Nomination of Sean Jordan to the United States District Court for the Eastern District of Texas
Questions for the Record
March 12, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

   It is not appropriate. Lower courts do not have authority to depart from Supreme Court precedent.

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

   Circuit judges may write concurring and dissenting opinions addressing any number of topics, including the possibility that the U.S. Supreme Court might, at some time, revisit one of its prior decisions. However, lower courts do not have the authority to depart from Supreme Court precedent.

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

   The Supreme Court has made clear that district court decisions are not binding precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (internal quotes and citation omitted)). A district court is therefore free to disagree with a prior district court precedent whenever it becomes clear that the prior precedent was incorrect.

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

   As a lower-court nominee, it would be unfitting for me to advise when it is appropriate for the Supreme Court to overturn its own precedent. The Court itself determines when that is appropriate. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating that only the Supreme Court has "the prerogative of overruling its own decisions").

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that

"superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

All Supreme Court precedent is settled law from the perspective of a district court judge, entitled to controlling precedential weight and dispositive stare decisis effect. That includes *Roe*. If confirmed to serve as a district judge, I would follow all Supreme Court precedent fully, fairly, and faithfully.

b. Is it settled law?

Yes, please see my response to Question 2(a) above.

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

Yes. All Supreme Court precedent is settled law from the perspective of a district court judge, entitled to controlling precedential weight and dispositive stare decisis effect. That includes *Obergefell*. If confirmed to serve as a district judge, I would follow all Supreme Court precedent fully, fairly, and faithfully.

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

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

As a federal judicial nominee, it would be unfitting for me to provide personal opinions about particular Supreme Court decisions or dissents from those decisions. If confirmed, I would faithfully apply all Supreme Court precedent.

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

The Supreme Court in *Heller* stated that "the right secured by the Second Amendment is not unlimited," adding, "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 arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court "also recognize[d] another important limitation on the right to keep and carry arms," namely, "that the sorts of weapons protected were those in common use at the time." *Id*. at 627 (internal quotation marks omitted).

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

Please see my response to Question 4(a) above.

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

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

The Supreme Court "has recognized that First Amendment protection extends to corporations." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010). In *Citizens United* in particular, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id*. at 365. If I am confirmed, I will be bound by *Citizens United* and all of the Supreme Court's precedents, and I will follow them faithfully. The scope of corporations' First Amendment rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

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

In *Citizens United*, the Supreme Court rejected what it called "the antidistortion rationale." 558 U.S. at 348–356. If I am confirmed, I

will be bound by *Citizens United* and all of the Supreme Court's precedents, and I will follow them faithfully. The scope of corporations' First Amendment rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

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

The question is broad. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993 and also noted the limits of its holding, *see, e.g.*, *id*. at 2759–2760. If I am confirmed, I will be bound by *Hobby Lobby* and all of the Supreme Court's precedents, and I will follow them faithfully. The existence and scope of corporations' religious freedom rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

6. In 2016, you authored an amicus brief urging the Supreme Court to consider the case of an individual, born on a U.S. military base overseas, who faced deportation proceedings.

You appeared to argue that the Fourteenth Amendment to the Constitution guarantees citizenship for individuals "born on land subject to the dominion and allegiance of" the United States. (Brief of *Amici Curiae* Certain Members of Congress in Support of Petitioner, *Thomas v. Lynch*, 136 S. Ct. 2506 (2016) (cert. denied))

a. Does the Fourteenth Amendment to the United States Constitution guarantee birthright citizenship?

The scope of the Fourteenth Amendment's Citizenship Clause is the subject of pending and impending litigation and political debate. Thus, Canons 3(A)(6) and 5 of the Code of Conduct for United States Judges prevent me from answering this question.

b. Is a child born in the United States to undocumented parents a citizen of the United States?

See my answer to Question 6(a).

7. In the 2014 Supreme Court case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, you authored an amicus brief arguing that the Fair Housing Act (FHA) prohibits only "purposeful" discrimination – that is, you argued

that the FHA does not prohibit neutral policies that disproportionately harm individuals who belong to protected classes.

You argued that allowing lawsuits for these disproportionately harmful policies would "inflict significant expense, time, and stigma" on housing providers. (Brief of *Amicus Curiae* Texas Apartment Association in Support of Petitioners, *Texas Dep't of Housing & Community Affairs v. the Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015))

Do you believe that policies that disproportionately harm protected classes should be allowed to continue simply because changing these policies would be costly and time- consuming?

The amicus brief referenced in this question was filed on behalf of my client, the Texas Apartment Association (TAA). TAA argued that the FHA does not provide a cause of action for claims of disparate-impact discrimination. The Supreme Court held, however, that disparate-impact claims are cognizable under the FHA. *Texas Dep't of Housing & Community Affairs v. the Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). If confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Supreme Court's decision in this case.

8. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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?

   As I noted in response to Question 26(a) of the Senate Judiciary Questionnaire, I interviewed with officials from the White House and Department of Justice on August 3, 2018. I generally recall some discussion of administrative-law principles. To the best of my recollection, the discussion focused on my understanding of current Supreme Court precedents in the general area.

   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?

   I do not recall ever being asked by the Federalist Society or Heritage

Foundation about my views on administrative law.

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

As a nominee to a lower federal court, it would be inappropriate for me to offer my personal opinions about specific areas of the law. That is particularly true for matters that could come before me as a judge. *See* Code of Conduct for United States Judges, Canon 3(A)(6). I can affirm, however, that if I am confirmed to serve as a district judge, I would approach any case involving administrative law issues in the same way that I would approach all other cases: by fairly and faithfully applying all applicable Supreme Court and Fifth Circuit precedents.

9. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2016. 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 did not write the Federalist Society's website and have never been employed by the Federalist Society. I am not aware of the Federalist Society's understanding of the quote referenced in the question. I have never had a discussion with any member or employee of the Federalist Society about this statement.

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

Please see my response to Question 9(a) above. I do not know how the Federalist Society seeks to reorder priorities in the legal system, if at all. I have never had a discussion with any member or employee of the Federalist Society about this statement.

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

Please see my response to Question 9(a) above. I am not aware of what the Federalist Society means by the phrase "traditional values." I have never

had a discussion with any member or employee of the Federalist Society about this statement.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

I have not discussed my nomination to serve as a district court judge with any officer or employee of the Federalist Society.

e. You indicated on your Questionnaire that you joined the Federalist Society in 2016, more than 20 years after you began practicing law. Why did you decide to join the Federalist Society in 2016?

I decided to join the Federalist Society after I had heard for a number of years that it sponsored a variety of helpful seminars on a broad range of topics, including issues and cases pending before the Supreme Court.

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

The Supreme Court has on various occasions made clear that courts may consider legislative history when the statutory language is ambiguous. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005).

11. 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.

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

I received the questions on Tuesday, March 12, 2018. I personally drafted the responses after consulting my Questionnaire, including its attachments, and conducting limited research. After sharing those draft responses with the Department of Justice, Office of Legal Policy, which offered suggestions and comments, I revised my responses as I thought appropriate in light of those comments. My answers to each question are my own.

Senate Judiciary Committee
Questions for the Record
March 12, 2019
Senator Amy Klobuchar

Question for Sean Jordan, Nominee to be U.S. District Judge for the Eastern District of Texas

As Deputy Solicitor General for the State of Texas, you were supporting counsel on amicus briefs submitted by Texas and other states challenging gun safety laws by the District of Columbia and the city of Chicago. The arguments advanced in those briefs relied on an interpretation of the original meaning of the Second Amendment at the time of the founding.

- How should courts evaluate restrictions on the use of firearms that did not exist at the time the Second Amendment was written?

  The Supreme Court in *Heller* stated that "the right secured by the Second Amendment is not unlimited," adding, "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 arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court "also recognize[d] another important limitation on the right to keep and carry arms," namely, "that the sorts of weapons protected were those in common use at the time." *Id*. at 627 (internal quotation marks omitted). Beyond that, as a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

Nomination of Sean D. Jordan, to be United States District Court Judge for the Eastern District of Texas
Questions for the Record
Submitted March 12, 2019

QUESTIONS FROM SENATOR COONS

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

   I would apply the framework set forth in the numerous Supreme Court decisions assessing these questions, including but not limited to *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

      Yes, as directed by the Supreme Court.

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

      Yes, as directed by the Supreme Court. The inquiry would include sources such as the historical practice under the common law, the practice in the American colonies, the history of state statutes and judicial decisions, and long-established traditions. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

      Yes. I would be bound by Supreme Court and Fifth Circuit precedent. Absent a decision from those courts on the issue, I could look to decisions from other courts of appeals as persuasive authority.

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

      Yes. I would consider whether a similar right has previously been recognized by Supreme Court or circuit precedent.

   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*).

Both *Casey* and *Lawrence* are binding precedents, and I would apply them faithfully along with other binding precedents.

f. What other factors would you consider?

I would consider any other factors that are relevant under Supreme Court or Fifth Circuit precedent.

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

The Equal Protection Clause applies to both race-based classifications and gender-based classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

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?

Any academic argument about the intent of the individuals who passed the Fourteenth Amendment does not affect the binding precedent cited above, which I would apply faithfully if I were fortunate enough to be confirmed as a lower court judge.

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 am unaware why *United States v. Virginia* was filed or resolved at the time it was filed or resolved.

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

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." *Obergefell*, 135 S. Ct. at 2607.

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

Equality under the law is paramount in our legal system. However, it is my understanding that this question is the subject of litigation, therefore Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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

Yes, under the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

Yes, under the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

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?

Yes, under the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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 Question 3 above.

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

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

If confirmed as a lower court judge, I would follow all binding Supreme Court precedent and Fifth Circuit precedent. Where applicable precedent from those courts makes it appropriate to consider such evidence, I would do so in accordance with that precedent.

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

The role of sociology, scientific evidence, and data depends on the nature of the judicial analysis at issue. I would consider binding Supreme Court and Fifth Circuit precedent to determine what role these sources should play in a given case.

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 is binding Supreme Court precedent, and I will follow it faithfully along with other binding precedents if I am fortunate enough to be confirmed as a district court judge. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018) ("Our 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.").

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

Please see my response to Question 5(a) above.

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 believe this topic has been the subject of significant scholarly debate over the last several decades. *See, e.g.*, M. McConnell, The Originalist Case for *Brown v. Board of Education*, 19 Harvard Journal of Law and Public Policy 457 (1995). From the perspective of a nominee to a lower court, the question is an academic one in light of the binding precedent of *Brown*, which I would apply faithfully.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Mar. 11, 2019).

I have not studied this white paper. The quoted language seems to reflect the fact that determining the original public meaning of a constitutional provision can be difficult.

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?

For a lower court judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If the Supreme Court has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision is dispositive. I would faithfully apply all binding Supreme Court precedents regardless of their methodology.

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) above.

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

I would faithfully apply all relevant Supreme Court and Fifth Circuit precedent that identifies the appropriate sources to use in discerning the contours of a constitutional provision.

7. You submitted an amicus brief in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), on behalf of the Texas Apartment Association. Your brief argued that the Fair Housing Act does not authorize disparate-impact claims, but the Court held the opposite. Specifically, the Court found that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose." *Id*. at 2521. You also argued that "disparate-impact claims overexpose housing providers to lawsuits based on race-neutral, routine decisionmaking." Do you agree that purportedly race-neutral decisionmaking might still involve "unconscious prejudices," which can hinder integration and diversity?

The amicus brief referenced in this question was filed on behalf of my client, the Texas Apartment Association (TAA). TAA argued that the FHA does not provide a cause of action for claims of disparate-impact discrimination. The Supreme Court held, however, that disparate-impact claims are cognizable under the FHA. *Texas Dep't of Housing & Community Affairs v. the Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). If confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Supreme Court's decision in this case. As a judicial nominee, Canon 5 of the Code of Conduct for United States Judges prohibits me from commenting on political matters.

8. You have submitted amicus briefs in several religious liberty cases, including *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016), which challenged a regulation requiring pharmacies to carry emergency contraception. How should a court evaluate a claim based on an individual business owner's religious beliefs when those beliefs conflict with generally applicable laws that protect others' fundamental rights?

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court

provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993 and also noted the limits of its holding, *see, e.g., id*. at 2759–2760. The issue of evaluating a claim based on a business owner's religious freedom rights under the circumstances referenced in the question is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further. If I am confirmed, I will be bound by *Hobby Lobby* and all of the Supreme Court's precedents on this issue, and I will follow them faithfully.

9. You were counsel of record for an amicus brief submitted on behalf of nine states in *Hall v. Florida*, 572 U.S. 701 (2014). In that case, you defended Florida's definition of intellectual disability, which the Court found created "an unacceptable risk that persons with intellectual disability will be executed" and, thus, was unconstitutional. What standards apply when determining whether a death sentence complies with the Eighth Amendment, and how would you ensure correct application of these standards?

   The Supreme Court has issued a number of decisions addressing standards to be applied in Eighth Amendment cases, including the *Hall* decision, *Trop v. Dulles*, 356 U.S. 86 (1958), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005). If I am confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Eighth Amendment standards set forth in *Hall* and the Supreme Court's other binding decisions concerning the Eighth Amendment, together with applicable Fifth Circuit precedent.

Questions for the Record for Sean Daniel Godwin Jordan
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. You filed an amicus brief on behalf of members of Congress in Thomas v. Lynch, asserting that "Members of our Armed Forces serving overseas have accepted the extraordinary responsibilities and unique conditions of military service in order to defend our Nation. There should be no doubt as to whether their children born on a military base abroad are unconditionally entitled to birthright citizenship."

   In your brief, you also argued that the Constitution's Citizenship Clause "'put th[e] question of citizenship and the rights of citizens . . . beyond the legislative power.'" When Bill Barr came before this Committee as the nominee to be Attorney General, I asked him if he believes birthright citizenship is guaranteed by the Fourteenth Amendment, in light of Donald Trump's claims that he would end birthright citizenship by Executive Order. Mr. Barr responded: "That is the kind of issue I would ask OLC to advise me on as to whether it is something that is appropriate for legislation."

   Do you agree with Attorney General Barr – that there is an open question about whether the Constitution guarantees birthright citizenship that warrants review by the Office of Legal Counsel?

   The scope of the Fourteenth Amendment's Citizenship Clause is the subject of pending and impending litigation and political debate. Thus, Canons 3(A)(6) and 5 of the Code of Conduct for United States Judges prevent me from answering this question.

3. In Stormans, Inc. v. Weisman, you were the counsel of record for a Supreme Court amicus brief in a case challenging a state regulation requiring pharmacies to stock emergency contraceptives. You argued that this regulation violated pharmacies' conscience rights and that "[f]reedom of conscience" is a "basic human right[]."

   a. Do you believe companies have all the same rights that a person does?

      The question is broad. The Supreme Court "has recognized that First Amendment protection extends to corporations." *Citizens United v. Federal Election Comm'n*, 558

U.S. 310, 342 (2010). In *Citizens United* in particular, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id*. at 365. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993 and also noted the limits of its holding, *see, e.g.*, *id*. at 2759–2760.

If I am fortunate enough to be confirmed, I will be bound by *Citizens United*, *Hobby Lobby*, and all of the Supreme Court's binding precedents, and I will follow them faithfully. The scope of corporations' First Amendment rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further. Likewise, the existence and scope of corporations' religious freedom rights is the subject of pending or impending litigation, therefore Canon 3(a)(6) makes it inappropriate for me to comment further on this issue.

b. Do you believe federal judges have the right to object to taking certain judicial actions, or ruling in a particular way on an issue, based on conscience, instead of following the Constitution?

Judges must fully, fairly, and faithfully apply the law, regardless of their personal views or preferences. If I am so fortunate as to be confirmed to serve as a district court judge, I will follow and faithfully apply the law, including all binding Supreme Court and Fifth Circuit precedent.

c. Do you have any objections based on conscience to emergency contraceptives that would prevent you from ruling impartially on this issue, if confirmed?

As a nominee for a lower federal court, it would not be fitting for me to comment on my personal beliefs concerning emergency contraceptives. I can confirm that, if I am so fortunate as to be confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply all binding Supreme Court and Fifth Circuit precedent concerning issues involving contraceptives, including the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

d. Do you have any objections based on conscience to abortions that would prevent you from ruling impartially on this issue, if confirmed?

As a nominee for a lower federal court, it would not be fitting for me to comment on my personal beliefs concerning abortion. I can confirm that, if I am so fortunate as to be confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply all binding Supreme Court and Fifth Circuit precedent concerning issues involving abortion, including the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

e. Do you have any objections based on conscience to same-sex marriage that would prevent you from ruling impartially on this issue, if confirmed?

As a nominee for a lower federal court, it would not be fitting for me to comment on

my personal beliefs concerning same-sex marriage. I can confirm that, if I am so fortunate as to be confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply all binding Supreme Court and Fifth Circuit precedent concerning issues involving same-sex marriage, including the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

4. You filed an amicus brief in Sterling v. United States that argued for broad application of the Religious Freedom Restoration Act (RFRA). That statute has been cited to justify denying women insurance coverage for contraception and allowing discrimination against LGBTQ individuals, despite laws guaranteeing otherwise.

   a. In your brief, you referenced the Religious Freedom Restoration Act as "a sweeping 'super-statute.'" What did you mean by that phrase? Is it your view that RFRA overrides all other laws, including laws protecting against discrimination and guaranteeing women access to contraceptives?

      The brief referenced in the question was filed in *Sterling v. United States* on behalf of 36 Members of Congress. In the specific passage referenced, on page 9 of the brief, the Members of Congress noted that the Supreme Court has described RFRA as offering protections "far beyond what this Court has held is constitutionally required," *Hobby Lobby*, 134 S.Ct. at 2767, and that a commentator had opined that RFRA is "a sweeping 'super-statute'" providing "a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulson, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253, 254 (1995).

      If I am so fortunate as to be confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply all binding Supreme Court and Fifth Circuit precedent concerning the interpretation and application of RFRA. Because issues concerning the construction and application of RFRA are the subject of pending or impending litigation, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

   b. In this case, you took the side of a Marine Corps member who was asked by her superior officer to take down a sign in a shared work space that simply said: "no weapon formed against me shall prosper." Do you believe that, under RFRA, an employee who shares her workspace with a gay coworker could put up a sign in the workspace that opposes homosexuality or same-sex marriage based on religious grounds?

      If I am so fortunate as to be confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply all binding Supreme Court and Fifth Circuit precedent concerning the interpretation and application of RFRA and antidiscrimination laws. Because issues concerning the construction and application of RFRA are the subject of pending or impending litigation, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further.

5. You were the counsel of record in a Supreme Court amicus brief that you filed on behalf of the Texas Apartment Association in Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc. In your brief, you argued that the Fair Housing Act does not protect against disparate impact discrimination – an argument that the Supreme Court ultimately rejected. In its decision, the Supreme Court recognized that the disparate impact

doctrine is an important way "to counteract unconscious prejudices and disguised animus" based on a policy's discriminatory effects.

a. Do you agree with Justice Kennedy that disparate impact liability is an important way "to counteract unconscious prejudices and disguised animus"?

The amicus brief referenced in this question was filed on behalf of my client, the Texas Apartment Association (TAA). TAA argued that the FHA does not provide a cause of action for claims of disparate-impact discrimination. The Supreme Court held, however, that disparate-impact claims are cognizable under the FHA. *Texas Dep't of Housing & Community Affairs v. the Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). If confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Supreme Court's decision in this case. As a nominee for a lower court, it would be inappropriate for me to comment on whether I agree with a Supreme Court decision or its reasoning.

b. Discrimination often occurs without clear, explicit evidence of discriminatory intent. In your view, in such instances, what are the types of evidence that would show that discrimination occurred?

The question is broad. The Supreme Court has generally made clear that, as in other types of cases, discrimination claims may be established through direct or circumstantial evidence. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *United States Postal Service Board v. Aikens*, 460 U.S. 711, 714 n. 3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence."). If I am so fortunate as to be confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply all binding Supreme Court and Fifth Circuit precedent concerning the types of evidence that may prove a discrimination claim.

Nomination of Sean Daniel Godwin Jordan
United States District Court for the Eastern District of Texas
Questions for the Record
Submitted March 12, 2019

QUESTIONS FROM SENATOR BOOKER

1. In 2014, you were counsel of record in *Texas Department of Housing & Community Affairs v. Inclusive* Communities *Project*, which dealt with the issue of whether the Fair Housing Act permits disparate impact claims. In your amicus brief, you argued that the Fair Housing Act prohibits only purposeful discrimination.

a. Do you understand the importance of the disparate impact theory in fighting housing discrimination?

The amicus brief referenced in this question was filed on behalf of my client, the Texas Apartment Association (TAA). TAA argued that the FHA does not provide a cause of action for claims of disparate-impact discrimination. The Supreme Court held, however, that disparate-impact claims are cognizable under the FHA. *Texas Dep't of Housing & Community Affairs v. the Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). If confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Supreme Court's decision in this case. Because disparate-impact claims under the FHA are the subject of pending or impending litigation, Canon 3(a)(6) of the Code of Conduct for United States Judges makes it inappropriate for me to comment further on this issue.

b. In this brief you argued that, looking at the legislative history, it is clear "that Congress viewed intentional discrimination as the barrier to equality in the housing market, and designed the Act to combat that evil alone." Do you think it would have been appropriate in this case for the Court to look at legislative history, as you argued, and not only the statutory text?

In the referenced amicus brief, at pages 5-12, TAA argued that the text of 42 U.S.C. § 3604 does not authorize disparate-impact claims. TAA also argued, at pages 13-18 of the brief, that "[a]lthough the Court need look no further than the text of [the statute] to determine that it does not authorize disparate-impact claims, the statute's history confirms this conclusion." If confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Supreme Court's decision in this case, including its method of decision-making.

2. 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?

The Supreme Court has stated that considering legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). If confirmed, I would faithfully follow the Supreme Court's precedent, including its approach to statutory interpretation and the use of legislative history.

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 2(a) above.

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

Justice Kagan recently stated that "we're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). The Supreme Court has repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If confirmed, I would faithfully apply Supreme Court precedent, including its approach to statutory interpretation.

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

The Supreme Court has looked to the original public meaning and considered it relevant when interpreting constitutional provisions. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). Whatever approach the Supreme Court has taken in a particular context, a lower-court judge is bound to follow it.

5. In 2014, you were counsel of record on an amicus brief submitted in *Hall v. Florida*, which challenged the constitutionality of Florida's bright line rule that said that individuals scoring above 70 on an IQ test were eligible for execution. Ultimately, the Supreme Court found the Florida law unconstitutional and said that it created an "unacceptable risk that persons with intellectual disability will be executed."

a. Were you at all concerned personally that Florida's bright line rule created a significantly high risk that someone with an intellectual disability could be executed?

The amicus brief referenced in this question was filed on behalf of my clients, the States of Arizona, Alabama, Arkansas, Idaho, Kansas, Oklahoma, South Carolina, Tennessee, and Utah. The States argued that Florida's statutory scheme for assessing intellectual disability claims was constitutional. The Supreme Court held that Florida's threshold requirement, as interpreted by the Florida Supreme Court, that defendants show an IQ test score of 70 or below before being permitted to submit additional intellectual disability evidence was unconstitutional because it created an unacceptable risk that persons with intellectual disabilities will be executed. *Hall v. Florida*, 572 U.S. 701 (2014). If confirmed to serve as a district court judge, I will fully, fairly, and faithfully apply the Supreme Court's decision in this case.

b. Do you believe the Supreme Court reached the right conclusion in that case?

The Supreme Court's decision in *Hall v. Florida* is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether that case, or any other decision of the Supreme Court that I would be bound to follow, was correctly decided.

6. 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.[1] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

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

Yes.

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

Yes.

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

[1] 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.
[2] *Id.*
[3] 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.
[4] *Id.*

reviewed on this topic.

No.

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.[5] Why do you think that is the case?

I have not studied this issue.

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.[6] Why do you think that is the case?

I have not studied this issue.

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?

Racism will have no place in my courtroom. All judges should be mindful of the potential for bias—implicit and explicit—in their courthouses and in the cases before them. In terms of addressing racial bias in the criminal justice system, however, judges are not policy makers and can decide only cases or controversies before them. If confirmed, I would uphold my judicial oath of office to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation. 28 U.S.C. § 453.

[5] 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.

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

7. 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.[7] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[8]

    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 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 this issue.

8. 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.

9. Do you believe that *Brown v. Board of Education*[9] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Brown is a landmark decision of the Supreme Court and is binding precedent on all lower courts. If confirmed, I would faithfully follow it. Beyond that, it would be inappropriate to opine on whether *Brown*, or any other decision of the Supreme Court that I would be bound to follow, was correctly decided. *See, e.g.*, Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 64 (2010) ("I think that . . . it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases.") (statement of Hon. Elena Kagan).

10. Do you believe that *Plessy v. Ferguson*[10] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    In *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson* and struck down the doctrine of "separate but equal," noting that it "has no place" in American law. *Brown*, 347 U.S. 483, 494-95 (1955). Please see my response to Question 9.

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[7] 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.
[8] *Id.*
[9] 347 U.S. 483 (1954).
[10] 163 U.S. 537 (1896).

11. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    No, the responses to these questions, and to those asked during my hearing, are my own. Lawyers from the Office of Legal Policy in the Department of Justice provided general guidance on questions that have been asked of other nominees and on the Code of Conduct for United States Judges.

12. 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."[11] 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 Due Process Clause applies 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). Beyond that, as a judicial nominee, it would be inappropriate under Canon 3(A)(6) of the Code of Conduct for United States Judges to answer this question, which relates to the subject of pending or impending litigation.

[11] 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 12, 2019
For the Nomination of

Sean D. Jordan, to the U.S. District Court for the Eastern District of Texas

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 to serve as a district judge, I would devote careful thought to every sentencing proceeding, working to ensure that the sentence imposed is "sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing set forth by Congress. 18 U.S.C. § 3553(a). To achieve that goal, I would consult the governing statutes and applicable precedent, the presentence report of the probation officer, see 18 U.S.C. § 3552, the advisory Sentencing Guidelines and other factors set forth in § 3553(a), the arguments of the parties, and the statements of victims or witnesses. I fully appreciate the weighty nature of sentencing and the care it requires, and I would faithfully follow the law and my judicial oath in carrying out this responsibility.

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

    Please see my response to Question 1(a) above.

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

    Supreme Court precedent and the advisory Sentencing Guidelines explain the circumstances and considerations that can justify a departure or variance from the Guidelines. Part K of Section 5 of the Guidelines lists specific circumstances that can justify a departure from the advisory Guidelines range. Under Supreme Court precedent, the factors listed in 18 U.S.C. § 3553(a) may also call for varying from the advisory Guidelines range.

    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?**

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

I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a pending judicial nominee, it would be unfitting for me to comment on this matter. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6), 5. If confirmed, I would be required to follow the law of mandatory minimums regardless of my personal view on the deterrent effect of such minimum sentences.

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

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

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) above.

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?**

I am aware that mandatory minimum sentences have generated significant controversy and debate. I am also aware that judges have faced criticism over using judicial opinions as opposed to other channels to publicize their disagreement with a law. If I am confirmed, I would evaluate each case individually and would carefully consider the law and my ethical obligations if confronted with the circumstances hypothesized in this question.

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

The power to charge individuals with crimes lies exclusively with the Executive Branch. As a judge, I would be bound to respect the separation of powers built into the constitutional framework.

[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

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

   The clemency power is reserved to the Executive Branch. As a judge, I would be bound to respect the separation of powers built into the constitutional framework.

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

   Yes.

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

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

      Yes.

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

      Sadly, racial bias still affects our country in many ways. In a nation committed to the equality of all people without regard to race, it should play no role in our justice system, especially our criminal justice system. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly and impartially without regard to race.

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

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

      Yes.

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

      If confirmed, I would ensure that qualified minorities and women are given serious consideration for all positions that I am in a position to fill.