

**Nomination of John Peter Cronan to the United States District Court for the
Southern District of New York
Questions for the Record
Submitted March 11, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. In a 2001 law review article, you wrote that “[t]he successes of affirmative action have rendered race an unreliable proxy for disadvantaged status and diversity.” (*The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions* (2001))

a. Is it your view that race-based affirmative action is illegitimate?

The cited law review article was drafted around 1999, when I was early in my time at law school and considering pursuing a career in academia. The article took a position in support of a system that takes into account in higher education admissions both race and non-racial factors that indicate whether an applicant faced a disadvantaged past and would contribute to the diversity of the institution. Since the publication of the article, the Supreme Court has issued a number of decisions on the issue of affirmative action in higher education, and I understand that the issue is currently the subject of litigation (including litigation in which the United States Department of Justice has filed pleadings). As a nominee for a federal district judgeship, it would be inappropriate for me to provide a personal view on an issue that is the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on affirmative action, including *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

b. Is any consideration of race, without proof of ‘disadvantaged status,’ impermissible?

Please see my response to Question 1(a).

2. In a 2000 article, you argued that the D.C. District Court wrongly decided *United States v. Microsoft Corporation*, which held that Microsoft had violated antitrust laws by aggressively bundling several of its products. You argued that, contrary to the court’s holding, Microsoft’s product bundling both benefited consumers and had procompetitive justifications. The D.C. Circuit Court disagreed, holding that Microsoft’s actions in “keeping rival browsers from gaining widespread distribution” had “anticompetitive effect.” (*Uphill Skiing: Microsoft as the Opposite of Aspen* (2000); *United States v. Microsoft Corporation* (2001))

a. Do you still believe that Microsoft’s bundling practices should have been upheld under federal antitrust law?

The cited article was published in an undergraduate journal, and I drafted the piece when I was in law school after taking one introductory class on antitrust law. The article focused only on the allegations that Microsoft’s efforts to improve the browsing capabilities of Windows—such as pricing Internet Explorer at zero and tying it to Windows—lacked any procompetitive justifications. I had not practiced antitrust law at that time, nor have I practiced antitrust law since law school, and I am not an expert in that field of law. If confirmed and an antitrust case were to come before me, I would carefully and thoroughly research the applicable statutes and caselaw. In addition, as a judicial nominee, it would be inappropriate for me to comment on whether I agree with a prior judicial decision, as the issue may be the subject of pending or impending litigation. *See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6)*. If confirmed, I will fully and faithfully apply all precedents from the Supreme Court and the Second Circuit on antitrust.

b. Do you disagree with the Circuit Court’s ruling regarding the “anticompetitive effect” of these practices? If so, why?

Please see my response to Question 2(a).

3. During your hearing, you replied to my question about whether you had worked on Attorney General Sessions’ Zero Tolerance immigration policy by saying that you had not created or implemented the policy. Below, I have several more questions related to your work at the Department of Justice. Please answer the following questions regarding the work you performed while serving as Principal Deputy Assistant Attorney General and Acting Assistant Attorney General. If you worked or advised on any of the policies or issues listed below, please explain the nature and extent of your work on each.

a. Did you work or advise on anything related to the investigation of Russian interference in the 2016 election?

I had no role in supervising or directing the work of the Special Counsel’s Office, nor did I myself work in that Office. The Special Counsel’s Office was a litigating component of the Department of Justice that was separate and independent from the Criminal Division, where I worked and continue to work. Certain employees of the Criminal Division were detailed to work at the Special Counsel Office during my time as Acting Assistant Attorney General and Principal Deputy Assistant Attorney General. I participated in the routine approvals of extensions of those details, and the Criminal Division provided the Special Counsel’s Office with all requested human resources. In addition, like any other litigating component of the Department of Justice, to the extent the Justice Manual required the Special Counsel’s Office to consult with, or seek the approval from, the Criminal Division, that process occurred with the appropriate component of the Criminal Division. Other than complying with any Justice Manual requirements, I did not work on or advise on any substantive matters related to the investigation of Russian interference in the 2016 election.

b. Did you work or advise on anything related to the Justice Department's opioids initiatives?

Yes. For example, in October 2018, Brian A. Benczkowski, the Assistant Attorney General of the Criminal Division, announced the creation of the Appalachian Regional Prescription Opioid (ARPO) Strike Force. The ARPO Strike Force is a joint effort with 10 U.S. Attorney's Offices, the Department of Health and Human Services, the Drug Enforcement Administration, the Federal Bureau of Investigation, and state law enforcement to combat the opioid epidemic in the Appalachian region and surrounding areas. The mission of the ARPO Strike Force is to identify and investigate health care fraud schemes, and to effectively and efficiently prosecute medical professionals and others involved in the illegal prescription and distribution of opioids. Thus far, 73 defendants, including 64 medical professionals, have been charged criminally involving the alleged illegal distribution of approximately 50 million controlled substance pills. To date, at least 25 defendants either have pled guilty or been found guilty following a jury trial.

Additionally, in June 2018, while I was serving as the Acting Assistant Attorney General of the Criminal Division, the Division's Fraud Section's Health Care Fraud Unit led the 2018 National Health Care Fraud and Opioid Takedown. This was the single largest health care fraud law enforcement operation in history. The Takedown resulted in charges against 601 individuals, including 165 doctors, nurses, and other licensed medical professionals, involving approximately \$2 billion in alleged fraudulent billing. Of the 601 individuals charged, 162 defendants, including 32 doctors, were charged in cases involving the alleged illegal distribution of opioids.

c. Have you worked or advised on any gun control measures?

Yes. I participated in discussions to formulate legislative and regulatory proposals to address the problem of mass shootings in the United States.

d. Have you worked or advised on the Administration's response to mass shootings?

Yes. I participated in discussions to formulate legislative and regulatory proposals to address the problem of mass shootings in the United States.

e. Have you worked or advised on the Administration's policy of separating families at the border?

No.

f. Have you worked or advised on efforts to limit the number of asylum seekers or refugees permitted to enter the country?

No.

g. Have you worked or advised on funding options for building a wall along the border between the United States and Mexico?

No.

h. Have you worked or advised on the Administration's rules or policies restricting asylum for people entering through the Southern border?

No.

i. Have you worked or advised on the Administration's public charge rule?

No.

j. Have you worked or advised on the creation or implementation of the Administration's Migrant Protection Protocols policy?

No.

k. Have you worked or advised on any potential safe-third party country agreements?

No.

l. Have you worked or advised on the creation or implementation of the Administration's rule to expand the scope of expedited removal?

No.

m. Have you worked or advised on the Department's charging and sentencing policy instructing prosecutors to charge and pursue "the most serious, readily provable offense," announced May 12, 2017?

No.

n. Have you worked on the Department's revised policy on marijuana enforcement, announced January 4, 2018?

While I was not involved in drafting or consulting on the policy announced by former Attorney General Jeff Sessions on January 4, 2018, I recall being present at one meeting at the Department of Justice at which possible changes to the Department's then-existing marijuana enforcement policy were discussed.

4. 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 a lower court to depart from Supreme Court precedent. A lower court must always fully and faithfully follow precedent from the Supreme Court.

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 federal district judge must rigorously follow all applicable Supreme Court precedents, regardless of that judge's personal views or opinions. A district judge would be in a position to author a concurrence or dissent if the judge is sitting by designation on a court of appeals or on a specially constituted three-judge panel of the district. In limited situations, it may be appropriate for a judge to note potential conflicts or inconsistencies in a particular legal doctrine so as to invite clarification or explanation from the Supreme Court.

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

A decision from a federal judge lacks "binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). Federal Rules of Civil Procedure 59(e) and 60 provide the standards under which a district court may reconsider a prior ruling.

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

The question of when it is appropriate for the Supreme Court to overturn its own precedent is one for the consideration and purview of the Supreme Court only, as all inferior courts are required to fully and faithfully apply all Supreme Court precedents. I am aware that the Supreme Court has discussed factors it may consider in exercising its authority to overturn its own prior precedent. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). If confirmed, I will fully and faithfully apply all Supreme Court precedents.

5. 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 Supreme Court precedent and binding on all lower courts. If confirmed, I will fully and faithfully apply the holding in *Roe*.

b. Is it settled law?

Yes.

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

Yes.

7. 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?

As a nominee to be a federal district judge, I believe it would be inappropriate for me to opine on the correctness of Supreme Court precedent or the legal reasoning of an opinion authored by a Justice of the Supreme Court. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply *District of Columbia v. Heller*, 554 U.S. 570 (2008), as well as all other applicable precedents from the Supreme Court and the Second Circuit.

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

In *Heller*, the Supreme Court stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited,” and that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arm.” *Heller*, 554 U.S. at 626-627.

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

I do not believe it is appropriate for a nominee for a district judgeship to opine on whether a Supreme Court's decision has followed one or more of the Court's earlier decisions. I note, however, that the Supreme Court in *Heller* stated that "[w]e conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." *Heller*, 554 U.S. at 625. If confirmed, I will fully and faithfully apply all Supreme Court precedents, including *Heller*.

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

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

In *Citizens United v. Federal Election Commission*, the Supreme Court "recognized that First Amendment protection extends to corporations," and further held that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" 558 U.S. 310, 342 (2010) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, including *Citizens United*.

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

As a nominee for a federal judgeship, I do not believe it is appropriate for me to comment on my personal agreement with *Citizens United* or any other Supreme Court precedent. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, including *Citizens United*.

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

While the decision did not reach the First Amendment's free exercise clause, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707-08 (2014) held that the Religious Freedom Restoration Act applies to closely-held corporations. *Hobby Lobby* is Supreme Court precedent that, if confirmed, I will fully and faithfully apply. I do not believe it is appropriate for me to comment further on this issue, because it could be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

9. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The relevant provisions of the Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The First Amendment also restricts the power of the government to legislate in certain respects, providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend I. Both of these constitutional amendments enshrine and protect important liberties enjoyed in the United States. If confirmed, I will fully and faithfully apply the Constitution and all Supreme Court and Second Circuit precedents. As a judicial nominee, it would be inappropriate for me to otherwise comment on this issue, as it may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

10. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

The Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) that state laws prohibiting interracial marriage violate the Equal Protection Clause. Please also see my response to Question 9.

11. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

The Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), that state laws prohibiting interracial marriage violate the Equal Protection Clause. Please also see my response to Question 9.

12. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

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

I was not aware of the website page quoted in Question 12. I cannot speak to its meaning as I was not the author, nor have I ever heard a discussion of the quoted contents of the

page.

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

Please see my response to Question 12(a).

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

Please see my response to Question 12(a).

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

I have not had any contact or communications with any senior officials of the Federalist Society or anyone in the national office of the Federalist Society regarding my possible nomination. I was first contacted about interviewing for a federal judgeship in May 2018. Since then, I have spoken with friends and colleagues about the process, including meetings and discussions with lawyers at the Department of Justice and at the White House Counsel’s Office in relation to my nomination. I understand that some of those individuals are members of the Federalist Society.

e. Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No.

f. Why did you decide to join the Federalist Society in 2017, more than 15 years after you graduated from law school?

Since my graduation from law school, I worked in New York City until August 2017, first clerking for federal judges and then in the United States Attorney’s Office for the Southern District of New York. During those years, I had limited visibility into the Federalist Society in my legal circles. I moved to Washington, D.C. in late August 2017 to serve as the Principal Deputy Assistant Attorney General of the Criminal Division. Upon arriving in Washington, D.C., I began to have more exposure to the activities of the Federalist Society, and thought I would find of interest events hosted by the Federalist Society in the Washington, D.C. area. It is my understanding that the Federalist Society presents an opportunity for discussion of legal questions of importance, such as the role of judges and individual freedoms, typically featuring a variety of perspectives and viewpoints.

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct].” (*Draft Ethics Opinion No. 117: Judges’ Involvement with the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

g. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

While I have heard a reference to a draft ethics opinion on this issue, including at a prior confirmation hearing, I am not otherwise aware of the draft opinion nor have I read it.

h. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

Canon 4 of the Code of Conduct for United States Judges states that “[a] judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and government activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.” Code of Conduct for United States Judges, Canon 4. The Commentary to Canon 4 states that “[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law.” Canon 4 further states that “a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, lead to frequent disqualification, or violate the limitations set forth below.” Code of Conduct for United States Judges, Commentary to Canon 4. In addition, Committee on Codes of Conduct Advisory Opinion 116 sets forth a non-exhaustive list of factors that a judge should consider “[i]n assessing the propriety of participation in a conference or seminar (either as a lecturer, panel member, or attendee),” such as “whether it engages in education, lobbying, or outreach to members of Congress, key congressional staffers, or policymakers in the executive branch”; “whether it is actively involved in litigation in the state or federal courts, including the filing of amicus briefs, participating in moot courts or boards to prepare candidates or advocates”; and “whether it advocates for specific outcomes on legal or political issues.” Committee on Codes of Conduct Advisory Opinion No. 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.

If confirmed, I will consider and apply these standards, as well as consult and consider any other applicable Canons of the Code of Conduct for United States Judges, any rules for the federal judiciary, and other guidance, to determine whether to be a member of the

Federalist Society or any other organization.

13. 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?

Not that I recall.

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

No.

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

As a judicial nominee, I do not think it would be appropriate to offer my personal views on any area of the law, other than to affirm my commitment to apply the law as set by the Constitution, statute, or judicial precedent. If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and the Second Circuit concerning administrative law and any other area of the law.

14. Do you believe that human activity is contributing to or causing climate change?

I have not studied this issue. Additionally, I believe it would be inappropriate for me, as a nominee for a federal judgeship, to comment on a political issue, particularly one that is the subject of political discussion or debate or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

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

If confirmed, I will follow and apply Supreme Court and Second Circuit precedents governing the consideration of legislative history to construe a statute. The Supreme Court has made clear that if the text of a statute is clear, the inquiry ends there. *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Supreme Court similarly has instructed that legislative history should be considered only if the statutory text is ambiguous. *See, e.g., id.*

(“Even those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’” (citations omitted)); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992). The Supreme Court further has cautioned that “[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms,” noting that “[n]ot all extrinsic materials are reliable sources of insight into legislative understandings.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Court additionally observed that “legislative history is itself often murky, ambiguous, and contradictory,” and that “judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.” *Id.*

16. 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.

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

I was sent these questions by the Department of Justice’s Office of Legal Policy on Wednesday, March 11, 2020. I reviewed some of the materials cited in the questions, conducted some limited research, and drafted my responses. The Office of Legal Policy made some formatting edits to the responses, which I reviewed and approved. I then authorized the filing of these responses.

**Written Questions for John Cronan
Submitted by Senator Patrick Leahy
March 11, 2020**

1. Over the years, you have made a number of comments insinuating that, generally, immigrants are members of gangs and savages. You have implied that lax, in your view, immigration enforcement leads to “replenish[ment]” of gang members. Your comments included that “[w]e want these savages [MS-13] incapacitated before they can try to cross over our borders.

a) Do you believe that all immigrants are gang members, or gang members in waiting?

No. I believe my quoted comments were made during remarks at the White House on February 6, 2018, and during remarks with President Donald J. Trump at a roundtable discussion on immigration in Bethpage, New York, on May 23, 2018. On both occasions, my comments were specifically referring to members of the murderous transnational criminal organization, MS-13. As I discussed on both occasions, MS-13 is a violent and ruthless gang, which boasts the motto, “Mata, Viola, Controla,” or “Kill, Rape, Control,” and is terrorizing communities across the United States. At no point did I even remotely suggest that all immigrants are gang members or gang members in waiting, nor do I believe that to be the case.

b) Do you believe that immigrants are more prone to criminal behavior than others in our country?

No. Please also see my response to Question 1(a).

c) How can you reassure us that you will treat all parties before your court equally and with humanity, regardless of immigration status?

Throughout my over 17-year career in public service with the Department of Justice, I have been steadfastly dedicated to promoting the rule of law, ensuring justice and due process, and treating all colleagues, defendants, and attorney adversaries fairly, equally, and with dignity. As a prosecutor, my career in the Department has been devoted to pursuing just and appropriate results under the law and the facts. If confirmed, I will faithfully and impartially decide cases without bias, prejudicial, or regard to the litigant before me, consistent with the judicial oath I would take and with Canon 1 of the Conduct of Conduct for United States Judges.

2. In 2001, you argued that it is “easy” to “forecast whether [a prison inmate] will become a sexual aggressor or victim” by profiling him. You also stated that “black inmates are most likely to become the sexual aggressors.” As a judge, you will be responsible for sentencing decisions and for evaluating the risks and needs of all defendants before you with equal treatment.

a) Do you still believe it is “easy” to forecast the risk offenders present of future sexual misconduct based factors on socio-economic status and racial or physical characteristics?

In the cited article, my co-author and I discussed a very troubling issue, namely, multiple studies and reports suggesting that inmates were being victimized by sexual abuse at an alarming rate. My co-author and I relied upon various studies, conducted by others, that identified certain factors that reflect the incidence of sexual abuse or victimization. We surveyed and assembled those studies and the various factors identified in them, and suggested that an understanding of the dynamics of prison rape and the relevant factors identified in those studies could allow prison officials to assess which inmates are more likely to be violent and which are more likely to be victimized, and take preventive measures accordingly.

My co-author and I did not conduct independent research on our own concerning the incidence of prison sexual abuse, nor did we conduct any inmate interviews or otherwise perform our own studies on what factors inform the likelihood of sexual assault in prison. In retrospect, and having re-read the article recently, I believe that my co-author and I overly relied upon studies conducted by others.

b) Do you still believe that “black inmates are most likely to become the sexual aggressors?”

No. This quotation referred to a study conducted by Wayne S. Wooden and Jay Parker, not to any studies that my co-author and I conducted or any conclusions that we independently reached. *See* Way S. Wooden & Jay Parker, *Men Behind Bars: Sexual Exploitation in Prison 2* (1982). My co-author and I were discussing Wooden and Parker’s study of the California penal system, including their findings as to the role of race in prison sexual assaults. As noted in my response to Question 2(a), in this article, my co-author and I surveyed various studies, conducted by others, that examined the dynamics of prison sexual assault and the factors that indicate the likelihood of sexual assault in prison.

To be clear, to the extent any aspect of the article may be read as suggesting that certain individuals are more likely to engage in sexual assault in prison—or any other criminal activity, for that matter—based on their race, that certainly was not my position then, nor is it my view today. I would find such a suggestion patently offensive. My co-author and I were attempting to digest and summarize various studies—conducted by others—that discussed the subculture that exists in prison and the factors within that subculture that researchers found inform the likelihood of sexual assault in prison.

c) How can you reassure us that you will evaluate the defendants before you based on the facts of their case and not the broad generalizations you used to profile inmates in this article?

Initially, I note that in this article, my co-author and I relied upon studies conducted by others that examined the dynamics of sexual assault in prison, not our own independent studies or conclusions. Moreover, throughout my over 17-year career in public service with the Department of Justice, I have been steadfastly dedicated to promoting the rule of law, ensuring justice and due process, and treating all colleagues, defendants, and attorney adversaries fairly, equally, and with dignity. As a prosecutor, my career in the Department has been devoted to pursuing just and appropriate results under the law and the facts. If confirmed, I will faithfully and impartially decide cases without bias or regard to the litigant before me, consistent with the judicial oath I would take and with Canon 1 of the Conduct of Conduct for United States Judges.

3. You vocally supported Brian Benczkowski when he was nominated to lead the Criminal Division at the Department of Justice in 2018, stating that he was a “truly phenomenal nominee,” when he had zero prosecutorial experience. After he was confirmed, Mr. Benczkowski met with Rudy Giuliani regarding one of Mr. Giuliani’s clients while the U.S. Attorney for the Southern District of New York was investigating Mr. Giuliani’s associates.

a) **Did you attend this meeting with Mr. Benczkowski and Mr. Giuliani?**

Yes.

b) **At the time, were you aware of the ongoing SDNY investigation into Mr. Giuliani’s associates?**

No.

c) **Do you think it was appropriate for Mr. Benczkowski to take this meeting given his position as Chief of the Criminal Division at DOJ?**

Yes.

4. In 2000, you proposed in a law review article that the genetic profiles of all persons in the U.S. should be collected at birth or upon entry into the country and input into a federal DNA database. You described this database as providing “unprecedented law enforcement benefits” while only presenting a “minimum” intrusion of privacy.

a) **Do you believe that the U.S. Constitution guarantees a right to privacy?**

Yes. The Supreme Court has recognized a right to privacy, going back to *Griswold v. Connecticut*, 381 U.S. 479 (1965) and decisions that followed. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Griswold* and other decisions recognizing a right to privacy.

b) **If not, please explain why not.**

Please see my response to Question 4(a).

c) If yes, please explain why mandatory collection of genetic profiles of all people who are born or enter the U.S. is only a “minimal” privacy intrusion.

I do not today believe that mandatory collection of genetic profiles of all people at birth or upon entry into the country would be a “minimal” privacy intrusion, nor do I support such a proposal. This article began as a paper I wrote for a class at Yale Law School called “Convicting the Innocent,” which examined why individuals are wrongfully convicted. The purpose of that article was to present a proposal to reduce wrongful convictions, increase law enforcement efficiency and effectiveness, promote deterrence, and reduce law enforcement costs. In addition, I wrote this article at a time when I thought I might be interested in pursuing a career in academia and, as such, was thinking about proposals that were original and might be thought-provoking.

I also wrote this article before having practiced a day of law. Since then, I have practiced for nearly 20 years, and for most of those years in the criminal justice system. From that experience, I have a far more refined and matured understanding of the Fourth Amendment, the limited exceptions to the Fourth Amendment warrant requirement, privacy issues, and the potential abuses and misuses of DNA information than I had when I was a law student in my early 20s. I now realize that the proposal in my article would not be workable, and, more importantly, would come with seriously troubling privacy implications and significant constitutional problems.

d) Do you still believe that the U.S. should collect genetic data from all persons born in or entering the country for a nationwide database?

No. Please also see my response to Question 4(c).

5. In a 2002 law review article, you proposed that the existing exception to protected free speech under *Brandenburg* – speech that is directed at inciting imminent lawless action and is likely to incite such action – should be broadened for speech on the internet. Your proposal for a new “Internet incitement standard” would have the effect of weakening existing First Amendment protections for speech on the internet.

a) Can you articulate why you think there should be a broader exception to protected free speech on the internet? How do you distinguish between internet speech from other forms of expression, such as flyers or pamphlets, which can also be distributed widely and rapidly?

Like the article discussed in my response to Question 4, I also wrote this article when I was in law school and thought I might be interested pursuing in a career in academia. I therefore was thinking about ideas that were original and might be thought-provoking. This article was written around the time of the infancy of the Internet, and proposed a modification of the standard for incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to adapt to the emerging Internet. The *Brandenburg* standard considers whether (1) the speaker subjectively intended incitement, (2) in context, the words were likely to

produce imminent lawless action, and (3) the words used by the speaker objectively encouraged and urged incitement. My article proposed a modification of this standard for potentially inciting communications over the Internet, to take into account that there often is time delay between when words are conveyed over the Internet and when they are received, and the audience tends to be more uncertain.

The modification proposed in my article has not been adopted and is not the law; *Brandenburg* remains the prevailing Supreme Court precedent on the incitement standard. If confirmed, I will fully and faithfully apply the *Brandenburg* standard, irrespective of any proposals that I wrote approximately 20 years ago as a law student.

b) As a judge, would you apply the governing *Brandenburg* standard regardless of whether speech is on the internet or not?

Yes. *Brandenburg* remains the prevailing Supreme Court precedent on the incitement standard, and if confirmed, I will fully and faithfully apply *Brandenburg* and any other precedents from the Supreme Court and the Second Circuit.

6. 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?**

King v. Burwell, 135 S. Ct. 2480 (2015) is binding Supreme Court precedent and, if confirmed, I will fully and faithfully apply that precedent. The Supreme Court has instructed that, in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I will fully and faithfully apply all precedents from the Supreme Court and Second Circuit concerning the methods for statutory interpretation.

7. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

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

The independence of our federal judiciary is a fundamental feature of our constitutional system and separation of powers. Constitutional provisions, such as life tenure and

compensation protections in Article III, Section 1, ensure that a judge will not be affected by political pressures and will follow the law, without repercussion. Canon 1 of the Code of Conduct for United States Judges similarly notes that “[a]n independent and honorable judiciary is indispensable to justice in our society.” Code of Conduct for United States Judges, Canon 1. As a judicial nominee, I believe it would be inappropriate for me to discuss any comments that are the subject of political discussion or debate. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(A).

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

Please see my response to Question 7(a).

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

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

The Supreme Court has held that courts can review decisions of the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Because the scope of constitutional provisions and their applications to judicial review of national security decisions may be the subject of pending or impending litigation, I do not think it would be appropriate for me to comment further. *See* Code of Conduct for United States Judges, Canons 2(a), 3(A)(6).

9. 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?

As a nominee for a federal judgeship, I think it would be inappropriate for me to opine on a hypothetical scenario, particularly as to comments that are the subject of political discussion or debate or as to a scenario that may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(A). If confirmed, and such a scenario were to come before me, I will carefully examine the relevant authorities on the issue and fully and faithfully apply all applicable Supreme Court and Second Circuit precedents.

10. 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?

The Constitution grants Congress the power to declare war, and grants the President the powers to conduct military, national security, and foreign affairs. In *Hamdan v. Rumsfeld*, the Supreme Court stated that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” 548 U.S. 557, 593 n.23 (2006) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). If confirmed, I will fully and faithfully following any applicable precedents from the Supreme Court and the Second Circuit. As a nominee for a federal judgeship, I do not think it is appropriate to comment further on an abstract or hypothetical scenario, which may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

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?

Please see my response to Question 10(a).

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 response to Question 10(a).

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

If a federal court is presented with an issue that requires the balancing of the President’s expertise in national security matters with the judicial branch’s constitutional duty to prevent abuse of power, the court should apply controlling precedents from any superior courts, including the Supreme Court. Further specifics as to that balancing would depend on the facts presented to the court and the controlling legal standards.

12. 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 the Equal Protection Clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an “exceedingly persuasive justification” for gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *see also Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). If confirmed, I will fully and faithfully follow all Supreme Court and Second Circuit precedents in this area.

13. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”

I am not familiar with that characterization. If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on the Voting Rights Act.

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

Article I, Section 9, Clause 8 states: “No Title of Nobility shall be granted by the United States: And no Person holding any office of Profit or Trust under them, shall, without Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

15. 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?

A federal district judge relies on the parties to place before the court the appropriate factual record, consistent with the Federal Rules of Evidence, and the Court of Appeals considers the record developed below pursuant to established standards of review. If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, including *Shelby County, Ala v. Holder*, 570 U.S. 529 (2013). As a nominee for a federal judgeship, I do not think it is appropriate to comment further on an abstract and hypothetical scenario, which may be the subject of pending or impending litigation. *See Code of Conduct for United States Judges*, Canons 2(A), 3(A)(6).

16. 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 Thirteenth, Fourteenth, and Fifteenth Amendments reflect a commitment to counteract racial discrimination and provide that Congress has the power to enforce the Amendments “by appropriate legislation.” U.S. Const. amend XIII, § 2; U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2.

17. 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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court established a fundamental right to personal autonomy. If confirmed, I would fully and faithfully apply all precedent of the Supreme Court and Second Circuit, including *Lawrence*.

18. 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?

The Supreme Court has often explained and affirmed the importance of lower courts adhering to the doctrine of *stare decisis*. See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (“*Stare decisis* ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))); *Hilton v. South Carolina Public Ry. Comm’n*, 502 U.S. 197, 202 (1991) (“the doctrine of *stare decisis* is of fundamental importance to the rule of law” (quoting *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987))). Lower courts must always follow binding precedent established by their superior courts. If confirmed, I will fully and faithfully follow all precedents of the Supreme Court and the Second Circuit.

19. 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.

From practicing law for almost 20 years, I appreciate the importance of impartiality—including the appearance of impartiality—for federal judges, to ensure public confidence in our courts. If confirmed, I will scrupulously consult and apply the relevant statute, 28 U.S.C. § 455, and the Code of Conduct for United States Judges, as well as any other applicable precedent, rules, or guidance. As necessary and appropriate, I also will consult with colleagues and ethics officials within the court to discuss potential recusal issues. While recusal is a case-by-case determination, I will recuse myself from any case that I had participated in as a counsel or advisor or otherwise supervised while in the Department of Justice, either at the Criminal Division or at the United States Attorney’s Office for the Southern District of New York.

20. 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.”

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

If confirmed, I would fully and faithfully apply all Supreme Court precedent, including *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). As a judicial nominee, I do not think it would be appropriate for me to assign relative weight or importance to a particular footnote in that opinion or otherwise to comment on it.

21. 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?

Yes.

22. Do you believe there are any discernible limits on a president’s pardon power? Can a president pardon himself?

The Constitution states that the President “shall have the Power to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment.” U.S. Const. art. III, § 2. If confirmed and this issue were to come before me, I will research the subject and fully and faithfully apply all applicable Supreme Court and Second Circuit precedents regarding Presidential powers. As a nominee for a federal judgeship, I do not think it would be appropriate for me to comment further on abstract and hypothetical scenarios. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

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

The Constitution confers powers on the federal government, including the power to regulate interstate and international commerce under Article I, Section 8, Clause 3, and the power to enforce by appropriate legislation the provisions of the Fourteenth Amendment. The Supreme Court has issued a number of decisions addressing these powers. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 of the Fourteenth Amendment). If confirmed, I will fully and faithfully apply Supreme Court and Second Circuit precedents concerning the scope of congressional power, including those addressing the Commerce Clause and Section 5 of the Fourteenth Amendment.

24. 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?

The Supreme Court’s decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) is binding precedent that, if confirmed, I will fully and faithfully apply, along with other applicable Supreme Court or Second Circuit precedents. As a nominee for a federal judgeship, I think it would be inappropriate for me to comment further on any particular Supreme Court precedent or opinion. I additionally think that it would be inappropriate for me to comment on this issue, because the issue may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(A).

25. 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.

The Supreme Court has held in *Whole Woman's Health v. Hellerstedt* that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Whole Woman's Health*. As a nominee for a federal judgeship, I do not think it is appropriate for me to comment further on abstract and hypothetical legislative examples, which may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

26. 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 held that “[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotations omitted). The Supreme Court explained in *Pearson* that “[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Id.* If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, including precedents applicable to the doctrine of qualified immunity. As a nominee for a federal judgeship, I do not believe it is appropriate for me to comment further on judicial decisions in this area.

27. 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?

The Fourth Amendment articulates a fundamental and important guarantee for the people of the United States “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The Supreme Court explained in *Carpenter v. United States* that new technologies in the digital era can

“risk[] Government encroachment of the sort the Framers, ‘after consulting the lessons of history,’ drafted the Fourth Amendment to prevent.” 138 S. Ct. 2206, 2223 (2018) (citation omitted); *see also Riley v. California*, 573 U.S. 373, 402 (2014) (cell phones). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, including precedents on data collection and the Fourth Amendment. As a nominee for a federal judgeship, I do not believe it is appropriate for me to comment further on abstract and hypothetical scenarios, which may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6).

28. 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.

a) 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 studied this issue in depth, but if confirmed and presented with this issue, I would fully and faithfully apply all Supreme Court and Second Circuit precedents regarding presidential power in this respect. In addition, as a nominee for a federal judgeship, I do not believe it is appropriate for me to comment further on scenarios, which may be the subject of political discussion or debate or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

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

The independence of our federal judiciary is a fundamental feature of our constitutional system and separation of powers. Constitutional provisions, such as life tenure and compensation protections in Article III, Section 1, ensure that a judge will not be affected by political pressures and will follow the law, without repercussion. Canon 1 of the Code of Conduct for United States Judges similarly notes that “[a]n independent and honorable judiciary is indispensable to justice in our society.” Code of Conduct for United States Judges, Canon 1. As a judicial nominee, I believe it would be inappropriate for me to discuss any comments that are the subject of political debate. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

**Nomination of John Peter Cronan, to be United States District Court Judge for the
Southern District of New York
Questions for the Record
Submitted March 11, 2020**

QUESTIONS FROM SENATOR COONS

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

If confirmed, I will fully and faithfully apply the framework set forth by the Supreme Court addressing whether a right is fundamental and protected under the Fourth Amendment, including but not limited to *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In particular, I would consider whether the asserted right is, “objectively, ‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’” such that ‘neither liberty nor justice would exist if they were sacrificed.” *Glucksberg*, 521 U.S. at 720-71 (internal citations omitted).

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

Yes, consistent with Supreme Court and Second Circuit precedent.

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 in *Glucksberg* explained that the analysis as to whether a right is deeply rooted in our nation’s history and tradition entails “examining our Nation’s history, legal traditions, and practices.” *Glucksberg*, 521 U.S. at 710. If confirmed, I will follow guidance from the Supreme Court in *Glucksberg* and its progeny, including precedents from the Supreme Court and the Second Circuit, and consider historical practice under the common law, the practice in the American colonies, historical state statutes, judicial decisions, and long-established traditions, *see, e.g., id.* at 710-20.

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

Yes. If confirmed, I will fully and faithfully apply all precedents from the Supreme Court and Second Circuit. In the absence of binding precedent, I would consider persuasive authority from other circuit courts of appeals and district courts. Please also see my response to Question 1(b).

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

Yes, I will consider whether a similar right has been recognized by the Supreme Court or the Second Circuit. In the absence of binding precedent, I also would consider as persuasive authority whether a similar right has been considered from other circuit courts or district courts. Please also see my responses to Questions 1(b) and 1(c).

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. Both *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Lawrence v. Texas*, 539 U.S. 558 (2003) are binding precedents of the Supreme Court. If confirmed, I would fully and faithfully apply all precedents of the Supreme Court and the Second Circuit, including *Casey* and *Lawrence*.

f. What other factors would you consider?

If confirmed, I will consider any other factors that have been found applicable by the Supreme Court or the Second Circuit.

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an “exceedingly persuasive justification” for gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996); see also *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). If confirmed, I will fully and faithfully follow all Supreme Court and Second Circuit precedents in this area.

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?

While there may be a debate as to the intent of those who passed the Fourteenth Amendment, the Supreme Court precedent on the issue is clear: the Fourteenth Amendment applies to both race-based classifications and gender-based classifications. If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Second Circuit on the Fourteenth Amendment.

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 issue raised in the *Virginia* litigation did not reach the Supreme Court until 1996.

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*, the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry “on the same terms as accorded to couples of the opposite sex.” 135 S. Ct. 2584, 2607 (2015). To the extent this question is seeking my view on an issue that has not been resolved by the Supreme Court, as a judicial nominee, I think it would be inappropriate for me to comment on a subject that may be pending or impending in litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents, 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?

It is my understanding that the Supreme Court has not reached this issue. As a judicial nominee, I do not think it would be appropriate to discuss this issue, as it may be the subject of pending or impending litigation. See Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on the Fourteenth Amendment and concerning the treatment of transgender people.

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 protects a woman’s right to use contraceptives. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Second Circuit, including *Griswold* and *Eisenstadt*.

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 in multiple cases that there is a constitutional right to privacy that protects a woman’s right to an abortion. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I would

fully and faithfully apply all precedents of the Supreme Court and Second Circuit, including *Roe*, *Casey*, and *Whole Woman's Health*.

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 the constitutional right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Second Circuit, including *Obergefell* and *Lawrence*.

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, 3(a), and 3(b).

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?

In the event that Supreme Court or the Court of Appeals precedent instruct lower courts to consider evidence that sheds light on our changing understanding of society, lower court judges must follow that precedent and act accordingly. If confirmed, I will fully and faithfully apply and follow Supreme Court and Second Circuit precedents on this issue, including *Virginia* and *Obergefell*.

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

Whether sociology, scientific evidence, or data would play a role in a judicial proceeding would depend on the nature of the particular issue arising in the case. A district court judge presiding over a trial often encounters issues involving the admission of scientific evidence. The Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) that a district judge performs a gatekeeper function to determine whether the proffered expert evidence is scientifically valid and reliable and relevant to

the case at hand. If confirmed, I will fully and faithfully apply *Daubert*, other precedents from the Supreme Court and Second Circuit on the admission of expert testimony and scientific evidence, and Federal Rules of Evidence 702 and 703.

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

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

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) is binding Supreme Court precedent that I would fully and faithfully apply. In addition to holding in *Obergefell* that same-sex couples have a right to marry, the Supreme Court has held in *Lawrence v. Texas*, 539 U.S. 558 (2003) that same-sex couples have a right of privacy. The Supreme Court further has more recently stated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and the Second Circuit, including *Obergefell*, *Lawrence*, and *Masterpiece Cakeshop*.

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

Please see my responses to Questions 1 and 5(a).

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

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

I am aware that there is a debate among legal scholars as to whether the holding in *Brown v. Board of Education*, 347 U.S. 483 (1954) is consistent with an original meaning of the

Fourteenth Amendment. The Supreme Court has made clear, however, that racial discrimination is unconstitutional. I believe that *Brown* was correctly decided and corrected a grave injustice in our country. If confirmed, I will fully and faithfully apply all precedents of the Supreme Court and Second Circuit on racial discrimination, including *Brown* and its progeny.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Mar. 4, 2020).

I have not read this article and I am not familiar with the argument. If confirmed, I would fully and faithfully apply all precedents of the Supreme Court and Second Circuit concerning free speech, equal protection, and due process, regardless of any academic debates surrounding the issue.

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, the prevailing view of the Supreme Court or the Second Circuit on the meaning of a constitutional provision would be dispositive. The Supreme Court has examined the Constitution’s text from the perspective of the original understanding in interpreting a provision. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). However, if the Supreme Court determined the meaning of a constitutional provision by applying another mode of interpretation, that decision would be binding on me as a district judge. If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent, regardless of the method of constitutional interpretation employed.

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?

If confirmed, I would fully and faithfully apply all relevant precedents from the Supreme Court and the Second Circuit instructing on the appropriate sources to consider in discerning the contours of a constitutional provision. Please also see my response to Question 6(c).

7. In a 2000 law review article titled “The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks,” you proposed “catalog[ing] the genetic profiles of all persons in

the country” by collecting DNA “at birth and upon entry into the country” in order to build complete DNA databanks. You asserted that this proposal would “spur unprecedented law enforcement benefits” and present only an “extremely minimal” privacy intrusion.

a. How did you select your topic for this article?

This article began as a paper I wrote for a class at Yale Law School called “Convicting the Innocent,” which examined why individuals are wrongfully convicted. The purpose of that article was to present a proposal that might reduce wrongful convictions, increase law enforcement efficiency and effectiveness, promote deterrence, and decrease law enforcement costs. In addition, I wrote this article at a time when I thought I might be interested in pursuing a career in academia and, as such, was thinking about proposals that were original and might be thought-provoking in the academic community.

As I mentioned at my hearing, I wrote this article before having practiced a day of law. Since then, I have practiced for nearly 20 years, and for most of those years in the criminal justice system. From that experience, I have a far more refined and matured understanding of the Fourth Amendment, the limited exceptions to the warrant requirement, privacy issues, and the potential for abuse and misuse of DNA information than I had when I was a law student in my early 20s. I now realize that the proposal in my article would not be workable, and, more importantly, would come with seriously troubling privacy implications and significant constitutional problems.

b. You testified during your hearing that now, “having spent a long time actually litigating cases . . . in the criminal justice system,” your “understanding of [Fourth Amendment] issues is . . . more mature and refined.” Please explain how your understanding of Fourth Amendment issues has evolved and what specific experiences prompted that evolution.

As a federal prosecutor for many years, I have come to appreciate the importance of the rights recognized in the Fourth Amendment. The Fourth Amendment ensures that people are “secure in their persons, houses, papers, and effects against unreasonable searches and seizures” and further imposes the probable cause requirement for the issuance of warrants. U.S. Const. amend. IV. It is essential that a person’s privacy rights are respected and protected, and law enforcement only intrudes upon those privacy rights through constitutional searches when there is probable cause or an exception to probable cause, such as if the individual provides knowing and voluntary consent to the search. As a prosecutor and a supervisor, I often litigated or oversaw the litigation of Fourth Amendment issues. I also regularly gave counsel to law enforcement officers on the Fourth Amendment, ensuring that the officers fully appreciated the contours of the constitutional right to be free from unreasonable searches and seizures and the demands of probable cause. I provided that legal advice to try to ensure that the officers did not violate someone’s constitutional rights and that any evidence collected was collected constitutionally and in accordance with the law. In sum, from my career as a prosecutor, I have been fortunate to see firsthand the significance of the protections of the Fourth Amendment in a way that I was not able to appreciate as a law student.

c. You stated in your hearing that you now believe that the proposal your article suggested would be “unworkable” and “extremely problematic.” Please explain what you now see as unworkable and problematic about the proposal.

Now 20 years removed from drafting that paper, I am better able to appreciate the serious privacy issues attendant to the collection of a person’s DNA information, as well as the very real danger of misuse and abuse if that DNA information lands in the wrong hands or is used improperly. For related reasons, I also have realized that I significantly underestimated the extent of the privacy intrusion that occurs when a person’s DNA is collected and maintained in a database. In addition, having gained extensive experience as a prosecutor litigating Fourth Amendment issues, and as a supervisor overseeing the litigation of Fourth Amendment issues, I now appreciate that the “special needs” analysis, which I cited in the article, is unlikely to provide a constitutional justification for the warrantless searches, particularly in light of the significant privacy intrusions. Lastly, logistically, I believe that the database would never be constructed in the first place, especially given the very serious constitutional flaws with the proposal.

d. Please describe the legal standard you would apply to determine whether law enforcement’s collection of evidence violated the Fourth Amendment rights of an individual.

The specific Fourth Amendment standard would depend on the circumstances of the collection of evidence. In most instances, however, the law enforcement officers would need to obtain a search warrant, which requires a showing of probable cause. *See* U.S. Const. amend IV; Fed. R. Crim. P. 41. In some limited instances, the Supreme Court has authorized warrantless searches, such as for consent, exigent circumstances, plain view, search incident to arrest, hot pursuit, and the automobile exception. If confirmed, I will fully and faithfully apply all precedents from the Supreme Court and the Second Circuit on the Fourth Amendment and Rule 41, including any precedents describing the probable cause standard and articulating any exceptions to the warrant requirement.

8. In a 2001 law review article titled “Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for ‘Deliberate Indifference,’” you asserted that because prison officials are intimately familiar with prison subculture, deliberate indifference could be established by a prison official’s knowledge of indicators of whether an inmate is likely to be an aggressor or a victim. You wrote that these indicators might include race, physical characteristics, socio-economic status, criminal history, and other factors, citing purported findings that “Black inmates are most likely to become the sexual aggressors” and “Black inmates also are the least likely to be victims of sexual assault.”

a. How did you select your topic for this article?

I originally wrote a piece with four other law students at Yale Law School, titled “Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most ‘Open’ Secret,” which was published in the *Yale Law and Policy Review* in 1999. In this piece,

we examined something we perceived to be high troubling, the incidence of male and female sexual misconduct, primarily at state institutions; the legal standards of “deliberate indifference” under *Farmer v. Brennan*, 511 U.S. 825 (1994) and qualified immunity; and successful and unsuccessful litigation brought by inmates. My recollection is that my co-authors and I were all editors on the *Yale Law and Policy Review* at the time, and we decided to write this article because we felt the incidence of prisoner sexual abuse was an important topic for discussion in our law journal.

The following summer, while I was a summer associate at a law firm in Washington, D.C., I worked closely with an associate at the law firm who happened to be working on a law review article on prison sexual abuse. The associate’s draft article was focused on the sexual abuse of male inmates by other male inmates, exploring the prison subculture and the dynamics of sexual assault in prison, and assessing that subculture with an eye on assisting the ability of prison staff to prevent sexual assault. When the associate learned that I had recently worked on an article concerning prisoner sexual abuse, the associate asked if I would be interesting in assisting in finalizing the article that he already had begun drafting.

b. What types of research did you perform when writing this article?

My co-author and I conducted legal research and reviewed prior studies and reports on prison sexual assault for the article. We did not conduct independent research on our own regarding the incidence of prison sexual abuse, nor did we conduct any inmate interviews or otherwise perform our own studies on what factors increase the likelihood that an inmate would engage in sexual assault or that an inmate would be victimized. My recollection is that we relied entirely on studies conducted by others, and we cited those studies throughout the article. In retrospect, and having re-read the article recently, I believe that my co-author and I overly relied upon studies conducted by others.

c. Do you still agree with the statements in this article?

I believe that it is important to take appropriate measures to prevent any crimes in prison—especially sexual assault—and that assailants should be prosecuted in appropriate circumstances. However, re-reading the article recently, I believe that my co-author and I overly relied upon studies conducted by others. As noted in my response to Question 8(b), we did not perform any independent research or studies on the incidence of prisoner sexual assault, or conduct any interviews of inmates.

In response to the implication of Question 8(d), to the extent any aspect of the article may be read as suggesting that certain individuals are more likely to engage in sexual assault in prison—or any other criminal activity for that matter—based on their race, that certainly was not my position then, nor is it my view today. To the contrary, I would find such a suggestion patently offensive. My co-author and I were attempting to digest and summarize various studies—conducted by others—that discussed the subculture that exists in prison and the factors within that subculture that those researchers found inform the likelihood of sexual assault in prison.

d. Please describe your understanding of what constitutes illegal racial profiling.

Racial profiling is abhorrent and has no place whatsoever in society. To the extent that this question suggests a perception that my co-author and I advocated for racial profiling in prison, that most certainly was not my intention in the article. It was not my opinion at the time we wrote the article that racial profiling in prison—or anywhere in society—is acceptable, and it definitely is not my opinion today. Please also see my response to Question 8(d).

9. During a 2018 roundtable on immigration, you discussed surging federal prosecutors to the border to prosecute immigration offenses, referring to MS-13 members, and stating, “[w]e want these savages incapacitated before they can try to cross over our borders.” Please explain what you meant by this statement.

The referenced comments were part of remarks I delivered at a roundtable discussion with President Donald J. Trump on immigration in Bethpage, New York, on May 23, 2018. My comments were specifically referring to members of the murderous transnational criminal organization, MS-13. As I discussed at the roundtable, MS-13 is a violent and ruthless gang, which boasts the motto, “Mata, Viola, Controla,” or “Kill, Rape, Control,” and is terrorizing communities across the United States. I discussed the high estimates of MS-13 members believed to be in the United States, including in Long Island. I additionally discussed the horrifying and unspeakable acts of MS-13 members to include murdering victims with machetes, chains, knives, bats, and firearms; gang-raping young girls and selling them for sex; and killing not just rival gang members but also fellow MS-13 members who are suspected of cooperating with law enforcement or who violated gang rules. I provided three examples of particularly heinous murders committed by MS-13 members, discussed the Department of Justice’s efforts to dismantle MS-13, and mentioned the Department’s work with law enforcement in Central America, which has led to thousands of arrests.

The quoted statement was made in that context. My point was to emphasize that, in light of this public safety threat and the tendency of MS-13 to replenish its ranks when gang members travel to the United States from El Salvador, it is important for the Department of Justice to work with our foreign partners to apprehend MS-13 members before they can arrive in the United States to commit unspeakable acts of murder and other violence.

10. During a press briefing in 2018, you referred to MS-13 as a “brutal gang of savages” that has “infiltrated our country.” You went on to say, “It’s not enough that federal and state authorities are enforcing the criminal laws. . . . We also have to make sure that MS-13 is not in a position to replenish its ranks by sending additional members or additional unaccompanied children into the United States who will later be recruited by MS-13 to be their murderers in a few years down the road.”

a. Please provide an estimate of the percentage of undocumented immigrants in the United States who are MS-13 members.

I do not have that information.

b. Please provide an estimate of the percentage of unaccompanied children crossing the border into the United States who are MS-13 members.

I do not have that information.

c. When you referred to the “fail[ure] to enforce immigration laws and allow for loopholes to exist” at the same press conference, what loopholes were you referring to?

The concern I was attempting to express at the February 6, 2018 White House Press Briefing related to the transnational nature of the MS-13 threat. I explained that MS-13 is based and operates in El Salvador, and largely directs its murderous mission from prisons in El Salvador. Because of that, merely enforcing our laws criminalizing violent crimes and gun offenses is not enough to combat the threat posed by MS-13. My point was that when the Government fails to enforce our lawful immigration statutes, it permits a murderous gang like MS-13 to more easily replenish its ranks by bringing additional gang members into the United States from El Salvador and elsewhere. Enforcement of the immigration laws is not among my responsibilities in the Criminal Division, aside from investigating and prosecuting migrant smuggling networks (please see my response to Question 10(d)). Representatives from the Department of Homeland Security spoke a roundtable earlier in the day about their concerns with immigration laws.

d. Please provide a complete list of immigration matters you have worked on during your service in the Trump administration.

As Acting Assistant Attorney General and Principal Deputy Assistant Attorney General of the Criminal Division, I played no role in any policy decisions of the Administration concerning immigration enforcement at the border, nor does the Criminal Division tend to prosecute immigration offenses at the border. The Criminal Division’s involvement in immigration offenses generally involves the international smuggling of migrants presenting national security threats. The Criminal Division’s Human Rights and Special Prosecutions Section has an Immigration Unit whose portfolio includes targeting, disrupting, and dismantling international criminal travel networks that pose national security, organized crime, or humanitarian threats.

e. Were you involved in the administration’s “zero tolerance” family separation policy? If yes, please provide a description of your role.

No.

Nominations
Hearing before the Senate Committee on the Judiciary
March 4, 2020

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Mr. John P. Cronan

1. In 2001, you published a law review article entitled, “The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions.” In that article, you wrote: “The successes of affirmative action have rendered race an unreliable proxy for disadvantaged status and diversity. A system that looks solely at race ignores both the achievements made by members of minority groups and the need to assist underprivileged whites.” You also noted that “[t]raditional affirmative action programs, which look primarily at race, played a critical role in helping American society move past racial discrimination and fostering racial equality.”

a. Do you believe that American society has moved past racial discrimination?

No.

i. If so, at what point did American society “move past” racial discrimination? Why?

Please see my response to Question 1(a).

ii. If not, what was the basis for your contention that American society had “move[d] past” racial discrimination?

The cited article was written when I was a law student approximately 20 years ago. To the extent that the quoted language could be read as suggesting that I believed at the time that racial discrimination ceased to exist in American society, that was imprecise language. It was not my intention to contend that racial discrimination had ended. My point was that the progress American society has made on racial issues had rendered a purely race-based system of preferences less desirable, and counseled in favor of a system that considers both race and non-racial factors that indicate whether an applicant faced a disadvantaged past and would contribute to the diversity of the institution.

To be sure, at various points in the article, I indicated that racial harm continued to exist in society. *See, e.g.,* John P. Cronan, *The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions*, 34 SUFFOLK UNIV. L. REV. 305, 307 (2001) (“Certain fatal flaws, however, reside in a class-based system, most notably its refusal to acknowledge contemporary racial harm . . .”); *id.* at 322-24 (noting that plunges in minority enrollment at schools that abandoned racial consideration in admissions “suggest that minorities still face

obstacles solely on account of race”); *id.* at 324-25 (“Ample evidence suggests that middle- and upper-class minorities still do not compete on a level playing field with Whites.”); *id.* at 327-28 (“Race merits consideration because of the contemporary racial harm discussed earlier.”); *id.* at 328 (“Evidence of contemporary racial harm—experienced by both wealthy and poor minorities—demonstrates the need to level the playing field.”); *id.* (“Minorities in today’s society face unique experiences based solely on the color of their skin.”).

In that article, I also cited studies or scholarship that maintained that racial harm continued to exist in society. *See id.* at 324 (citing views of a “scholar of contemporary racism and segregation in society” who concluded “that Blacks and other minorities are no better off today and in some ways are worse off than they were before the civil rights era” and noting “that Blacks, by and large, are still economically disadvantaged and that housing segregation is still near pre-*Brown* levels”); *id.* at 325 (citing a study that determined “that middle-class Blacks are systematically worse off than the middle-class Whites in several areas, placing them at a competitive disadvantage in a White-dominated economy and society”); *id.* at 325-26 (citing studies that “have revealed striking disparities in employment levels of Blacks and Whites in Washington, D.C., citing racial discrimination as the major cause”).

Regardless of what I wrote in an article approximately 20 years ago when I was considering pursuing a career in academia, if confirmed as a federal district court judge, I would be firmly bound to apply Supreme Court and Second Circuit precedents. Since publication of the article, the Supreme Court has issued a number of decisions on the issue of affirmative action in higher education. If confirmed, I would fully and faithfully apply all Supreme Court and Second Circuit precedents on affirmative action, including *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

One of the major achievements of the 20th century was the recognition that racial segregation is a great and legal wrong. The Supreme Court recognized this truth in one of its most esteemed decisions, *Brown v. Board of Education*.

b. Do you believe that *Brown v. Board of Education* was correctly decided?

Yes, I believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided. As a general matter, I believe it is important to adhere to the longstanding approach of judicial nominees before the Senate Judiciary Committee not to comment favorably or negatively on Supreme Court cases. In my view, *Brown* is an exception to this general practice. The core holding of *Brown*—overturning *Plessy v. Ferguson*, 16 S.Ct. 1138 (1896), giving force to the rights of the Fourteenth Amendment, establishing that “separate but equal” violates the Equal Protection Clause of the Fourteenth Amendment, and correcting a grave injustice in our country—holds a special and unique place in our constitutional history and our country’s history. It also is a decision that, I

believe, is extremely unlikely to be subject to future litigation that would come before me if I were to be confirmed. For those reasons, I am comfortable opining on *Brown*, and saying that I believe the decision was correctly decided.

**Questions for the Record for John Peter Cronan
From Senator Mazie K. Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

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

No.

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

No.

2. In *Blagojevich v. United States*, your name was listed as counsel on the Department of Justice's brief opposing former-Illinois Governor Rod Blagojevich's petition for certiorari in which he sought to have his conviction for extortion under color of official right and sentence vacated.

a. Do you believe that Blagojevich was convicted "over a phone call where nothing happens," as stated by President Trump? If so, why did you oppose Blagojevich's petition for certiorari in this case?

Responses to petitions for writs of *certiorari* in federal criminal appeals are handled by the Solicitor General's Office, often with assistance from appellate attorneys in the Criminal Division. As has long been the practice at the Department of Justice, the head of the Criminal Division is listed on every criminal brief filed in the Supreme Court by the Solicitor General. I was the Acting Assistant Attorney General of the Criminal Division from November 2017 to July 2018. During that time, approximately 210 briefs were filed in opposition to or in support of petitions for *certiorari* that listed my name as part of the signature block.

The prosecution of former Illinois Governor Rod Blagojevich was handled by the United States Attorney's Office for the Northern District of Illinois, not the Department of Justice's Criminal Division. Aside from the petition for *certiorari*, the prosecution had concluded by the time I began working in the Criminal Division in August 2017. I therefore am not familiar with the evidence in the case. The brief before the Supreme Court, which I neither drafted nor reviewed, addressed whether the Supreme Court should grant *certiorari* as to issues concerning the language of a jury instruction and whether plain error occurred at sentencing.

Even if I were familiar with the facts of this prosecution, as a nominee for a federal judgeship, I do not think it would be appropriate for me to comment on those facts or on

the cited quote. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(C).

b. Do you believe that Blagojevich’s conviction was unfair, as it was characterized by President Trump? If so, why did you oppose Blagojevich’s petition for certiorari in this case?

Please see my response to Question 2(a).

3. During your tenure as Acting Assistant Attorney General, you made numerous statements advocating for tougher immigration policies in order to combat the violent gang MS-13. Among other things, you said that MS-13 is “here because they’re able to take advantage of the weaknesses at our border;” “[w]e want these savages [MS-13] incapacitated before they can try to cross over our borders;” and “when we fail to enforce immigration laws, . . . MS-13 can very easily simply replenish its jailed membership by sending more gang members across our borders.”

The Associated Press has labeled similar statements by President Trump as false. As the Associated explained: “Trump suggests that weak border enforcement is contributing to crime committed by MS-13. But the gang actually has many U.S.-born members at this point — people who by virtue of U.S. citizenship can’t be denied entry based on their nationality, or deported. The government has not said recently how many members it thinks are citizens and immigrants. In notable raids on MS-13 in 2015 and 2016, most of the people caught were found to be U.S. citizens.”

a. What are the factual bases for your statements that MS-13 is “here because they’re able to take advantage of the weaknesses at our border” and “when we fail to enforce immigration laws, . . . MS-13 can very easily simply replenish its jailed membership by sending more gang members across our borders,” and other similar statements?

As the Acting Assistant Attorney General and the Principal Deputy Assistant Attorney General of the Criminal Division, I oversaw the Division’s Organized Crime and Gang Section (OCGS). OCGS is responsible for, among other things, investigating and prosecuting violate gangs and criminal organizations across the country, with a top priority being MS-13. In addition, Criminal Division employees are assigned to El Salvador, where a major focus of their efforts is to combat MS-13.

From working with these individuals, and also working with law enforcement officers, I have become familiar with the actions of MS-13. First, I have learned about their criminal conduct in the United States. MS-13 is violent and ruthless gang, which boasts the motto, “Mata, Viola, Controla,” or “Kill, Rape, Control,” and terrorizes communities across the United States. As I have discussed publicly, MS-13’s heinous acts include murdering victims with machetes, chains, knives, bats, and firearms; gang-raping young girls and selling them for sex; and killing not just rival gang members but also fellow

MS-13 members who are suspected of cooperating with law enforcement or who violated gang rules.

I also have learned about MS-13's transnational activities. MS-13 is based and operates in El Salvador, and MS-13 leadership largely directs the organization's murderous mission from prisons in El Salvador. My point in the cited statements was, because of the transnational nature of the MS-13 threat, merely enforcing our laws criminalizing violent crimes is not enough to combat the threat. Without enforcement of our lawful immigration statutes, MS-13 can more easily replenish its ranks by bringing additional gang members into the United States from El Salvador and elsewhere. It is therefore important for the Department of Justice to work with our foreign partners to apprehend MS-13 members before they can attempt to travel to the United States to commit unspeakable acts of murder and other violence.

b. In contrast to the rhetoric used by people like President Trump and yourself, the vast majority of immigrants are law-abiding citizens. Are you aware that studies show that immigrants have a lower criminal incarceration rate than native-born Americans and there are lower crime rates in the neighborhoods where immigrants live?

I completely agree that the vast majority of immigrants are law-abiding citizens. The cited quotations from me were specifically referring to members of MS-13, a murderous transnational criminal organization. As I discussed in my response to Question 3(a), MS-13 is a violent and ruthless gang that is terrorizing communities across the United States. At no point did I even remotely suggest that all immigrants are gang members or gang members in waiting, nor do I believe that to be the case.

c. In August 2019, a gunman killed 22 people at a Walmart store in El Paso, Texas, in an attack intended to target Mexicans. What role do you think statements like yours play in perpetuating a misleading narrative that portrays immigrants as 'violent' and 'criminals' and inciting opposition to immigration based on fear and misinformation?

My comments were specifically referring to members of MS-13, a murderous transnational criminal organization that is terrorizing communities across our country through unspeakable acts of violence and murder. At no point did I even remotely suggest that all immigrants are violent and criminals.

d. What responsibility do you think high-ranking Justice Department officials, like yourself, have to not present misinformation about immigration and crime that can harm immigrant communities and undermine confidence in the justice system?

All Justice Department officials certainly have a responsibility to not present misinformation about any subject, including but not limited to immigration and crime. I do not believe that I presented any misinformation in any of my statements about MS-13.

Rather, I was discussing the very real and serious threat to society posed by MS-13, and the Department of Justice's efforts to combat that threat.

4. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Yes.

b. Have you ever taken such training?

Yes. When watching videos of prior confirmation hearings, I observed questioning of judicial nominees, including from Senator Hirono, about implicit bias. I recently went on the Department of Justice's online training site, where I found a training video on unconscious bias and voluntarily viewed that video so I could better understand the issue.

c. If confirmed, do you commit to taking training on implicit bias?

I found the video I watched on unconscious bias to be highly informative. If confirmed, I would certainly be willing to receive trainings on implicit bias and other issues that are available to federal judges.

Nomination of John Peter Cronan
United States District Court for the Southern District of New York
Questions for the Record
Submitted March 11, 2020

QUESTIONS FROM SENATOR BOOKER

1. In a 2001 law review article on affirmative action, you put forth a plan for a “comprehensive” affirmative action system for school admissions that would consider both race and “disadvantaged status.”¹ In the article, you said that, due to its successes, affirmative action based on race is an “unreliable proxy for disadvantaged status and diversity.”²

a. Do you stand by that assertion?

The cited article was written when I was a law student approximately 20 years ago. My point was that the progress American society has made on racial issues has rendered a purely race-based system of preferences less desirable, and counseled in favor of a system that considers both race and non-racial factors that indicate whether an applicant faced a disadvantaged past and would contribute to the diversity of the institution. The article maintained that race should remain one of the factors considered in determining disadvantaged status and diversity, and cited evidence that racial harm continued to exist in society.

Regardless of what I wrote in an article about 20 years ago when I was considering pursuing a career in academia, if confirmed as a federal district court judge, I would be firmly bound to apply Supreme Court and Second Circuit precedents. Since publication of the article, the Supreme Court has issued a number of decisions on the issue of affirmative action in higher education. If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on affirmative action, including *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

b. Do you believe we live in a post-racial society and have attained racial equality and equity? Please explain your answer.

I believe that racial discrimination continues to exist in today’s society, which is consistent with statements in this article, which I wrote about 20 years ago. At various points in the article, I indicated that racial harm continued to exist in society. *See, e.g.,* John P. Cronan, *The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions*, 34 SUFFOLK UNIV. L. REV. 305, 307 (2001) (“Certain fatal flaws, however, reside in a class-based system, most notably its refusal to acknowledge contemporary racial harm”); *id.* at 322-24 (noting that plunges in

¹ John P. Cronan, *The Diversity Justification in Higher Education: Evaluating Disadvantaged Status in School Admissions*, 34 SUFFOLK U. L. REV. 305 (2001).

² *Id.* at 307.

minority enrollment at schools that abandoned racial consideration in admissions “suggest that minorities still face obstacles solely on account of race”); *id.* at 324-25 (“Ample evidence suggests that middle- and upper-class minorities still do not compete on a level playing field with Whites.”); *id.* at 327-28 (“Race merits consideration because of the contemporary racial harm discussed earlier.”); *id.* at 328 (“Evidence of contemporary racial harm—experienced by both wealthy and poor minorities—demonstrates the need to level the playing field.”); *id.* (“Minorities in today’s society face unique experiences based solely on the color of their skin.”).

I also cited in that article studies or scholarship that maintained that racial harm continued to exist in society. *See id.* at 324 (citing views of a “scholar of contemporary racism and segregation in society” who concluded “that Blacks and other minorities are no better off today and in some ways are worse off than they were before the civil rights era” and noting “that Blacks, by and large, are still economically disadvantaged and that housing segregation is still near pre-*Brown* levels”); *id.* at 325 (citing a study that determined “that middle-class Blacks are systematically worse off than the middle-class Whites in several areas, placing them at a competitive disadvantage in a White-dominated economy and society”); *id.* at 325-26 (citing studies that “have revealed striking disparities in employment levels of Blacks and Whites in Washington, D.C., citing racial discrimination as the major cause”).

c. Do you believe that having a diverse student body is a compelling government interest?

The Supreme Court has held that a diverse student body is a compelling government interest. *See, e.g., Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of California v. Bakke*, 434 U.S. 810 (1977). If confirmed, I will fully and faithfully apply precedents from the Supreme Court and the Second Circuit on this issue, including *Bakke*, *Grutter*, and *Fisher*.

d. Do you believe that the Supreme Court’s landmark decisions upholding race-conscious admissions programs—in particular, *Regents of the University of California v. Bakke*,³ *Grutter v. Bollinger*,⁴ and *Fisher v. University of Texas*⁵—were correctly decided?

Bakke, *Grutter*, and *Fisher* are precedents of the Supreme Court and, if confirmed, I will follow those precedents, and any other Supreme Court or Second Circuit precedents, fully and faithfully. I believe, however, that is important for me to adhere to the longstanding approach of judicial nominees before the Senate Judiciary Committee—including now-Justices Elana Kagan and Ruth Bader Ginsburg—not to comment favorably or negatively

³ 438 U.S. 265 (1978).

⁴ 539 U.S. 306 (2003).

⁵ 136 S. Ct. 2198 (2016).

on Supreme Court cases. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(A). There is an important reason to adhere to that general practice. Commenting on a Supreme Court opinion puts into question that nominee’s apparent impartiality and could give future litigants or observers the impression that the judge would be more partial to certain Supreme Court precedents than others.

e. Please explain why, if you’re confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case about affirmative action.

Regardless of my writings in this article from 20 years ago when I was considering pursuing a career in academia, if confirmed, I would be firmly bound to apply Supreme Court and Second Circuit precedents. Since publication of the article, the Supreme Court has issued a number of decisions on the issue of affirmative action in higher education. If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on affirmative action, including *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

2. In 2001, you wrote a law review article, where you contended that it is “easy to forecast whether a certain inmate will become a sexual aggressor or victim.”⁶ Additionally, in the article, you argued that “[b]lack inmates are most likely to become the sexual aggressors.”⁷

a. Please explain what data, studies, or research you relied on to arrive at the assertion that “[b]lack inmates are most likely to become the sexual aggressors.”

I do not believe that black inmates are more likely to become sexual aggressors. The cited quotation referred to a study conducted by Wayne S. Wooden and Jay Parker, not to any studies that I conducted or any conclusions that I reached. *See* Way S. Wooden & Jay Parker, *Men Behind Bars: Sexual Exploitation in Prison 2* (1982). My co-author and I were discussing Wooden and Parker’s study of the California penal system, including their findings as to the role of race in prison sexual assaults. In this article, my co-author and I surveyed and assembled various studies conducted as to factors that indicate the likelihood of sexual assault in prison. To the extent any aspect of that article may be read as suggesting that certain individuals are more likely to engage in assault in prison—or any other criminal activity for that matter—based on their race, that certainly was not my position then, nor is it my view today. To the contrary, I would find such a suggestion patently offensive. My co-author and I were attempting to digest and summarize various studies—conducted by others—that discussed the subculture that exists in prison and the factors within that subculture that those researches found inform the likelihood of sexual assault in prison.

b. Why do you think that African Americans who are incarcerated are more likely to

⁶ Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127 (2001).

⁷ *Id.* at 163.

be sexual aggressors?

I do not believe African Americans who are incarcerated are more likely to be sexual aggressors. I find such a view offensive and do not agree with it. Please also see my response to Question 2(a).

c. Do you stand by the assertions you made in that law review article?

I believe that it is important to take appropriate measures to prevent any crimes in prison—especially sexual assault—and that assailants should be prosecuted in appropriate circumstances. My co-author and I discussed a very troubling issue, namely, multiple studies and reports suggesting that inmates are being victimized by sexual abuse at an alarming rate. My co-author and I surveyed and summarized various studies conducted by others that examined the subculture that exists in prison and those studies identified certain factors that reflect the incidence of sexual abuse or victimization. After assembling these studies and the various factors that were identified in those studies, we suggested that an understanding of the relevant factors could allow prison officials to assess which inmates are most likely to be the violent and which are the most likely to be victims, and take preventive measures accordingly. My co-author and I did not conduct independent research for the article, and in retrospect upon re-reading the article, I believe we relied too heavily on studies conducted by others and we should have attempted to conduct more direct research rather than merely cite those other studies. Please also see my response to Questions 2(a) and 2(b).

d. Please explain why, if you're confirmed, an African American in your courtroom should expect to get a fair hearing from an impartial judge in a criminal proceeding based on these comments.

The article relied on studies conducted by others that examined the subculture in prisons, not our own independent studies or conclusions, and I believe my co-author and I relied on those studies too heavily. Please also see my response to Questions 2(a), 2(b), and (2)(c).

Moreover, throughout my over 17-year career in public service with the Department of Justice, I have been steadfastly dedicated to promoting the rule of law, ensuring justice and due process, and treating all colleagues, defendants, and attorney adversaries fairly, equally, and with dignity. As a prosecutor, my career in the Department of Justice has been devoted to pursuing just and appropriate results under the law and the facts. If confirmed, I will faithfully and impartially decide cases without bias, prejudicial, or regard to the litigant before me, consistent with the judicial oath I would take and with Canon 1 of the Conduct of Conduct for United States Judges.

3. When you were Acting Assistant Attorney General for the Criminal Division at the Department of Justice, you participated in a White House Press Briefing in February 2018 and a reporter asked you about marijuana offenses. In response to the reporter's question, you said you have "seen the harm marijuana can do."

a. What did you mean by that statement?

By way of background, I was participating in a White House Press Conference on February 6, 2018, to discuss the threat posed by MS-13. About one month earlier, on January 4, 2018, former Attorney General Jeff Sessions issued a memorandum that rescinded the Department of Justice's former policy memoranda, authored by a prior Deputy Attorney General, on enforcement of federal marijuana laws. Attorney General Sessions's memorandum directed federal prosecutors to use well-established principles of federal prosecution principles, explaining that those principles provide the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime.

After I completed my statement on the MS-13 threat, the White House Press Secretary invited questions from reporters. The first question asked why, in light of the MS-13 threat, "has Attorney General Sessions renewed a, sort of, increase in the enforcement against marijuana, even though a lot of states have tried to decriminalize marijuana."

In my response, I attempted to make two points. First, that the Department of Justice has the resources to advance multiple criminal enforcement objectives at once. In other words, the Attorney General's memorandum on marijuana enforcement was not taking resources away from our efforts to combat MS-13 or other significant public safety threats. Second, when I mentioned the "harm that marijuana can do," I was alluding to my experiences as a federal criminal prosecutor. I have prosecuted, or supervised prosecutions, of members of dangerous drug trafficking organizations that transport various narcotics, such as cocaine and heroin but also marijuana, into the United States. For instance, while serving in the Criminal Division, I participated in the supervision of the prosecution of Joaquin Guzman, a/k/a "El Chapo," a former head of the murderous Sinaloa Cartel. The evidence offered at trial established that the Sinaloa Cartel was responsible for importing and distributing massive amounts of narcotics—to include cocaine, methamphetamine, heroin, and marijuana—into the United States. As another example, when I was a narcotics prosecutor at the United States Attorney's Office, I prosecuted members of a New York-based drug trafficking organization that transported a variety of dangerous narcotics into the New York City area. That case involved the seizure of over 1,300 kilograms of marijuana in the Bronx.

b. What were the purported harms you referenced?

Please see my response to Question 3(a).

c. What scientific data, evidence, or research did you rely on in coming to your conclusion?

Please see my response to Question 3(a).

4. When you were Acting Assistant Attorney General, you commented on the nomination of

Brian Benczkowski to be Assistant Attorney General for the Criminal Division when you spoke to the U.S. Chamber Institute for Legal Reform.⁸ You said “we have a truly phenomenal nominee pending” and you said it was “unfortunate” that his nomination was stalled in the Senate.

a. Why did you believe Assistant Attorney General Benczkowski was a “phenomenal” nominee to head the Criminal Division at the Department of Justice when he lacked any prosecutorial experience whatsoever?

My statement was a reference to Mr. Benczkowski’s wealth of experience both in leadership positions at the Department of Justice and in private practice.

Within the Department, Mr. Benczkowski previously served as the Chief of Staff for the Office of the Attorney General and the Office of the Deputy Attorney General. In these roles, he was the principal legal and policy advisor to the two most senior leaders of the Department. Mr. Benczkowski also served as Principal Deputy Assistant Attorney General for Legislative Affairs, where he managed the Department’s relationship with Congress. He additionally served as Chief of Staff at the Bureau of Alcohol, Tobacco, Firearms and Explosives and Staff Director and Senior Counsel to the Department of Justice’s Office of Legal Policy. In addition to these roles in the Department, Mr. Benczkowski served as a Staff Director for the Senate Judiciary Committee, where he was the top advisor and strategist for legislative, oversight, and nominations matters.

In addition to this extensive public service experience, Mr. Benczkowski was a partner in the Washington, D.C. office of a large international law firm, where his practice focused on white collar criminal defense as well as government and internal investigations, including in the areas of health care fraud, environmental enforcement, and campaign finance.

It was my belief then—and remains so today—that this experience had prepared Mr. Benczkowski exceptionally well to serve as the Assistant Attorney General. I believe I was correct, as Mr. Benczkowski has been an outstanding leader for the Criminal Division.

b. Do you believe that prosecutorial experience or experience in criminal matters is an important qualification for a nominee to be Assistant Attorney General for the Criminal Division? If not, please explain why.

The President is vested with the authority to appoint the Assistant Attorney General of the Criminal Division, with the advice and consent of the Senate. As a nominee for a federal district judgeship, I do not think it is appropriate for me to opine on the appropriate qualifications that the President should consider for a nominee for this position or that the Senate should consider in deciding to confirm such a nominee.

5. During your hearing with the Senate Judiciary Committee, your fellow nominee, Thomas

⁸ Remarks Before the U.S. Chamber Institute for Legal Reform, Washington, D.C. (May 7, 2018).

Cullen, stated that statistically there are more acts of violence perpetrated by far right extremists than any other group. In fact, between 2001 and 2015, more Americans were killed by homegrown right-wing extremists than by Islamist terrorists.⁹ Additionally, a 2017 GAO report found that “Of the 85 violent extremist incidents that resulted in death since September 12, 2001, far-right wing violent extremist groups were responsible for 62 (73 percent) while radical Islamist violent extremists were responsible for 23 (27 percent).”¹⁰

a. Do you believe Cullen’s statement to be true? Please site any evidence you find regarding your answer.

I have not studied statistics cited by Mr. Cullen at the confirmation hearing. I am therefore not in a position to offer an opinion on Mr. Cullen’s statement, nor am I aware of any other statistics or evidence on this matter.

b. If you have not studied the issue, do you have any reason to doubt the statistics cited above?

Having not studied the issue, I am not in a position to offer an opinion as to the accuracy of those statistics.

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

Having never been a judge, I am uncomfortable assigning a label to my judicial philosophy. I believe the role of a judge is to decide the case or controversy before the court, and to do so with fidelity to precedent and, in the absence of binding precedent, with adherence to the plain text and original understanding of the statutory or constitutional provision at issue.

My understanding of originalism is that a constitutional or statutory provision should be interpreted according to its plain text, understood from the perspective of the public meaning at the time of the framing of the Constitution, when the Amendment was enacted, or when the statute was passed.

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

Having never been a judge, I am uncomfortable assigning a label to my judicial philosophy. I believe the role of a judge is to decide the case or controversy before the court, and to do so with fidelity to precedent and, in the absence of binding precedent, with adherence to the plain text and original understanding of the statutory or constitutional provision at issue.

My understanding of textual is that a constitutional or statutory provision should be interpreted

⁹ Jennifer Williams, *White American men are a bigger domestic terrorist threat than Muslim foreigners*, VOX (Oct. 2, 2017), <https://www.vox.com/world/2017/10/2/16396612/las-vegas-mass-shooting-terrorism-islam>.

¹⁰ UNITED STATES GOV’T ACCOUNTABILITY OFFICE, COUNTERING VIOLENT EXTREMISM 4 (Apr. 2017), <https://www.gao.gov/assets/690/683984.pdf>.

according to its plain text.

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

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

If confirmed, I will follow and apply Supreme Court and Second Circuit precedents governing the consideration of legislative history to construe a statute. The Supreme Court has made clear that if the text of a statute is clear, the inquiry ends there. *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The Supreme Court similarly has instructed that legislative history should be considered only if the statutory text is ambiguous. *See, e.g., id.* (“Even those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’” (citations omitted)); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992). The Supreme Court further has cautioned that “[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms,” noting that “[n]ot all extrinsic materials are reliable sources of insight into legislative understandings.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Court additionally observed that “legislative history is itself often murky, ambiguous, and contradictory,” and that “judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.” *Id.*

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

Please see my response to Question 8(a).

9. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.¹¹ In fact, in-person voter fraud is so

¹¹ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017),

exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.¹²

a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I am do not have any firsthand information as to the prevalence of voter fraud. In addition, because litigation involving this issue may be pending or impending before the courts, I believe it would be improper for me to comment on this issue. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on this issue, including any precedents concerning the Voting Rights Act.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

While I have not studied this issue, I believe that voting is a fundamental constitutional right that must be protected. Any efforts at voter suppression cannot be tolerated in our country. As a nominee for a federal district judgeship, it would be inappropriate for me to comment further on an issue that may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedents on this issue, including any precedents concerning the Voting Rights Act.

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 9(b).

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

<https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹² *Id.*

¹³ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

¹⁴ *Id.*

¹⁵ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

whites in the state prison systems is greater than 10 to 1.¹⁶

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

I am not familiar with the cited studies, but I do believe implicit racial bias exists in society. If confirmed, I will do everything in my power to eliminate any bias whatsoever in my courtroom, and will treat every defendant and litigant fairly, without bias, and with dignity and respect.

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

Yes, based on my understanding of statistics of our country's jail and prison populations, I believe people of color are disproportionately represented in our nation's jails and prisons.

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

When watching videos of prior confirmation hearings, I observed questioning of judicial nominees about implicit bias. I recently went on the Department of Justice's online training site, where I found a training video on unconscious bias and voluntarily viewed that video so I could better understand the issue.

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

I have not studied that cited study by the United States Sentencing Commission, and am unable to provide an explanation for that statistic. If confirmed, I will do everything in my power to eliminate any bias whatsoever in my courtroom, and will treat every defendant and litigant fairly, without bias, and with dignity and respect at all stages of a criminal proceeding, including sentencing.

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

I also am not aware of that academic study, and am unable to provide an explanation for

¹⁶ *Id.*

¹⁷ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁸ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

that statistic. If confirmed, I will do everything in my power to eliminate any bias whatsoever in my courtroom, and will treat every defendant and litigant fairly, without bias, and with dignity and respect at all stages of a criminal proceeding, including sentencing.

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

Federal appellate judges should carefully scrutinize the record below, to ensure that racial bias did not enter the criminal prosecution being reviewed at any point.

If confirmed as a federal district judge, I will ensure that all criminal proceedings in my courtroom are conducted fairly and all parties are treated equally and without bias. One way that a district judge can guard against racial bias at trial is through a thorough and effective jury *voir dire*. A judge should ask searching questions to determine whether prospective jurors can be fair to the defendant and decide the case without bias. Similarly, a judge during *voir dire* should faithfully and fully apply *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that prosecutors may not use preemptory challenges to strike jurors solely on their race. When presented with a *Batson* challenge, a judge must carefully determine whether the preemptory strike is racially-neutral and not a pretext, and a judge should not hesitate to sustain a meritorious *Batson* objection and sit the prospective juror on the jury.

11. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁹ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²⁰

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

I have not studied the cited fact sheet or the statistics therein, and am not in a position to offer an opinion on this issue.

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

I have not studied the cited fact sheet or the statistics therein, and am not in a position to offer an opinion on this issue.

¹⁹ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

²⁰ *Id.*

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

Yes.

13. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

14. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."²¹ Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

I understand that the recusal determination is made on a case-by-case basis, and is governed largely by 28 U.S.C. § 455 and the Code of Conduct for United States Judges. In addition, the independence of our federal judiciary is a fundamental feature of our constitutional system and separation of powers. Constitutional provisions, such as life tenure and compensation protections in Article III, Section 1, ensure that a judge will not be affected by political pressures and will follow the law, without repercussion. Canon 1 of the Code of Conduct for United States Judges similarly notes that "[a]n independent and honorable judiciary is indispensable to justice in our society." Code of Conduct for United States Judges, Canon 1. As a judicial nominee, I believe it would be inappropriate for me to discuss any comments that are the subject of political debate or discussion or any issues that could be pending or impending in litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), 5(A).

15. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."²² Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that the protections of the Due Process Clause "appl[y] to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will fully and faithfully apply all Supreme Court and Second Circuit precedent on this issue, including *Zadvydas*.

²¹ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

²² Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

Questions for the Record from Senator Kamala D. Harris
Submitted March 11, 2020
For the Nomination of:

John Cronan, to be United States District Judge for the Southern District of New York

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?

If confirmed, I will take sentencing extremely seriously, as I did when I was a federal prosecutor in the United States Attorney's Office. As a federal prosecutor, I always ensured that I was completely prepared for every sentencing, knew the record thoroughly, and carefully considered the application of the relevant factors under 18 U.S.C. § 3553(a) and the advisory Guidelines range in making a sentencing recommendation on behalf of the Government. If confirmed as a federal district judge, I also will engage in a careful and thorough analysis of the facts of the case and the relevant factors under § 3553(a) and the advisory Sentencing Guidelines at sentencing.

Prior to imposing sentence, I would carefully review the Presentence Investigative Report and the sentencing submissions from the parties, including any submissions providing character information, mitigation, or other support for the defendant and any submissions from victims of the offense. If after reviewing these materials, there are any issues for which I desire clarification, I would direct the parties to address them prior to sentencing. At the sentencing proceeding, I would conduct a proceeding in compliance with Federal Rule of Criminal Procedure 32, and would provide the defendant's attorney, the defendant, the prosecutor, and any victims the opportunity to be heard. Only after hearing from the parties, and carefully considering the appropriate sentence pursuant to § 3553(a) and the advisory Guidelines range, would I impose sentence. For further details on how I would consider the relevant sentencing factors, please also see my response to Question 1(b).

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

If confirmed, every sentence I impose will be individually tailored to the defendant before me, taking into account the circumstances of the defendant, the criminal conduct, and the harm caused. To do this, I will calculate the applicable advisory Guidelines range pursuant to the United States Sentencing Guidelines, and then consider the objectives of sentencing and considerations set forth in 18 U.S.C. § 3553(a). In particular, I would consider the nature and circumstances of the offense and the need for just punishment. This would entail not just looking at the title of the offense, but what exactly the defendant did, why the defendant committed the crime in the first place, and if the defendant stopped committing the crime prior to being arrested, why the defendant

stopped. I also would look at the history and characteristics of the defendant, including the advantages and disadvantages the defendant faced, any circumstances that may have led the defendant to criminal activity, and whether the crime was an aberration in an otherwise largely law-abiding life. Other important sentencing considerations are the need for deterrence, the need to protect the public from future crimes of the defendant, and the need to promote respect for the law. I also would consider rehabilitation interests—such as the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment—to help the defendant make a successful transition from incarceration (if the sentence entails incarceration) and reentry into society. I would take into account victim considerations, including the need for restitution, and I would be mindful of the need to avoid unwarranted sentencing disparities. Then, after considering the ranges of sentences available, I would impose a sentence that I determined to be “sufficient, but not greater than necessary,” to comply with the purposes of sentencing under § 3553(a).

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

Section 5K of the Sentencing Guidelines provide for various departures from the otherwise applicable Guidelines range, including situations where the defendant provided substantial assistance to authorities. The Supreme Court held in *United States v. Booker*, 534 U.S. 220 (2005) that the Sentencing Guidelines are not mandatory. Accordingly, while a district judge is required to calculate the advisory Guidelines range and carefully considering that range in every case, a judge is not bound by the Guidelines and also must consider the relevant sentencing factors under 18 U.S.C. § 3553(a).

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?

While I am not familiar with Judge Reeves’ statement, the decision to include mandatory minimum sentences in federal criminal statutes is reserved for Congress. As a nominee for a federal judgeship, I think it would be inappropriate for me to comment on a policy matter that is reserved for the legislative and executive branches and has been the subject of political discussion and debate. If confirmed, I will fully and faithfully apply federal sentencing laws, including any mandatory minimums, as determined by Congress and pursuant to precedent of the Supreme Court and the Second Circuit.

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

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>.

Please see my response to Question 1(d)(i).

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

Please see my response to Question 1(d)(i).

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?

If confirmed and confronted with the circumstances described, I would carefully evaluate the law and facts of each case individually, as well as my ethical obligations, and render an opinion accordingly. In doing so, I would fully and faithfully apply the law as set by Congress and as required by any precedent of the Supreme Court or Second Circuit.

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

Pursuant to the separation of powers under the Constitution, charging decisions and charging policies are vested with the Executive Branch, not the Judicial Branch. If confirmed, I will respect that separation of powers. However, if I become aware of an ethical violation of a prosecutor, I would not hesitate to take appropriate action consistent with my oath of office.

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

Pursuant to the separation of powers under the Constitution, clemency decisions are vested with the Executive Branch, not the Judicial Branch. If confirmed, I will respect that separation of powers.

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?**

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>.

Yes.

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. I believe that ensuring a fair and equitable justice system is an essential and fundamental role of a federal judge.

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.**

Yes. Based on my understanding of statistics of our country's jail and prison population, I believe that minorities are disproportionately represented in our nation's jails and prisons. If confirmed, I will do everything in my power to eliminate any bias whatsoever in my courtroom, and will treat every defendant and litigant fairly, without bias, and with dignity and respect.

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?**

To the extent as a federal district judge I am in a position to appoint or recommend candidates for positions of power or supervisory positions, yes, I commit to ensuring that qualified minorities and women are given serious considerations for such positions.