Nomination of Douglas Russell Cole to the United States District Court for the Southern District of Ohio
Questions for the Record
July 3, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

   It is never appropriate for lower courts to depart from Supreme Court precedent.

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

   A district court judge is required to apply all binding Supreme Court precedent in all decisions. As a general matter, district court judges do not write concurrences or dissents, as they sit alone on cases. If the question is instead asking whether it is proper for a district court judge to question statements by Supreme Court Justices in concurrences or dissents, concurrences and dissents are non-precedential. A district court judge is required to apply the rule stated in the majority opinion of the applicable precedent.

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

   As a general matter, district court opinions are considered non-precedential. *See, e.g., Ohio A. Philip Randolph Inst. v. Larose*, 761 F.App'x 506, 513, n. 4 (6th Cir. 2019) (noting "the general rule that district court judges are not bound by other judges within the district") (*citing Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 469, n.10 (1996)). If I am confirmed as a district court judge, were I faced with that issue, I would faithfully apply all relevant Supreme Court and Sixth Circuit precedent on that issue.

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

   The United States Supreme Court has the authority under the United States Constitution and previous Supreme Court decisions to revisit or overturn its own precedent as it deems appropriate. As a district court nominee, it would be inappropriate for me to comment on the conditions under which it is appropriate for the United States Supreme Court to overturn its own precedent.

2. 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"?

Roe v. Wade, 410 U.S. 113 (1973), is a landmark decision by the United States Supreme Court that has since been reviewed and affirmed by the United States Supreme Court, *see, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed as a district court judge, I will faithfully apply all United States Supreme Court precedent, including *Roe v. Wade*.

b. Is it settled law?

From the perspective of a district court judge, all United States Supreme Court precedent, including *Roe v. Wade*, is settled law.

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

From the perspective of a district court judge, all United States Supreme Court precedent, including *Obergefell v. Hodges*, is settled law.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

The United States Supreme Court's decision in *Heller* disagreed with Justice Stevens. As a district court judge, I would be bound to apply Supreme Court precedent, including the majority's decision in *Heller*. I do not believe that it would be appropriate for me, as a nominee to a district court, to opine on whether I personally agree or disagree with the reasoning in either the Court's decision, any concurrence, or any dissenting opinion.

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

In *Heller*, the United States Supreme Court held that "the right secured by the

Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In its opinion, the Court also addressed certain types of permissible regulations.

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

The United States Supreme Court decision in *Heller* stated that "nothing in [Supreme Court] precedents forecloses [the Court's] adoption of the original understanding of the Second Amendment." *Heller*, 554 U.S. at 625. If confirmed as a district court judge, I would be bound by the Supreme Court's precedent, including its reading of its own precedents in *Heller*.

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

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

The United States Supreme Court held in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010), "that First Amendment protection extends to corporations." The Court went on to hold that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" *Id*. (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). If confirmed as a district court judge, I would be bound by United States Supreme Court precedent and Sixth Circuit precedent on this issue, as with all issues.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

The Supreme Court in *Citizens United* rejected what it referred to as the "antidistortion rationale." In rejecting that rationale, the Court noted that acceptance of the rationale "would permit [the] Government to ban political speech simply because the speaker is an association that has taken on the corporate form." *Id*. at 349. If confirmed as a district judge, I will faithfully apply all United States Supreme Court precedent and Sixth Circuit precedent, including the Supreme Court decision in *Citizens United*.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014), that owners of a closely held corporation do not forfeit all Religious Freedom Restoration Act protection "when they decided to organize their business as corporations rather than sole proprietorships or general partnerships." Any extent to which the *Hobby Lobby* case protects corporations' rights to religious freedom is

currently the subject of litigation around the country. Pursuant to Canon 3 of the Code of Conduct for United States Judges, I do not believe it would be appropriate for me, as a nominee to the district court, to opine further.

6. In 2006, you helped defend an Ohio law that required women seeking an abortion to meet with a physician in-person at least 24 hours prior to the procedure. The law also made changes to Ohio's judicial bypass procedures that limited minors seeking an abortion without parental consent to one judicial bypass petition per pregnancy.

   In one brief, you cast doubt on fears that the in-person meeting requirement would especially burden women in abusive relationships and potentially prevent them from obtaining abortions. You also dismissed concerns that the new judicial bypass law would burden minors who develop fetal abnormalities after having their request for a judicial bypass denied. (Final Brief of Defendants-Appellees, *Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006))

   a. How did you come to be involved in defending this law?

   At the time, I was the State Solicitor in Ohio. As State Solicitor, I was tasked with representing the State of Ohio in the United States Supreme Court, the Ohio Supreme Court, and in intermediate courts of appeals, like the Sixth Circuit, in cases involving issues that may generate Supreme Court review, or that were otherwise of significant public interest. The case was identified as one such case, and thus the Solicitor's section in the office became involved after judgment was entered in the district court.

   b. Please describe your role in the preparation of any legal arguments related to the case.

   As State Solicitor, I had overall responsibility for the contents of all briefs filed under my name. I typically did not prepare first drafts of briefs, but would review, edit and revise briefs prepared by others. I would also consult with drafters on shaping the legal arguments that would be included in the briefs.

   c. The Sixth Circuit struck down the provision of the Ohio law relating to judicial bypass and held that "limiting minors… to one petition per pregnancy was an undue burden on the constitutional right to an abortion." Please explain the evidence supporting your argument that limiting minors to one judicial bypass petition per pregnancy was not an undue burden on their right to an abortion.

   The evidence cited in the State's briefing on this issue, and contained in the record from the proceeding below, was the evidence on which the State relied in making this argument.

d. Do you believe that a minor who has been denied a judicial bypass and later develops a fetal abnormality should be forced to continue the pregnancy?

As the State Solicitor for Ohio, I had an obligation to present any reasonable and lawful argument that I could in support of the constitutionality of the statute at issue, which had been passed by Ohio's General Assembly and signed by Ohio's Governor. The views expressed in the brief represent advocacy on behalf of my client, the State of Ohio, and do not necessarily represent my personal views. As a nominee to the district court, I believe it would be inappropriate for me to express my personal views on this topic, as the permissible scope of regulations related to abortion continues to be a topic of legislation and litigation around the country.

e. You argued that increased costs and a process spread over multiple days do not impose an undue burden on women in abusive relationships who wish to terminate a pregnancy. Please identify the evidence you used to support this assertion.

The evidence cited in the State's briefing on this issue, and contained in the record from the proceeding below, was the evidence on which the State relied in making this argument.

7. You were Counsel of Record on briefs submitted to the Sixth Circuit in *Cincinnati Women's Medical Professional Corp. v. Baird*, which considered a challenge to the Ohio Department of Health's denial of a license to a women's reproductive health clinic. The Sixth Circuit ultimately held that the Ohio Department of Health had denied the clinic its procedural due process by failing to hold a pre-deprivation hearing. (*Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006))

a. How did you come to be involved in defending this action?

Please see my answer to Question 6.a. The same answer applies here.

b. Please describe your role in the preparation of any legal arguments related to the case.

Please see my answer to Question 6.b. The same answer applies here.

c. Did you participate in the preparation of or give approval for arguments made in any oral arguments or briefs to which you were not a signatory? If so, please identify the arguments or briefs and explain your involvement.

During my time at the Attorney General's Office, as well as during my time in private practice, I have participated in moot courts in various cases, typically at the request of the attorney who will be presenting argument in the matter to assist that

person in preparation. For example, I have assisted at various moot courts on dormant Commerce Clause issues over the years.

When I was the State Solicitor, there were many occasions on which other personnel, either from the Solicitor's section or from another section in the Attorney General's Office, would appear in an appellate court to argue on behalf of the State. I sometimes participated in moots regarding those matters, and when doing so provided general guidance and feedback on arguments and argument techniques. In terms of "approval," I would general expect those lawyers to follow the arguments set forth in the briefing that the Office had filed on the matter, but do not recall specifically "authorizing" any particular arguments.

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

   a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

   In September of 2017, I met with personnel from the White House Counsel's Office and the United States Department of Justice. We discussed a variety of topics. I do not recall any specific discussion regarding my views, if any, on administrative law topics.

   b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

   Respectfully, I cannot recall every informal conversation I may have had since 2016, nor am I certain I know whether each person to whom I have spoken during that time may or may not be affiliated with the Federalist Society. That said, I do not believe any such conversations occurred. I have been at Federalist Society events where administrative law topics have been discussed in a large group setting, but I do not recall offering any opinions, nor anyone soliciting my opinions, on any such topic.

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

   If I am fortunate enough to be confirmed as a district court judge, I will apply all

United States Supreme Court precedent and Sixth Circuit precedent, including such precedent on administrative law topics.

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

   The Supreme Court has held that a judge may consider legislative history in interpreting a statute in certain situations where the statute is ambiguous. If confirmed as a district court judge, I will faithfully apply Supreme Court precedent and Sixth Circuit precedent, including precedent regarding appropriate tools to use in statutory interpretation.

10. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

    No.

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

    I reviewed the various materials discussed in a particular question (Supreme Court decision, previous briefing, etc.), considered responses that other nominees had provided in regard to similar questions, and then drafted my responses to the questions. I sent my draft responses to personnel at the United States Department of Justice requesting their feedback on my draft responses. I then revised my answers as I deemed appropriate in light of the comments that I received. All of my answers are my own.

Written Questions for Douglas Russell Cole
Submitted by Senator Patrick Leahy
July 2, 2019

1. In 2007, you wrote an article on the antitrust case *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, which overruled a longstanding antitrust decision. In that article, you commented that "[t]he Court held that stare decisis is not as 'significant' in Sherman Act cases as it is in other areas of law."[1]

   a. Are there other areas of law where you similarly believe that stare decisis is not "as 'significant'"? If so, please list each area and why you reached that conclusion.

   The statement in the article was paraphrasing a passage in the opinion itself, in which the Court stated that "Stare decisis is not as significant in this case, however, because the issue before [the Court] is the scope of the Sherman Act." *Leegin*, 551 U.S. 877, 899. The Court went on to observe that the presumption that changes to a statute should be left to Congress carries less weight with regard to the Sherman Act, as Congress intended the Sherman Act to be a "common-law statute." I am not currently aware of other statutes that the Supreme Court has indicated should be treated as common-law statutes, or as to which the Court has indicated that stare decisis is "not as significant." If confirmed as a district court judge, though, I will faithfully apply Supreme Court and Sixth Circuit precedent on this topic.

   b. How do you view your role in making those determinations, if confirmed as a district court judge?

   My role as a district court judge would be to interpret and apply statutes in a manner consistent with the instructions of the Supreme Court and the Sixth Circuit as applied to the particular facts and circumstances of the case before me.

2. Throughout your career you have argued numerous cases concerning the dormant commerce clause, including a few pro bono cases.

   a. **Have you specifically sought out these types of cases? If so, what aspects of the dormant commerce clause jurisprudence have you sought to change?**

   I have not specifically sought out such cases. When I was the State Solicitor, I argued a matter in the Supreme Court involving the dormant Commerce Clause. As a result of my involvement in that case, when I returned to private practice, parties seeking to press dormant Commerce Clause issues sometimes sought me out. In addition, attorneys involved in such matters sometimes contacted me to discuss

[1] Doug Cole, J. Bruce McDonald, Dr. Miles *Receives its Coup de Grace*, JONES DAY ANTITRUST COMMENTARY (July 2007) (SJQ Attachment 12(a) at p. 225).

whether I may have interest in acting as counsel for amici in such matters at the Supreme Court, typically on a pro bono basis.

3. Chief Justice Roberts wrote in *King v. Burwell* that

> "oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'"

(a) Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

The Supreme Court has held that, in interpreting statutes, it is important to read the statutory text in context. If confirmed as a district court judge, I would follow all Supreme Court and Sixth Circuit precedent regarding statutory interpretation.

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

(b) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

Respect for the rule of law is a vitally important aspect of our system of governance. Anything that erodes respect for the rule of law is thus a matter of concern. As a nominee for a district court judgeship, or as a sitting judge, though, I do not believe it would be appropriate for me to opine on whether, in my view, conduct by elected members of the government, other than perhaps conduct in connection with a matter before me, would erode respect for the rule of law.

(c) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

I do not believe that it would ever be appropriate for a district court judge to criticize the legitimacy of a federal judge or court.

5. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and will not be questioned*." (Emphasis added.)

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

To the extent that the Supreme Court of the Sixth Circuit Court of Appeals has held that the exercise of such authority by the Executive Branch is subject to judicial review, if confirmed, I would faithfully apply such precedent.

6. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders.

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

Respect for the rule of law requires that parties conform their behavior to court orders, and the Federal Rules of Civil Procedure, as well as case law, provide judges the authority to sanction parties who fail to comply with a given court order. Exercise of that authority requires a careful analysis of the scope of the authority in the context of the facts and circumstances of a particular case. If confirmed as a district court judge, I will faithfully apply Supreme Court and Sixth Circuit precedents regarding that issue.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

If confirmed as a district court judge, I will faithfully apply all Supreme Court and Sixth Circuit precedent that is relevant to a matter before me, including *Hamdan v. Rumsfeld*.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

I have not researched the extent to which the President's war powers authorize him or her to override statutes or immunize violators from prosecution, although I am generally aware that the Supreme Court has addressed potentially related issues in the past, such as, for example, whether the President can suspend habeas corpus, or nationalize the steel industry, in support of a war effort. If confirmed as a district court judge, to the extent I faced such issues, I would faithfully apply Supreme Court and Sixth Circuit precedent.

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

Please see my answer to question 7.b.

8. **How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?**

I have never had occasion to research or investigate the issue of how (or whether) courts should balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuses of power. If I am confirmed as a district court judge, should I face such an issue, I would do my best to investigate, understand, and faithfully apply any applicable Supreme Court or Sixth Circuit precedent on this issue.

9. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(a) Do you agree with that view? Does the Constitution permit discrimination against women?

The Supreme Court has held that state action that discriminates on the basis of gender is subject to heightened scrutiny under the Fourteenth Amendment. If confirmed as a district court judge, I will faithfully apply Supreme Court and Sixth Circuit precedent, including precedent on this issue.

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

As a general matter, the Voting Rights Act is a landmark and important statute, although the Supreme Court held in *Shelby County v. Holder*, 570 U.S. 529 (2013), that one portion of the Act, Section 4(b), is unconstitutional. As a district court judge, I would apply the Voting Rights Act in a manner consistent with the Supreme Court and Sixth Circuit precedent interpreting the Act.

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

The Constitution addresses foreign emoluments in Article I, Section 9, Clause 8. As relevant to emoluments, that provision states that "no Person holding any Office of Profit or Trust under them, 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." I have not faced any issue in my career that has required research or investigation regarding the Emoluments Clause. If I am confirmed as a district court judge, though, should I face such an issue, I would faithfully apply any applicable Supreme Court or Sixth Circuit decision interpreting that provision.

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

(a) When is it appropriate for a court to substitute its own factual findings for those made by Congress or the lower courts?

The Supreme Court has addressed on more than one occasion the role and weight of congressional findings of fact in interpreting statutes. If I am confirmed as a district court judge, I would faithfully apply all Supreme Court precedent.

13. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

The text of each of these three amendments contains an express delegation of power to Congress "to enforce this article by appropriate legislation." While I have not had recent occasion to research the issue, I am generally aware that the Supreme Court has opined on the scope of Congress's enforcement power under these amendments, or at least under Section 5 of the Fourteenth Amendment. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). If I am confirmed as a district court judge, I would faithfully follow Supreme Court and Sixth Circuit precedent on this issue.

14. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

Lawrence v. Texas is binding Supreme Court precedent. In the case, the Court discusses certain limitations that the Due Process Clause of the Fourteenth Amendment imposes on the ability of States' to regulate certain forms of private conduct. If I am confirmed as a district court judge, I will faithfully apply all Supreme Court precedent, including *Lawrence v. Texas*.

15. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

As a district court judge, I would not have the power to overturn Supreme Court or Sixth Circuit precedent, but instead would be bound to follow it. District court judges thus rarely face questions regarding the strength of stare decisis. That being said, as a general matter, stare decisis is an important aspect of the rule of law, as it provides predictability and stability in the law. While I have not had recent occasion to research the issue carefully, I am generally aware that the Supreme Court has issued multiple decisions discussing the scope and contours of stare decisis, and the extent to which that scope and contour may be different with regard to questions of statutory or constitutional interpretation, or even may vary as to different statutes, *see, e.g., Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007) (observing that stare decisis concerns are "not as significant" when dealing with questions regarding the scope of the Sherman Act). If confirmed as a district court judge, I would faithfully apply all Supreme Court precedent.

16. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

While I have not had occasion to carefully investigate this topic, I am generally aware that federal statutes (*see, e.g.*, 28 U.S.C. § 455 and 28 U.S.C. § 144), as well as the Code of Conduct for United States Judges, impose recusal requirements. Moreover, the Supreme Court in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), held that the Due Process Clause (albeit there of the 14th Amendment) also can impose recusal requirements in certain circumstances. As a general matter, a federal judge should disqualify him- or herself in any proceeding in which his or her impartiality might reasonably be questioned, including but not limited to cases in which the judge has a personal bias or prejudice concerning a party, personal knowledge of a disputed evidentiary matter, has previously served as a lawyer or witness, has expressed an opinion concerning the appropriate outcome of a matter, or in which the judge or an immediate family member has a financial interest in the matter. As these examples suggest, questions regarding recusal tend to be fact-specific. If I am confirmed as a district court judge, I would carefully examine the facts and circumstances of each matter, as well as the various sources of law regarding recusal, to understand whether I had an obligation to recuse myself as to a given case.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

(b) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

Courts have the authority to enforce the constitutional limitations on the exercises of power by the other branches of government. This is typically referred to as the power of judicial review, which the Supreme Court announced in *Marbury v. Madison*. The power of judicial review has sometimes been characterized as an antimajoritarian power, as it involves courts striking down laws enacted by the democratically elected branches, when those laws transgress constitutional boundaries. Footnote 4 in the *Carolene Products* case has come to be understood as describing some instances when the Supreme Court's power in this regard may take on special import, for example, when dealing with "discrete and insular minorities," who may have particular difficulty seeking redress through traditional political channels for legislation that unconstitutionally impacts them. If I am confirmed as a district court judge, I will faithfully apply all Supreme Court and Sixth Circuit precedent

18. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

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

As a general matter, I would agree that Congressional oversight is an important means for creating accountability in all branches of government. I have not had reason during my career to research or investigate the scope of Congress's power in that regard. If I were confirmed as a district court judge, were I faced with such a question, I would faithfully apply all Supreme Court and Sixth Circuit precedent regarding that issue.

19. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

During my career, I have not had occasion to research or investigate the scope of the President's pardon power under the Constitution or federal statutes. If I am confirmed as a district court judge, were I to face such an issue, I would faithfully apply all relevant Supreme Court and Sixth Circuit precedent.

20. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Article I of the Constitution, and in particular the Commerce Clause, grants Congress the power to regulate interstate commerce. The Supreme Court has addressed on multiple occasions the question of what constitutes "interstate commerce." *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Lopez*, 514 U.S. 549 (1995). If confirmed as a district court judge, I would faithfully apply all Supreme Court and Sixth Circuit precedent.

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Fourteenth Amendment through appropriate legislation. The Supreme Court has addressed the contours of Congress's enforcement power under Section 5 on various occasions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed as a district court judge, I would faithfully apply all Supreme Court and Sixth Circuit precedent.

21. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

While I have not carefully researched the issue, I am aware that, as a general matter, courts have opined in areas outside the immigration context on the general topic of when evidence of unlawful pretext may be able to override facially neutral justifications for given conduct. I have not had occasion in my career to research or investigate the extent to which, if any, those general principles would apply in the context of immigration policy. If I am confirmed as a district court judge, I would faithfully apply all Supreme Court and Sixth Circuit precedent on that issue.

22. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016), the Supreme Court observed that a regulation imposes an "undue burden" under *Casey* if "the '*purpose or effect*' of the provision '*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." (Emphasis in original). The Supreme Court in *Hellerstedt* then went on to strike two Texas laws, one that imposed an "admitting-privileges requirement," under which physicians performing abortions were required to have admitting privileges at a hospital not further than 30 miles from where the abortion is performed, and a second that imposed "surgical-center requirements" on abortion facilities, under which such facilities must meet the minimum standards imposed by Texas law for ambulatory surgical centers. The Supreme Court concluded that each requirement "places a substantial obstacle in the path of women seeking a previability abortion," and thus "each constitutes an undue burden on abortion access." *Id*. If confirmed as a district court judge, I would faithfully apply all Supreme Court precedent, including *Casey* and *Hellerstedt*.

23. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

(a) Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?

The Supreme Court has addressed the doctrine of qualified immunity, as well as the framework that lower courts should use in assessing qualified immunity, in a number of cases. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). Under that precedent, a person operating under color of state law is "entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *See Wesby*, 138 S. Ct. at 589 (quoting *Reichle v. Howard*, 566 U.S. 658, 664 (2012)). If I am confirmed, I would faithfully apply Supreme Court and Sixth Circuit precedent regarding the appropriate analysis for qualified immunity.

24. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone

geolocation technology. The Court noted "seismic shifts in digital technology," such as the "exhaustive chronicle of location information casually collected by wireless carriers today."

(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?

Carpenter suggests that the more exhaustive and pervasive the data collected about a person by a third party (there a cell phone provider), the more likely that government access of that data would raise Fourth Amendment concerns. If I am confirmed as a district court judge, if I were to face such an issue, I would faithfully apply all relevant Fourth Amendment precedent from the Supreme Court and the Sixth Circuit Court of Appeals.

25. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

(b) With the understanding that you cannot comment on pending cases, are there situations in which you believe a president can lawfully allocate funds for a purpose previously rejected by Congress?

I have not researched this issue, but I am generally aware that the President has certain powers in the face of a national emergency, but that those powers are not unlimited. If I am confirmed as a district court judge, were I to face such an issue, I would faithfully apply any applicable Supreme Court or Sixth Circuit precedent.

26. **Can you discuss the importance of judges being free from political influence or the appearance thereof?**

Our constitutional form of governance depends on judges who are fair, impartial, and independent. Without such judges, the rule of law does not work. For citizens to believe that the rule of law is working, not only must judges be free from political influence, but citizens must believe that judges are free from such influence. Thus, the appearance of political influence on judicial outcomes can create problems for the rule of law.

Nomination of Douglas Russell Cole
to the United States District Court for the Southern District of Ohio
Questions for the Record
Submitted July 3, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Recent reporting in the Washington Post ("A conservative activist's behind-the-scenes campaign to remake the nation's courts," May 21, 2019) documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.
    a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

       Not before answering this question. As requested in the question, though, I have now reviewed those materials.

    b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

       The integrity of the judicial branch, and respect for the rule of law, are incredibly important to the constitutional design for governance in our country. Consistent with that, it is vitally important to nominate and confirm judges who are committed to the rule of law. If confirmed as a district court judge, I pledge to perform my role in a fair, impartial, and independent manner, consistent with rule of law principles.

    c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

       The Constitution affords the President, with the advice and consent of the Senate, the authority to nominate judges. How that process should proceed is thus a question better left to the President and the Senate. As a nominee for a district court judgeship, I do not believe it would be appropriate for me to express an opinion on that topic.

    d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

       I believe that Mr. Leo was aware that I was under consideration for nomination as a district court judge in the Southern District of Ohio, but I do not know whether he has taken a position on, or otherwise advocated for or against, my nomination.

    e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a

"newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

During the audio record, which is nearly 30 minutes in length, Mr. Leo offers a number of different opinions, including that the judicial branch should enforce the structural design of the Constitution. I believe that adherence to the Constitution, and the structural design that it reflects, is an important aspect of the rule of law. If confirmed as a district court judge, I would faithfully apply all Supreme Court precedent, including precedent directed at such structural concerns, irrespective of the beliefs espoused by Mr. Leo or by anyone else.

2. 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?

      Under our constitutional design, the role of the judicial branch is to interpret and apply the law in a fair and impartial manner to the parties in the case before the court. To the extent that approach is captured in Chief Justice Roberts' metaphor, I would agree with the metaphor.

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

      A judge should consider the practical consequences of a decision as to those issues where Supreme Court precedent, or (in my case, should I be confirmed) Sixth Circuit precedent, makes such consequences relevant. For example, there are times where it may be appropriate to consider, as part of undertaking statutory interpretation, whether a given interpretation will lead to "absurd results."

3. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

   A "genuine dispute" exists if, based on the evidence in the record, a reasonable jury could return a verdict in favor of either party on the disputed issue. A fact is material if resolution of the dispute as to that fact "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The test for materiality may turn on the substance of issue under the governing law. For example, if a cause of action requires there to have been a material misstatement in order for the plaintiff to prevail, and further provides that materiality as to a misstatement is measured by an objective standard, then the existence of a genuine dispute as to a material fact may turn on whether there is evidence of a misstatement that is objectively material. Determining whether there is a genuine dispute as to any material fact requires a careful and searching review of the evidence in the record, as well as a thorough review of the parties' arguments. If I am confirmed as a district court judge, I will exercise deliberate care in assessing whether summary judgment is warranted in a particular case.

4. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a

young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

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

A judge has an obligation to enforce the rule of law. That being said, rule of law principles sometimes require consideration of the unique circumstances of a given party. For example, in the exercise of lawful discretion in sentencing a criminal defendant, it can be appropriate to consider defendant-specific characteristics, which could be characterized as empathy for the defendant's circumstances. If I am confirmed as a district court judge, in situations where Supreme Court or Sixth Circuit precedent require consideration of party-specific characteristics in reaching a legal decision, I will faithfully apply those precedents.

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

I believe that a judge should do his or her best to minimize the extent to which the judge's personal life experience impacts his or her decision-making. Justice should not be judge-dependent, but rather should turn on application of the rule of law to the facts and circumstances of the case before the judge.

c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

Through the years, I have had friends and acquaintances from many different walks of life. Based on my interactions and conversations with those people, as well as my own experiences, I believe I have some understanding of, and appreciation for, the difficulties that various groups have faced, and continue to face, in our country. To the extent appropriate in a given situation, I would consider those issues in exercising my judicial role.

5. 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?

In my view, it is never appropriate for a judge to ignore an order from a superior court, except in the rare circumstance where a subsequent order from that superior court (or an even higher court), renders invalid the order at issue.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the jury play in our constitutional system?

The jury acts as an important check on the exercise of governmental power as to a particular defendant or party, both in criminal and civil matters.

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

The Seventh Amendment, like all constitutional provisions, should always be a matter of concern to a judge. That being said, the Supreme Court has addressed the intersection

between the Seventh Amendment and pre-dispute arbitration clauses. If confirmed, I would faithfully apply all Supreme Court precedent, including the precedent on this issue.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my answer to question 6.b.

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

The Supreme Court has addressed the role of congressional fact-findings on various occasions, including, for example, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). In *Gonzales*, for example, the Court observed that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." 550 U.S. at 165. If confirmed, I would faithfully apply all Supreme Court and Sixth Circuit precedent on this issue, including *Hellerstedt* and *Gonzales*.

8. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.
   a. Have you read Advisory Opinion #116?

   Yes, at the request of this question.

   b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
      i. Determining whether the seminar or conference specifically targets judges or judicial employees.

      I will ensure that my participation in any education seminar satisfies all ethical requirements.

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

      I will ensure that my participation in any education seminar satisfies all ethical requirements.

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

      I will ensure that my participation in any education seminar satisfies all ethical requirements.

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

I will ensure that my participation in any education seminar satisfies all ethical requirements.

v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

I will ensure that my participation in any education seminar satisfies all ethical requirements.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

I will ensure that my participation in any education seminar satisfies all ethical requirements.

Nomination of Douglas Russell Cole, to be United States District Court Judge
for the Southern District of Ohio
Questions for the Record
Submitted July 3, 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 United States Supreme Court has identified the factors to consider in determining whether a right is subject to protection under the Fourteenth Amendment in cases such as *Washington v. Glucksberg,* 521 U.S. 702 (1997), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and others. I would apply the factors that the Supreme Court has identified, along with any factors set forth in precedent from the Sixth Circuit Court of Appeals.

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

      Yes, as Supreme Court precedent requires.

   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, as Supreme Court precedent requires.

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

      If the Supreme Court, or the Sixth Circuit, has identified a given right as fundamental and subject to protection under the Fourteenth Amendment, I would be bound by such precedent in my role as a district court judge. I would consider precedent from other circuits as persuasive authority on that issue.

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

Yes, I would be bound by all Supreme Court precedent on this issue, including the cases that you have identified above, as applicable.

f. What other factors would you consider?

I would consider those factors identified by the United States Supreme Court, by the Sixth Circuit, and, to the extent that I found the opinions persuasive, the factors identified by other circuit courts of appeals.

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

The Supreme Court has held that state action that discriminates on the basis of gender is subject to heightened scrutiny, typically referred to as intermediate scrutiny, under the Fourteenth Amendment.

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 district court judge, I would be bound by Supreme Court precedent on this issue. That Supreme Court precedent would control without regard to arguments about the original intent or understanding of the Fourteenth Amendment at the time it was passed.

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 do not know why the Supreme Court did not address this issue before *United States v. Virginia*.

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that the Fourteenth Amendment requires that same-sex couples must be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." If confirmed as a district court judge, I would faithfully apply all Supreme Court precedent, including *Obergefell*.

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

The right to equality under the law, as guaranteed by the Equal Protection Clause, is among the most important of the constitutional rights afforded to citizens of this country. The particular issue set forth in this question is currently the subject of ongoing litigation, and thus it would be inappropriate for me, as a district court nominee, to opine on that issue.

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

   Supreme Court precedent, including *Griswold v. Connecticut*, 381 U.S. 497 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), hold that the Constitution provides such a right. As a district court judge, I would faithfully apply Supreme Court precedent including *Griswold* and *Eisenstadt*, as well as Sixth Circuit precedent interpreting those cases.

   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 recognized such a right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As a district court judge, I would faithfully apply Supreme Court precedent including *Roe* and *Casey*, as well as Sixth Circuit precedent interpreting those cases.

   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 United States Supreme Court recognized such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). As a district court judge, I would faithfully apply Supreme Court precedent including *Lawrence*, as well as Sixth Circuit precedent interpreting that case.

   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 answers 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 to consider evidence that sheds light on our changing understanding of society?

The Supreme Court considered such evidence in, for example, *Obergefell* and *Virginia*. If confirmed, I would faithfully apply Supreme Court and Sixth Circuit precedent on this issue.

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

Federal Rule of Evidence 702 lists the factors a United States District Court is to consider when determining whether to admit testimony from a "witness who is qualified as an expert by knowledge, skill, experience, training, or education . . . ." Fed. R. Evid. 702. *See also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). One factor a court is to consider is whether "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]" Fed. R. Evid. 702(a).

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 Supreme Court held in *Obergefell* that same-sex individuals have a right to marry that is protected by the Fourteenth Amendment to the Constitution. If I am confirmed as a district court judge, I would faithfully apply all Supreme Court precedent, including *Obergefell*.

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

   As a district court judge, I would faithfully apply all Supreme Court precedent, including Justice Kennedy's opinion for the Court in *Obergefell*.

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 generally aware that this issue has been the subject of academic debate, but I am not familiar with the contours of that debate. If I am confirmed as a district court judge, I would faithfully apply all Supreme Court precedent, including *Brown*.

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 July 2, 2019).

I am not familiar with the argument that the authors present in this piece. If I am confirmed as a district court judge, I would be bound to faithfully apply all Supreme Court and Sixth Circuit precedent interpreting these terms, whether that precedent is based on original understandings 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?

If confirmed as a district court judge, I would be bound by United States Supreme Court precedent. In cases where the United States Supreme Court conducted an analysis of the original public meaning of the Constitution, I would be bound by such analysis and holding. In cases in which the United States Supreme Court used some other interpretive approach, I would be bound by such analysis and holding as well.

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

Please see answer to Question 6.c.

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

I would consider the text of the provision, as well as all Supreme Court and Sixth Circuit precedent relating to the provision, and precedent from other circuit courts to the extent persuasive.

7. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), you filed briefs arguing that the Religious Land Use and Institutionalized Persons Act (RLUIPA) is unconstitutional. The Supreme Court unanimously rejected this argument, finding that RLUIPA is consistent with the Establishment Clause.

a. Do you agree that incarcerated individuals have a protected right to practice their religion while incarcerated?

In the Supreme Court's unanimous opinion in *Cutter*, the Court held that RLUIPA, as applied in the prison setting, does not violate the Establishment Clause. If confirmed as a district court judge, I would faithfully apply all Supreme Court precedent, including *Cutter*.

b. What factors would you consider when evaluating the rights of incarcerated individuals?

Incarcerated individuals have certain rights under the U.S. Constitution, various federal statutes, including but not limited to RLUIPA, as well as various state laws (depending, in part, on where the prisoner is incarcerated). In a particular case, I would consider all of the various potential sources of rights to determine whether the incarcerated individual had the right which he or she was asserting.

Questions for the Record from Senator Kamala D. Harris
Submitted July 3, 2019
For the Nomination of

Douglas Russell Cole, to the U.S. District Court for the Southern District of Ohio

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

    a. **What is the process you would follow before you sentenced a defendant?**

    The task of sentencing criminal defendants is one of the most important jobs that a district court judge undertakes. When sentencing a defendant, I would review and apply applicable procedure, rules, and precedent regarding sentencing from the United States Supreme Court and the Sixth Circuit Court of Appeals. I would then review and consider the charging documents, the presentence report, any victim impact statements, any statements by the defendant's family or friends, written and oral arguments of counsel for both sides, the statements, if any, of the defendant, and any other relevant or required documentation the parties would bring to my attention. I would then consider the individual factors set forth in 18 U.S.C. § 3553(a), and calculate the proper sentence range as outlined in the Sentencing Guidelines. I would then determine whether there was any applicable basis that warranted a departure from the Sentencing Guidelines range.

    b. **As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

    Please see my answer to question 1(a). In addition, I would review and consider publications by the United States Sentencing Commission, as well as sentencing decisions rendered by the United States Supreme Court, the Sixth Circuit, and other information provided by the United States Judiciary.

    c. **When is it appropriate to depart from the Sentencing Guidelines?**

    The Supreme Court has held that the Sentencing Guidelines are not binding on trial judges, but rather are advisory. *See United States v. Booker*, 543 U.S. 220, 246 (2005). The Sentencing Guidelines provide guidance as to when a judge may depart from the advisory Sentencing Guidelines range. Case law interpreting 18 U.S.C. § 3553(a) further includes factors and considerations that I would consider before departing from the Sentencing Guidelines.

    d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or

indeterminate sentencing.[1]

i. **Do you agree with Judge Reeves?**

I do not believe that I am sufficiently familiar with Judge Reeves' views on this issue, or countervailing views and arguments, to express an opinion on this topic.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

I do not believe that I am sufficiently familiar with the literature and arguments on this topic to express an opinion. As a general matter, the question of whether to adopt mandatory minimums is a legislative question, and not a judicial question. If confirmed, I am obliged to follow the law on mandatory minimum sentences, subject to any constitutional constraints.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

While in private practice I undertook a pro bono representation of an individual named Patrick Lett. The U.S. Attorney for the Southern District of Alabama was arguing that Mr. Lett was subject to a mandatory minimum sentence in connection with a particular crime to which Mr. Lett had pled guilty. I argued on behalf of Mr. Lett in the Eleventh Circuit, in a petition for certiorari in the United States Supreme Court, and then in the District Court on remand, that Mr. Lett was not subject to the mandatory minimum. The district court judge, Judge Steele, agreed with the argument on remand and declined to impose the mandatory minimum sentence for which the government had argued.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

If confirmed, I would faithfully apply all mandatory minimum sentences to the extent that the statute requiring such sentence is constitutional and applicable to the facts and circumstances of a given case. I would also plan to outline in writing or on the record my reasons for imposing the particular sentence that I have chosen in a given case, along with any comments I have to such sentence in circumstances I deemed warranted, and to the extent required by applicable law.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

   Pursuant to the United States Constitution and applicable law, charging decisions are left to the Executive Branch. District court judges are required to impose any applicable mandatory minimum sentences, so long as the statute imposing such mandatory minimum is constitutional. I would raise charging decisions made by federal prosecutors to the extent legally permissible and appropriate and consistent with the Code of Conduct for United States Judges.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   Clemency decisions are the purview of the Executive branch of government. If confirmed, I do not believe it would be appropriate for me, as a judge, to intervene in that process.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

   Yes, to the extent warranted by the applicable statutes and the facts and circumstances of a given case.

2. 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?**

      Yes.

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

I am generally aware of statistics showing that various demographic sub-groups, and in particular African-American males, are over-represented on a percentage basis in prison populations in the United States.

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

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

      Yes.

   b. **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?**

      If confirmed, I would commit to ensuring that all qualified applicants, including qualified women and minority candidates, are given serious consideration for any position in which I am responsible for hiring.