stat. § 757.02. If I am confirmed, I am committed to using and applying appropriate judicial tools, tests, authorities, and applicable precedent to ensure that the law is applied equally and without respect to persons, as required by the judicial oath at 28 U.S.C. § 453.

e. What would you commit to doing to address racial disparities, if you were confirmed as a judge?

Response: Please see my responses to Question 1.a - d.

2. During your hearing, you stated that a member of the White House Counsel's Office, the Justice Department, and/or the Administration asked you about your views on the constitutional right to privacy. You asserted that during this conversation, you reaffirmed your commitment to faithfully applying Supreme Court and Seventh Circuit precedent as it applies to the constitutional right to privacy.

a. Please provide the name(s) of the specific individuals who asked about your views on the right to privacy.

Response: When I gave this answer, I was thinking of my preparations for the hearing, which involved a number of individuals. I do not recall with any specificity which individuals asked which questions. I do recall reviewing prior hearings and learning that Senators had asked other nominees about the constitutional right to privacy.

b. Please provide the specific questions that were asked concerning your views on the right to privacy.

Response: Please see my response to Question 2.a.

c. Please provide your answers to those specific questions regarding your views on the right to privacy.

Response: Without disclosing the substance of any conversations I have had with attorneys from the Office of the White House Counsel or the Department of Justice, at all stages of this process I have emphasized that I would faithfully apply all Supreme Court precedent including precedent related to the right to privacy as recognized by the Supreme Court.

d. Do you agree that under Supreme Court precedent, the right to privacy protects a woman's right to an abortion?

Response: Yes.

e. Do you agree that under Supreme Court precedent, the right to privacy protects a woman's right to access contraceptives?

Response: Yes.

f. Do you agree that under Supreme Court precedent, the right to privacy protects two consenting adults engaged in intimate and/or romantic relations, regardless of their sexes or gender-identities?

Response: In *Lawrence v. Texas* the Supreme Court recognized that the right to privacy includes the right of consenting adults to engage in intimate relations regardless of sexual orientation.

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

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

Response: Yes.

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

Response: Please see my response to Questions 1.a - d above.

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

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

Response: Yes. *See, e.g.,* Canon 3(B)(3), Administrative Responsibilities, Code of Conduct for United States Judges ("A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism.").

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

Response: Yes.