Nomination of Daniel A. Bress, to be United States Circuit Judge for the Ninth Circuit
Questions for the Record
Submitted May 24, 2019

QUESTIONS FROM SENATOR COONS

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

   The Supreme Court in various cases has provided guidance on the factors that courts can and should consider in the area of substantive due process. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully adhere to the precedents of the Supreme Court.

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

      Yes. The Supreme Court has held that many rights that are specifically enumerated in the Bill of Rights are incorporated against the States under the Fourteenth Amendment. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

      Yes, the Supreme Court has held that history and tradition can be considered in the area of substantive due process. *See, e.g.*, *Glucksberg*, 521 U.S. at 710 ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."); *Obergefell*, 135 S. Ct. at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries."). If confirmed, I would faithfully apply all applicable precedents in this area.

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

      Yes, as a lower court judge I would be bound by precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Similarly with respect to precedent from the Ninth Circuit, "[g]enerally, a panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit." *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009). If there is no Supreme Court or Ninth Circuit precedent on point, I would consider decisions from other circuits for their persuasive value.

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

   Yes.

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

   The decisions in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003), are binding Supreme Court precedents. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

f. What other factors would you consider?

   I would consider those factors that the Supreme Court and Ninth Circuit have identified as relevant to this type of inquiry.

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

   In addition to race-based classifications, the Supreme Court has held that the Equal Protection Clause also applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an "exceedingly persuasive justification" for such gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I would faithfully follow this precedent.

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

      As a judicial nominee, it is not appropriate for me to grade or opine on the decisions of the Supreme Court. If confirmed, I would faithfully apply *United States v. Virginia*, 518 U.S. 515 (1996), and all other precedents of the Supreme Court.

   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?

      I have not researched this issue, but regardless, as a judicial nominee, it is not appropriate for me to grade or opine on the decisions of the Supreme Court. If

confirmed, I would faithfully apply *United States v. Virginia*, 518 U.S. 515 (1996), and all other precedents of the Supreme Court.

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

The Supreme Court has held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). The Court in *Obergefell* further held that "the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605. If confirmed, I would faithfully apply *Obergefell* and all other precedents of the Supreme Court.

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

There is active or impending litigation concerning these issues. As a judicial nominee, it would therefore not be appropriate for me to opine on this topic. *See* Code of Conduct of U.S. Judges, Canon 3A(6).

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

The Supreme Court has held that there is a constitutional right to privacy that includes the right of married and unmarried persons to use contraceptives. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully follow these precedents.

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

The Supreme Court has held that the Constitution protects a woman's right to terminate a pregnancy. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I would faithfully follow these 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?

The Supreme Court has held that a Texas criminal statute prohibiting certain intimate sexual conduct between two persons of the same sex was unconstitutional because "there is a realm of personal liberty which the government may not enter," which includes intimate relations between two consenting adults of the same sex. *Lawrence*

v. Texas, 539 U.S. 558, 578 (2003) (quotations omitted). The decision in *Lawrence* is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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

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

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

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

      As a judicial nominee, it would not be appropriate for me to opine generally on abstract legal issues that may require consideration and application in future cases. *See* Code of Conduct of U.S. Judges, Canon 3A(6). If confirmed, I would faithfully apply the precedents of the Supreme Court and Ninth Circuit on the question of when and how such evidence should be considered.

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

      The consideration of such data and information in any case would likely depend upon the nature of the case and the particular legal issues at hand. For example, Federal Rule of Evidence 702 and precedents such as *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), govern the admissibility of certain scientific, technical, or other specialized knowledge. If confirmed, I would faithfully apply the precedents of the Supreme Court and Ninth Circuit on the question of when and how such evidence, data, and information should be considered.

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

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

   The decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

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

   Please see my response to Question 5(a).

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

   a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

      I am aware of scholarly debates on this question. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). Ultimately, however, lower court judges must follow the Supreme Court's precedents regardless of whether a given precedent is regarded as "originalist" in approach or not.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited May 24, 2019).

      The scope and nature of the constitutional rights identified above have been the subject of many decisions of the Supreme Court. I would faithfully follow these precedents. Lower court judges must follow the Supreme Court's precedents regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

The Supreme Court has considered the original public meaning of constitutional provisions when construing them. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). But ultimately, lower court judges must follow the precedents of the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Lower court judges must follow the Supreme Court's precedents regardless of whether a given precedent is regarded as "originalist" in approach or not.

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

Please see my response to Question 6(c).

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

In construing any particular provision of the Constitution, I would faithfully apply the applicable precedents of the Supreme Court and Ninth Circuit, and, as appropriate, would consult the sources that those courts have indicated may be considered.

7. You authored a note for the *Virginia Law Review* entitled "Administrative Reconsideration." In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984), the Supreme Court stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

a. Do you agree that the rationale and holding of *Chevron* remain good law?

The decision in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994), is binding Supreme Court precedent. If confirmed, I would faithfully apply this precedent and all other precedents of the Supreme Court.

b. Are existing limits on the application of *Chevron* deference sufficient to prevent agencies from overstepping their interpretative authority?

As a judicial nominee, it is not appropriate for me to grade or opine on the decisions of the Supreme Court, including where issues of this nature may be the subject of active or impending litigation. *See* Code of Conduct of U.S. Judges, Canon 3A(6). If confirmed, I would faithfully apply *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994), and all other precedents of the Supreme Court.

c. If a statute is unclear, what is the appropriate level of deference that should be afforded to an administrative agency's interpretation?

The Supreme Court has addressed this issue in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994), and other precedents. Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If confirmed, I would faithfully apply *Chevron* and all other precedents of the Supreme Court.

8. Please describe your nomination process.

a. Did you talk with anyone at the White House or Department of Justice about a judgeship in D.C.?

No.

b. Did you talk with anyone at the White House or Department of Justice about a judgeship in the Eastern District of Virginia?

No.

c. Did you talk with anyone at the White House or Department of Justice about a judgeship on the Fourth Circuit?

No.

d. Did anyone at the White House or Department of Justice raise concerns about your lack of California residence or level of experience?

No.

e. Did either Ranking Member Feinstein's nominating committee or Sen. Harris's nominating committee raise concerns about your lack of California residence or level of experience?

I do not recall Ranking Member Feinstein's or Senator Harris's judicial commissions raising concerns about where I lived. I recall discussing my practice and experience with both commissions, but I cannot say whether this presented any concerns to them.

9. At your hearing, you testified that you have not tried a case in federal court, nor have you argued an appeal in the Ninth Circuit. Please provide a list of substantive oral arguments or witness examinations that you have presented in federal court.

   As explained in my Senate Questionnaire, I have been involved in cases in federal and state courts in California and across the country. Although I have not kept records of oral arguments, I have argued in various cases in federal and state court on many occasions. *See, e.g.*, *Oddo v. Arcoaire Air Conditioning & Heating*, Case No. 15-cv-1985 (C.D. Cal.); *Williams v. BASF Catalysts LLC*, Case No. 11-cv-1754 (D.N.J.); *United States v. Honeywell Int'l Inc.*, Case No. 08-cv-961 (D.D.C.); *Sumer v. Carrier Corp.*, Case No. 14-cv-4271 (N.D. Cal.); *Depree v. BASF Catalysts LLC*, Case No. A140681 (Cal. Ct. App. 1st App. Dist. 2016); *Ochoa v. Anaheim City School District*, Case No. G052409 (Cal. Ct. App. 4th App. Dist. 2017); *Manuel v. BASF Catalysts LLC*, Case No. BC 479452 (Cal. Super., Los Angeles Cty.); *DSM Dyneema LLC v. Thagard*, Case No. 13-cv-1686 (N.C. Super. Ct., Business Ct.). In addition, while conducting witness examinations in court has not been the nature of my practice, I have been involved in dozens of depositions of fact and expert witnesses and have taken and defended numerous depositions. In addition, I have been involved in various capacities, including as a legal strategist, in cases that were presented to juries or that involved significant evidentiary proceedings; post-judgment proceedings and appeals following jury verdicts; and matters that have involved extensive factual and evidentiary work with fact and expert witnesses.