Nomination of Neil M. Gorsuch to be Associate Justice of the Supreme Court
Questions for the Record
Submitted March 24, 2017

<u>QUESTIONS FROM SENATOR FEINSTEIN</u>

1. At your hearing, you acknowledged you worked on the Graham amendment to the Detainee Treatment Act, which sought to eliminate habeas corpus for Guantanamo detainees.

   You also acknowledged that in December 2005, after the Detainee Treatment Act was passed, there were different factions in the Administration advocating different versions of the signing statement. In an email you sent to Steven Bradbury and others you said a signing statement:

   > *"…along the lines proposed below would help inoculate against the potential of having the Administration criticized sometime in the future for <u>not making sufficient changes</u> in interrogation policy in light of the McCain portion of the amendment; this statement clearly, and in a formal way that would be hard to dispute later, <u>puts down a marker to the effect that the view that McCain is best read as essentially codifying existing interrogation practices</u>."*

   This was in December 2005, just nine months after an Office of Legal Counsel memo signed by Steven Bradbury had concluded that waterboarding, stress positions, sleep deprivation, and other techniques were <u>not prohibited</u> by the standard applied under Article 16 of the Convention Against Torture.

   I read your email as saying if the Administration issued a signing statement along these lines then the passage of the McCain amendment would not require much of a change in interrogation policy than what the Department of Justice had already decided was allowable.

   a. **What did your email mean? What did you mean when you said that a signing statement would "inoculate against" being criticized in the future for "not making sufficient changes in interrogation policy"?**

RESPONSE: The December 29, 2005 email chain discussed proposed versions of a signing statement to accompany the Detainee Treatment Act. As we discussed at the hearing, these events took place many years ago and my recollection "is that there were individuals in maybe the Vice President's office who wanted a more aggressive signing statement … and that there were others, including at the State Department, who wanted a gentler signing statement." To my recollection, as I said at the hearing, "I was in the latter camp [along with] John Bellinger, among others." I did so in my role as a lawyer helping with civil litigation brought by individuals detained as enemy combatants and defended by the Department of Justice. The email chain indicates that the Legal Adviser for the State Department favored a gentler and more expansive statement for various reasons, including public and foreign relations. The email chain also indicates that the National Security Council expressed the view that the Detainee Treatment Act codified existing policies. In that light and as a lawyer advising a client, the email chain indicates that I suggested a signing statement could (1) speak about the Detainee Treatment Act positively to the public and to

foreign nations as the State Department suggested, (2) highlight aspects of the legislation helpful to litigators in the Civil Division of the Department of Justice, and (3) make transparent the client's position that the Act codified existing policies.

2. On the first day of questioning, you told Senator Graham that the Detainee Treatment Act prohibits waterboarding. But an email you wrote when you were part of the Bush Administration Justice Department seems to say the opposite—you said that the law should be read as "essentially codifying interrogation practices," which at the time included waterboarding, stress positions, sleep deprivation, and other techniques that had been approved in the Bradbury OLC memo from 2005.

   a. **What did you mean by "codifying existing interrogation policies"?**

RESPONSE: Please see the response to Question 1.

   b. **When did you come to the view that the Detainee Treatment Act bars waterboarding, and why in the Bush Administration did you have a different view?**

RESPONSE: I do not currently recall when precisely I came to that view. By its express terms, the Detainee Treatment Act prohibits cruel, inhuman, and degrading treatment. Please see also the response to Question 1.

3. Do you understand and agree that your former role at the Justice Department—and the positions you advocated for while at the Justice Department on behalf of the government—can and should have no bearing on the way you decide cases as a judge?

RESPONSE: I understand and agree that my former role at the Department of Justice has not had and will not have any bearing on the way I decide cases as a judge.

4. Do you agree with seminal Supreme Court decisions and precedents in cases that you were involved with or associated with, in which the Court ruled against the Bush Administration? Such cases include *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*. If confirmed, will you agree to follow these precedents?

RESPONSE: *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush* are precedents of the Supreme Court due all the weight of such precedents. As Alexander Hamilton said in Federalist Paper No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."

5. Do you believe that the courts play an important role in reviewing and deciding whether an individual's rights have been violated by the government, even and especially when the government is acting in the name of protecting national security? Should courts ever review the basis of the political branches' claim of national security—or are those claims subject to the exclusive determination of the executive and/or Congress? If so, in what situations and on what basis?

RESPONSE: The Constitution protects liberty by dividing the federal government's powers and authority into three co-equal branches. As I explained at my hearing, in our constitutional system, the judiciary provides an important, independent forum "for vindicating the rights of unpopular voices, minority voices, the least amongst us." This is true even when the political branches are acting in the name of national security. As I acknowledged at my hearing, "Presidents make all sorts of arguments about inherent authority [regarding national security]. . . . Presidents of both parties have made arguments, for instance, about the War Powers Act, both parties. And the Congress has taken a different position on that matter, for example, with both parties. And the fact is we have courts to decide these cases for a reason, to resolve these disputes. And I would approach it as a judge through the lens of the *Youngstown* analysis." Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), sets forth a widely accepted tripartite framework for evaluating presidential power. In the first category, as I stated at the hearing, the "President [is] acting with the concurrence of Congress" and this is "when the President is acting at his greatest strength because there are shared responsibilities in our Constitution." Next, "when the Congress and the President are in disagreement," this is "the other end of the spectrum" and the President is acting "at the lowest ebb of his authority." Finally, "when Congress is silent, that is the gray area in between."

6. Do you believe that any government actions are "unreviewable" by the courts (assuming the court has jurisdiction and the parties have standing)? If so, to what extent?

RESPONSE: As I said during my hearing, no one is above the law. The role of an independent judiciary is to consider cases and controversies based upon the law and the facts.

7. Do you believe that humane treatment of individuals held in U.S. custody—that is, freedom from torture or cruel, inhuman, or degrading treatment—is required by international law, federal statute, and our Constitution?

RESPONSE: As we discussed at my hearing, the Convention Against Torture and implementing legislation ban torture. The Detainee Treatment Act bans cruel, inhuman, and degrading treatment. The Eighth Amendment prohibits cruel and unusual punishment.

8. Do you believe that Congress has the authority to regulate and constrain the executive branch, including on issues related to national security? For example, do you agree that Congress can constitutionally require that the executive branch treat detainees humanely, and prohibit torture and cruel treatment? Are there any areas in which you believe that Congress is constitutionally *prohibited* from legislating to constrain the executive branch? If so, what specific areas, and to what extent?

RESPONSE: Please see the response Question 5.

9. The Detainee Treatment Act contained both Senator McCain's amendment that prohibited cruel, inhuman, and degrading treatment, and Senator Graham's amendment that eliminated the jurisdiction of the federal courts to hear claims brought by detainees at Guantanamo.

   When the bill was about to be voted on, you forwarded press articles explaining what having these two provisions together meant. One article quoted a law professor who said

the Graham provision would not only bar habeas petitions against the legality of *detention*, but also claims "against conditions of confinement"—such as torture. In these emails, you said this was the "Administration's victory" and "the Administration's upside."

a. Why did you see it as a victory that those who might have been tortured or who were detained unlawfully could not exercise their rights to have their habeas claims before a federal court?

RESPONSE: As a lawyer in the Department of Justice, I worked with the Department of Defense and with Congress and others in a bipartisan effort to establish a system of rules to govern litigation brought by individuals detained as enemy combatants at Guantanamo Bay, bearing in mind the *Youngstown* formulation discussed above. Among other things, and as Senator Graham spoke about at the hearing, a process was put in place to permit detainees to challenge their status as enemy combatants in Combatant Status Review Tribunals as well as in the United States Court of Appeals for the D.C. Circuit. Some in the Administration regarded these legislative provisions as intrusions on the President's powers. In contrast, and with others, I welcomed these developments as consistent with *Youngstown*. That is what I recall I meant by "the Administration's upside."

10. The President's signing statement on the Detainee Treatment Act said the Graham amendment limiting court review would apply to pending cases, not just future cases. You advocated issuing a signing statement making that point—that the Graham amendment should knock out cases by people challenging "*many different aspects of their detention and that are now pending*."

a. Is that true? Yes or no.

b. Is it true that you worked on the effort to use the Graham amendment to get the Supreme Court to dismiss the Hamdan v. Rumsfeld case?

c. Isn't it also true that the Supreme Court, in Hamdan v. Rumsfeld, rejected the position you advocated and held that the Graham amendment did not apply to pending cases?

RESPONSE: The Civil Division and Office of the Solicitor General of the Department of Justice advanced the position that the Detainee Treatment Act would apply to cases pending on the date of its enactment. As a lawyer for the Department, I supported that position. Ultimately, that position did not prevail in the Supreme Court, with five Justices disagreeing with the Government's position and three Justices agreeing (Chief Justice Roberts took no part in the consideration or decision of the case).

11. The Supreme Court in *Hamdan* (2006) rejected the Administration's position that the Graham amendment barred review of Hamdan's case. An e-mail shows you discussed the decision with reporters, and the next day you were drafting legislation to reverse the Court's ruling.

    The legislation apparently drafted by you and a lawyer from the Office of Legal Counsel

barred judicial review of pending cases, including cases challenging conditions of confinement—such as torture. (Section 7 of draft) It also would have authorized indefinite military detention of Americans and others as enemy combatants, even if they were arrested in the United States. (Section 3 of draft)

a. **Is that true? And is it also true that, after the Military Commissions Act of 2006 barred pending habeas petitions by Guantanamo detainees, the Supreme Court found that the law was unconstitutional?** (Boumediene v. Bush, 2008)

RESPONSE: My involvement in responding to *Hamdan* was limited. *Hamdan* was decided on June 29, 2006, approximately three weeks before I was confirmed as a judge. The Military Commissions Act was signed on October 17, 2006, months after I left the Department of Justice. Your question references an early draft of the Act that I reviewed but do not recall drafting. As I read it today, that draft would not have barred judicial review but would have sought to channel cases through the judicial-review mechanism of the Detainee Treatment Act. It is true that the Supreme Court some years later in *Boumediene v. Bush* (2008) held that certain aspects of the Act did not satisfy the Suspension Clause.

12. When President Bush signed the Detainee Treatment Act, he issued a statement that basically said he would only construe the law consistent with his powers as Commander in Chief. According to press reports, Administration officials confirmed "*the President intended to reserve the right to use harsher methods in special situations involving national security*." In other words, the signing statement reflected the President's belief that he had the power to not comply with the law he had just signed. (Charlie Savage, *Boston Globe*, Jan. 4, 2006)

    According to emails, you were involved in preparing that signing statement and you advocated for the issuance of the signing statement. They even show you saying to the top State Department lawyer that Harriet Miers, the White House Counsel, "*needs to hear from us, otherwise this may wind up going the other way*."

    a. **Why did you argue so strongly for the issuance of this statement, even going so far as to push the President's Counsel to do it?**

RESPONSE: Please see the response to Question 1.

13. One of the documents provided to the Committee by the Justice Department contains a series of questions—and we tell from the subject matter that the document was created approximately around November 22, 2005 (because it discusses the indictment of Jose Padilla that occurred on that date). The talking points ask whether "aggressive interrogation techniques employed by the Admin yielded any valuable intelligence?" In the margin next to this question, you hand-wrote one word: "**Yes**."

    a. **Please describe the information upon which you relied to make the assessment that "aggressive interrogation techniques employed by the Admin yielded any valuable intelligence."**

b. **Did you ever question whether they were lawful?**

c. **Do you believe that torture yields useful intelligence?**

RESPONSE: As we discussed at the hearing, clients of the Department of Justice had represented that certain interrogation techniques had yielded valuable intelligence. I have never considered or been asked to consider whether torture yields useful intelligence because, among other things, torture is expressly prohibited by federal statute.

14. As a presidential candidate, President Trump said he wanted to bring back waterboarding and a "hell of a lot worse." (The Hill, February 6, 2016)

    a. **Does the President have the authority to issue such an order?**

    b. **Would such an order be lawful?**

RESPONSE: No one is above the law—including the President. To the extent your question implicates issues that may arise in future cases that may come before me as a judge, it would not be proper for me to comment further. As a general matter, however, I would reemphasize that Justice Jackson's concurrence in *Youngstown* teaches that executive power is at its "lowest ebb" when undertaken in violation of a congressional statute. Please see the response to Question 5.

15. During the February 6, 2006 hearing with Attorney General Gonzales, senators from both parties raised serious concerns about his argument that the president had "inherent authority" that could not be limited by laws passed by Congress—the very argument that you had included in your draft testimony.

    Senator Graham observed at the hearing that this "inherent authority" argument could "wipe out" Congress' power and be used to justify torture. This was the same logic that John Yoo used in the torture memos—that the President's Article II powers enable him to override the laws passed by Congress.

    a. **Do you believe the President has the inherent authority to order waterboarding, as President Trump has promised, even though it is forbidden by law?**

RESPONSE: Please see the response to Question 14.

16. On May 30, 2005, Mr. Bradbury signed a memo for the Office of Legal Counsel concluding that waterboarding, stress positions, sleep deprivation, and other techniques were not prohibited by the substantive constitutional standard applicable to the United States under Article 16 of the Convention Against Torture—which also is the standard set forth in the McCain amendment. You came to work at the Department of Justice in June 2005.

    a. **Were you aware of this memo while you were at the Department of Justice?**

RESPONSE: I do not recall what I knew at the time about this then-classified memorandum.

17. You served in the George W. Bush Administration as the Principal Associate Deputy Attorney General. During this time, you defended Bush Administration positions that the President had the authority to engage in warrantless electronic eavesdropping.

    a. **Does this reflect your own views that a President has the authority to do this?**

RESPONSE: Positions that I took while at the Department of Justice, as an advocate for the interests of the Executive Branch, do not necessarily reflect my personal views or decisions that I have made or may make as a judge.

    b. **What was your view at the time of the so-called torture memos written by John Yoo and Jay Bybee that the President had the authority to redefine torture and allow it, despite the prohibition in federal law and treaties?**

RESPONSE: I had no occasion to pass upon the memos referenced in your question, which had been withdrawn before I joined the Department of Justice.

18. At your hearing, Senator Lee asked you if you had ever "held any public office in a policymaking arena outside the Federal judiciary." You responded that you had served on your children's school board, but "that is as close to policy as I care to get."

    Yet during your time at the Justice Department, you were a senior political appointee, the chief deputy to the third-ranking position in the department.

    Your Senate questionnaire, which you filled out, says you ***"assisted in the development and implementation of a wide variety of initiatives and policies."***

    In fact, I sent you a letter asking about the policies and initiatives you had worked on. I received a response from the Justice Department that said that based on searches they did, they found that you worked on a series of policies and initiatives.

    a. **In your high-level political appointment, didn't you work on policy matters, as you stated in your questionnaire?**

    b. **In your experience, isn't it typical for people at the leadership levels of the Justice Department where you served to be involved in policy decisions?**

RESPONSE: According to searches conducted by the Department of Justice (see March 8, 2017 letter from the Department), I assisted in the development and implementation of certain Departmental legal policies or initiatives while I was at the Department. Involvement in legal policy initiatives within the Department does not mean policymaking as a politician or legislator, which I understood Senator Lee to be asking about at the hearing.

    c. **You worked on legislation while you were at the Department of Justice, right? Can you name the bills or types of legislation you worked on, beyond the Detainee Treatment Act and the Military Commissions Act?**

RESPONSE: It is possible I worked on other legislation but, given the passage of time, I cannot currently recall other legislation.

19. On the campaign trail, then-candidate Trump stated that based on the justices he would appoint to the Supreme Court, *Roe* would be overturned "automatically" and "go back to the states." He also said women should be punished for having an abortion, before walking back the statement.

    a. **If *Roe* were overturned by the Supreme Court, could states decide whether to legalize abortion? Yes or no.**

    b. **Without *Roe*, in states that make access to abortion illegal, could a state pass a criminal law with penalties for a woman who has an abortion? Yes or no.**

RESPONSE: As we discussed at the hearing, *Roe v. Wade*, decided in 1973, is a precedent of the United States Supreme Court entitled to all the respect due such a precedent under the law of precedent. As a nominee, it would not be proper to speculate about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

20. When asked by Senator Blumenthal whether you agreed with the result in *Brown v. Board of Education*, you testified that *Brown* "was a seminal decision that got the original understanding of the Fourteenth Amendment right."

    a. **Is *Roe v. Wade* also "a seminal decision that got the original understanding of the Fourteenth Amendment right"? Yes or no.**

RESPONSE: *Roe v. Wade* is a precedent of the Supreme Court that, as I said at the hearing, "has been reaffirmed many times," and is entitled to all the respect due such precedent. In *Roe*, the Court grounded a right to abortion in its understanding of "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." 410 U.S. 113, 153 (1973).

21. When Chairman Grassley asked you whether you agreed with the decision in *Bush v. Gore*, 531 U.S. 98 (2000), you testified: "as a judge, it's a precedent of the United States Supreme Court, and it deserves the same respect as other precedents of the United States Supreme Court when you're coming to it as a judge."

    But in *Bush v. Gore*, the Court wrote that the Court's "consideration [wa]s limited to the present circumstances." *Id.* at 109.

    a. **In light of the Court's instruction that its consideration in *Bush v. Gore* was "limited to the present circumstances," do you believe that the Court's decision in that case deserves the same respect as precedent of the Court that *Roe v. Wade* does?**

RESPONSE: As discussed at the hearing, there are a number of "factors a good judge looks at when deciding any challenge to a precedent," including, among other things, "how long it has

been around," "whether it has been reaffirmed," "the quality of the initial decision," and "workability."

22. In 2015, you joined a dissent in the Little Sisters case where you argued in favor of the religious beliefs of an organization over the rights of an individual. *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc). The dissent you joined argued that requiring the groups to fill out a simple form violated their religious rights, but the opinion took no account of the harm that the groups' beliefs would impose on their female employees. In fact, the dissent makes no mention of them at all.

    a. **How was your approach in this case consistent with the Supreme Court's majority opinion in *Hobby Lobby* that "courts must take adequate account of the burdens" that a religious accommodation imposes on individuals who do not benefit from the accommodation and do not share the religious belief?**

RESPONSE: Respectfully, the two decisions are consistent. The Religious Freedom Restoration Act prohibits the federal government from substantially burdening a sincerely held religious belief unless its regulation is narrowly tailored to achieve a compelling government interest. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court noted, "[i]t is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.' That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest," 134 S. Ct. 2751, 2781 n. 37 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The dissent from denial of rehearing en banc in *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10th Cir. 2015), had no occasion to address the Government's compelling interest and the availability of a less restrictive means to advance that interest. The dissent addressed whether the Little Sisters' sincerely held religious beliefs had been substantially burdened, and concluded that the panel erred in not finding a substantial burden. *Id.* at 1318. The dissent would have remanded the case to the panel to analyze the remaining issues under RFRA of the existence of a compelling interest and the availability of a less restrictive means of advancing that interest. *Id*. Part of that analysis on remand could have included an analysis of the burdens that a religious accommodation would impose on individuals who do not benefit from the accommodation and do not share the religious belief.

23. Last June, California passed a law permitting assisted suicide for terminally ill patients, called the End of Life Options Act. It allows mentally competent adults to make their own decisions about their end of life.

    In your writings on the subject, you suggested that one reason to ban the practice of assisted suicide was a risk of abuse. But the California law has a number of safeguards to prevent such abuse: (1) only mentally competent adults who have only six months or less to live are eligible; (2) patients must request aid three times—twice orally, and once in writing in the presence of two witnesses (3) patients must consult with two different physicians; and (4) a final attestation form is required.

    a. **Even with all these safeguards that California has put in place, do you still**

believe that the assisted-suicide laws are subject to abuse?

RESPONSE: As we discussed at the hearing, my prior writings were offered as a commentator not in my role as a judge. Many of the issues raised here implicate issues that may come before me as a judge, and my decisions as a judge are based on the facts and law of each case, not my personal views. It would not be proper for me to comment further on how I might rule in a particular case. To do so would risk violating my ethical obligations as a judge, denying litigants the fair and impartial judge to whom they are entitled, and impairing judicial independence by suggesting that a judge is willing to offer promises or previews in return for confirmation.

24. One of the documents we received from the Department of Justice stood out to me as it related to this issue. In an email you wrote to Solicitor General Paul Clement, you expressed a hope that you could "*include an epilogue discussing the Court's ruling and, hopefully, remarking on the brilliant and winning performance of the SG*!" in the book you were writing on assisted-suicide.

    During the hearing, in response to a question from Senator Coons about this document, you said, "When you represent the Government, you want the Government to win."

    But this email is not a general expression of support for the Administration. It is you saying that you hoped to include a discussion of the Government winning the case in your book and to highlight how well the Solicitor General did in arguing the case.

    If the Justice Department had won that case, it would have meant that the federal drug laws would prohibit dispensing or prescribing a controlled substance to assist in suicide— it would, in effect, have outlawed this nationwide and wiped out state laws.

    a. **So my question to you is simple: before *Gonzales v. Oregon* was decided, was it your personal hope that the Bush Justice Department's position would prevail in that case?**

RESPONSE: As I discussed at the hearing, I was an advocate for the government at the time, and as an advocate representing the Department of Justice it was my hope that the government prevail in its case.

25. Like Justice Scalia, you are a self-professed originalist. (*See, e.g.*, "[The Constitution] isn't some inkblot on which litigants may project their hopes and dreams…but a carefully drafted text judges are charged with applying according to its original public meaning." *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (underlining added)).

    I am interested in whether you think your approach to originalism is the same or different from Justice Scalia's. For example, Justice Scalia repeatedly said that there was no protection of privacy rights under the Constitution outside the Fourth Amendment context.

    a. **Is your theory of originalism the same as Justice Scalia's in this regard?**

RESPONSE: As I said at the hearing, "I'm happy to be called [an originalist]. I do worry about the use of labels in our civic discussion . . . sometimes [leads to] ignor[ing] the underlying ideas. As if originalism belonged to a party, it doesn't. As if it belonged to an ideological wing, it doesn't." As I further said at the hearing: "I am with Justice Kagan on this. I think it is what we all want to know. I do not know a judge who would not want to know what the original understanding is of a particular term in the Constitution or a statute. That is information [that] would be valuable to any judge and considered by a judge." I also respectfully refer you to the response to Question 10 of Senator Leahy's questions for the record.

b. **The Court, as part of protecting privacy, has safeguarded the right to marry, the right to procreate, the right to custody of one's children, the right to keep the family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to abortion, the right to engage in private consensual homosexual activity, and the right to refuse medical treatment. Under your theory of originalism, which of these rights are protected?**

RESPONSE: As we discussed at the hearing, a good judge should always give appropriate respect to precedent. As Alexander Hamilton said in Federalist Paper No. 78: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." To the extent that the Court has ruled in these areas, those cases are precedent of the Supreme Court entitled to all the respect such precedent is due.

26. In the case Compass Environmental Inc. v. Occupational Safety and Health Review Commission, 663 F.3d 1164 (10th Cir. 2011), the issue involved a fine imposed by the Department of Labor on an employer for failing to train an employee who died after being electrocuted on the job. The worker—who had started working later than the rest of the crew, and did not receive the same safety training that the rest of the workers did—was killed when a piece of equipment came too close to a high-voltage overhead power line.

    The majority opinion, which was joined by another Tenth Circuit appointee of President George W. Bush, upheld the Department of Labor's fine against the employer, because it found that the employer had violated the law by failing to train this worker in light of the fact the worksite included hazardous high-voltage power lines, that the employer recognized this hazard as it applied specifically to worker, and that that it had trained most of its employees on that hazard but not the worker who died.

    You wrote that the fine should be overturned because the Secretary of Labor hadn't produced any evidence that a reasonably prudent employer would have anticipated this hazard or trained the worker about the hazards posed by high-voltage overhead lines.

    a. **There was evidence that (1) high-voltage power lines are very dangerous, (2) the employer had identified this power line as a hazard at this worksite, and (3) the employer had decided it should train employees on this hazard but had not trained this particular person because he didn't start working until later. Why didn't you believe this was enough evidence to support the contention that a**

reasonably prudent employer should have trained this worker—and could be held responsible for not doing so?

RESPONSE: My opinion in *Compass Environmental v. Occupational Safety and Health Review Commission* was based on the legal principle that the government cannot penalize anyone without some proof of wrongdoing. The Secretary of Labor had the burden of proving that "reasonably prudent employers in the industry would have anticipated the sort of electrical hazard that [the worker] encountered in this case and provided him with more training about it." 663 F.3d 1164, 1170 (10th Cir. 2011) (Gorsuch, J., dissenting). As I explained, I discerned no record evidence suggesting that a reasonable employer would have done more to anticipate or train for the accident than Compass did. As I explained, agencies "cannot penalize private persons and companies without *some* evidence the law has been violated." *Id*. My opinion in this respect endorsed the reasoning of an Administrative Law Judge.

27. Outside groups including Heritage Foundation and Federalist Society played an unprecedented role in the Supreme Court nomination process—President Trump stated that "we're going to have great judges, conservative, <u>all picked by the Federalist Society</u>." (Donald Trump, Breitbart News Interview, June 13, 2016).

    In September, when your name was added to President Trump's second shortlist, he specifically thanked both the Heritage Foundation and the Federalist Society. *The Wall Street Journal* wrote an article discussing Leonard Leo's role in selecting conservative Supreme Court nominees and specifically stated that "the week after the election… Mr. Leo was summoned to Trump Tower" to discuss "winnowing" the list. (Wall Street Journal, "Trump's Supreme Court Whisperer," Feb. 3, 2017)

    a. **When did you first meet Leonard Leo?**

RESPONSE: I do not exactly recall when I first met Leonard Leo, but it was many years ago.

28. I understand you sat on a panel with Mr. Leo entitled, "The Life and Legacy of Supreme Court Justice Antonin Scalia" on September 3, 2016. Your name was put on President Trump's second short list on September 23, 2016.

    a. **Did you discuss the Supreme Court vacancy with Mr. Leo when you interacted with him on September 3 or at any time before you name was put on the list?**

RESPONSE: On September 3, 2016, I moderated a long scheduled panel on the legacy of Associate Justice Antonin Scalia during the Tenth Circuit Judicial Conference with Justice Elena Kagan, Professor William Kelley, and Leonard Leo. During the course of the Conference, I had conversations with Justice Kagan, Professor Kelley, and Mr. Leo about many topics, including Justice Scalia's jurisprudence and current events.

    b. **Why do you think the Federalist Society and the Heritage Foundation recommended you for inclusion on Mr. Trump's list?**

RESPONSE: I cannot speak for the Federalist Society or the Heritage Foundation.

29. On the first day of questioning, Senator Blumenthal asked you about officials from the Heritage Foundation who discussed the Supreme Court with you. In response to his question you said: "*To my knowledge, Senator, from the time of the election to the time of my nomination, I have not spoken to anyone that I know of from Heritage*."

    a. **Did you speak to anyone from the Heritage Foundation prior to the 2016 election about the Supreme Court? How many conversations with people from Heritage did you have? When did they take place?**

RESPONSE: Prior to the 2016 election, to my knowledge, I did not have substantive conversations with someone whom I know to be employed by the Heritage Foundation about my potential nomination to the Supreme Court.

    b. **Did you speak to anyone from the Federalist Society before or after the election? If so, what topics and issues did you discuss?**

    c. **Have individuals from the Federalist Society and the Heritage Foundation been involved in your preparation for this nomination hearing? If so, please detail their involvement.**

RESPONSE: I have responded to many questions about my experiences in the nomination and confirmation process, both in the Senate Judiciary Committee Questionnaire and at the hearing. Various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Some of them are affiliated with the Federalist Society and some are affiliated with the American Constitution Society, societies that provide, among other things, valuable forums for civil discussion and debate on legal questions. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

30. During your hearing, Senator Blumenthal asked you about your interview with the President, and you said there was a mention of *Roe v. Wade*. He then asked about your interview with Steve Bannon, White House Chief of Staff Reince Priebus, and other advisors. He asked if they asked you about *Roe* and you said no.

    a. **Did they ask you about any case? If so, what cases did they ask you about?**

    b. **Did they ask about your judicial philosophy? If so, what did you say?**

RESPONSE: To my recollection, they asked me about my qualifications, my family and personal history, my record as a lawyer and a judge at the Tenth Circuit, and my approach to judging, as this Committee has. As I explained at the hearing, I have made no commitments to anyone on matters that might come before me as a judge.

31. Your questionnaire states that, on January 5, 2017, you interviewed with members of the

transition team—specifically including Steve Bannon and Reince Priebus, who is now the President's Chief of Staff.

a. **What did Steve Bannon specifically ask you? What else did he say to you?**

b. **What did Reince Priebus specifically ask you? What else did he say to you?**

c. **What else did you discuss?**

RESPONSE: I respectfully refer you to my testimony at the hearing on this subject and to Question 30.

32. Then you were interviewed by the President-elect.

a. **What did the President specifically ask you? What else did he say to you?**

RESPONSE: I respectfully refer you to my testimony at the hearing on this subject and to Question 30.

33. During your hearing, you were asked about the outside groups that are reportedly spending $10 million in support of your confirmation. You indicated that you had no idea what individuals may be contributing to that effort. When Senator Whitehouse asked if it was a problem that the American people did not know who was funding this extraordinary campaign on your behalf—or even whether you were concerned about that fact—you declined to answer.

a. **Please list any person, institution, corporation, or other entity that you believe to have made any contributions to this campaign.**

b. **Have you made any attempts to learn the identity of any individuals or organizations that have made contributions to this campaign? If so, what have you learned? If you have not made any such attempts, why not?**

c. **Will you publicly call on the Judicial Crisis Network and any other organization working in support of your nomination to disclose their donors?**

d. **You implied during the hearing that you are "uncomfortable" with the massive amounts of money being spent on the campaign to support your nomination. Will you publicly call on the Judicial Crisis Network and other organizations working in support of your nomination to cease this big-money campaign?**

RESPONSE: Respectfully, these questions are better directed to others. Over the last several weeks, I have focused on meetings with nearly 80 Senators, answering the Senate Judiciary Committee Questionnaire, completing the FBI process, interviewing with the ABA, preparing for the hearing, and answering questions for the record.

34. Please identify all individuals who assisted in your preparation for testifying before

the Judiciary Committee.

RESPONSE: In preparation for my hearing, various people have provided me advice, including Senators, Administration and transition personnel, former law clerks, and friends and family. Please see the response to Question 30.

35. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response Question 34.

36. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

RESPONSE: No one in this process has identified themselves to me as from the Judicial Crisis Network. Please see the response to Question 33.

37. You were previously a member of the Republican National Lawyers Association, and you chaired their Judicial Confirmation Task Force from 2001-2002.

    a. **What did your role as chair involve?**

    b. **You must have been successful in that role—the Senate Republican Conference gave you an Award for Distinguished Service based on your work. What did you do to warrant that award?**

RESPONSE: My role and the award you mention are described in the letter sent by the Department of Justice dated March 8, 2017.

38. While testifying during your hearing, you have at times lamented the current judicial confirmation process. You told Senator Whitehouse, in fact, "There is a lot about the confirmation process today that I regret." And Senator Lee said on Monday that "[T]he acrimony, the duplicity, the ruthlessness of today's politics are still quite unfamiliar to you. I hope that they will remain unfamiliar to you."

    In 2001, President Bush had just been elected. Republicans in the Senate had blocked over 60 of President Clinton's judicial nominees at the time and fights over the judiciary were already quite partisan.

    a. **You are obviously aware of the fact that judicial nominations can be quite contentious—you helped a partisan political organization confirm judges. What is different today than it was in 2001-2002?**

RESPONSE: I have not sought to study what is different today from 2001-2002 regarding the judicial confirmation process, but I respectfully refer you to an article I wrote in 2002, *Justice White and Judicial Excellence*, UPI (May 3, 2002).

39. You have said repeatedly during your hearing that you can't comment on precedent because it would "tip your hand" to future litigants.

    Yet on several occasions you have gone out of your way in separate opinions to call for precedent to be overturned.

    One example is the *Gutierrez-Brizuela* case, where you wrote the unanimous majority ruling for the immigrant on due process grounds, but then wrote an opinion concurring with yourself to call for the *Chevron* doctrine to be reconsidered.

    a. **How does answering <u>our questions</u> about precedent "tip your hand" any more than writing a separate, unnecessary opinion questioning a precedent that has been relied on thousands of times does?**

RESPONSE: As a circuit judge, I am responsible for applying the precedent of the Tenth Circuit and the Supreme Court to cases and controversies before me, which required the result the panel reached in *Gutierrez-Brizuela v. Lynch*. But, as I said at the hearing, circuit judges are also in a position to "identify[] issues" for the Supreme Court "when [they] see a problem" in a case or controversy. This is exactly what I did in my concurrence in *Gutierrez-Brizuela*. As I said at the hearing and explained in that opinion, an undocumented immigrant in that case was placed in a "whipsaw" "by a change in law effected by an administrative agency," which had "overrul[ed] a judicial precedent" and effectively added four years to the time Mr. Gutierrez had to wait outside the United States. As a circuit judge, it was appropriate for me to identify the problems that I saw underlying the result that we were required to reach. Raising an issue in this capacity is fundamentally different than offering my views on specific Supreme Court precedents in the context of a hearing where there is no case or controversy to resolve. Publicly discussing preferred or disfavored precedents in the context of a confirmation hearing undermines the independence of the judiciary and the separation of powers and carries with it a risk of suggesting to future litigants that I am not approaching their respective cases with an open mind or that I have prejudged their cases in order to secure confirmation.

40. During your tenure at the Justice Department, or after, did you ever learn that Justice Department leadership was considering the termination of specific U.S. Attorneys? If so, what did you learn and when?

RESPONSE: In the Department of Justice, U.S. Attorneys report to the Deputy Attorney General and are not hired or terminated by the Associate Attorney General, to whom I reported. Further, I was not employed by the Department at the time of the removal of seven U.S. Attorneys in December 2006 and do not recall involvement in the termination of these individuals.

41. The Department of Justice's Office of the Inspector General report "An Investigation in the Removal of Nine U.S. Attorneys in 2006" makes clear that while the actual firing of seven U.S. Attorneys occurred on occurred on December 7, 2006—after you had left the

Department of Justice—the report also found that "the process to remove the U.S. Attorneys originated shortly after President Bush's re-election in 2004," and that substantial groundwork was laid during the time period that you served at the Department.

a. **Did you ever communicate with Kyle Sampson or anyone else in Department leadership about the U.S. Attorney firings that occurred in 2006 and 2007? If so, what did you discuss and when? Did you have any such communications following your confirmation to the Tenth Circuit?**

RESPONSE: Please see the response to Question 40.

42. Did you ever communicate with Monica Goodling about politicization hiring at the Justice Department? If so, what did you discuss?

RESPONSE: I do not recall discussions about inappropriate political hiring for career positions with Ms. Goodling.

43. Did you ever communicate about consideration of political background or belief in the hiring process for career positions? Did you have any such discussions following your confirmation to the Tenth Circuit?

RESPONSE: I did not make inappropriate political hiring recommendations for career positions at the Department of Justice.

44. Did you ever participate in any decision to overrule the recommendation of a career attorney in the Civil Rights Division? If so, please identify each occasion where you participated in any such decision.

RESPONSE: At the Department of Justice, career attorneys in the Civil Rights Division report to the Assistant Attorney General of that Division, a presidentially appointed and Senate confirmed position. In turn, the Assistant Attorney General reports to the Associate Attorney General, also a presidentially appointed and Senate confirmed position. I also reported to the Associate Attorney General. It has been more than a decade since I worked at the Department, but I do not recall instances in which the Associate Attorney General overruled the Assistant Attorney General for Civil Rights during my time at the Department.

45. Did you ever communicate regarding hiring practices in the Civil Rights Division with Bradley Schlozman or anybody else? If so, what did you discuss and when, and with whom.

RESPONSE: I do not recall discussions about inappropriate political hiring for career positions in the Civil Rights Division with Mr. Schlozman or others during my time at the Department. In the course of preparing for the hearing, I have been shown an email that I sent, within days before the end of my tenure at the Department, alerting others to a newspaper article discussing hiring in the Civil Rights Division.

46. Did anyone ever communicate to you any concern about Bradley Schlozman's conduct in the Civil Rights Division? If so, who communicated them to you, and what were the concerns that were communicated? Did you ever discuss the concerns with anyone else, either before or after you left DOJ? What actions did you take to respond to any concerns you heard?

RESPONSE: Please see the response to Questions 43 and 45.

47. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response to Question 34.

48. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see the response to Question 34.

49. Please identify all communications you have had with any individuals from the Judicial Crisis Network in within the past year. If you are aware of people who had communications with any individual from the Judicial Crisis Network regarding your nomination or potential nomination, please identify such people, the nature of the communications, and when they occurred.

RESPONSE: No one in this process has identified themselves to me as from the Judicial Crisis Network. Please see the response to Question 33.