

**Nomination of Thomas Lee Kirsch II to the United States Court of Appeals for the Seventh  
Circuit  
Questions for the Record  
Submitted November 25, 2020**

**QUESTIONS FROM SENATOR FEINSTEIN**

- 1) You were recently quoted as saying that the Department of Justice will “always act appropriately to protect the integrity of the election process.” (*Assistant U.S. Attorney Appointed to Oversee Election Day Voting Complaints, Concerns*, THE TIMES (Oct. 20, 2020))

- a) **What did you mean when you said that DOJ would “always act appropriately to protect the integrity of the election process?”**

As the United States Attorney for Northern Indiana, I meant that my office, working with our federal, state, and local law enforcement partners, would act appropriately consistent with applicable federal law to protect the integrity of the election process in Northern Indiana.

- b) **Is it “appropriate” for election officials to cast doubt on election results with no evidence to support their claims?**

As the United States Attorney for Northern Indiana and as a judicial nominee, it would not be appropriate for me to comment on or offer my personal opinion on remarks or actions of any election officials, other than to acknowledge their obligation to follow the law.

- 2) In April 2020, you stated that DOJ was taking a “proactive” approach to ensuring inmate safety in the midst of the COVID-19 pandemic. (Virtual Press Conference, U.S. Attorney’s Office (Apr. 28, 2020); SJQ Attachment 12(d) at p. 107)

- a) **What “proactive” measures were you referring to?**

Among other measures, I was referring to the Attorney General’s March 26, 2020, Memorandum for the Director of the Bureau of Prisons on the prioritization of home confinement as appropriate in response to the COVID-19 pandemic.

- b) **Are you aware that, according to Federal Bureau of Prisons data, 143 federal inmates and two BOP staff members have died of COVID-19?**

I am aware of the data reported by the Bureau of Prisons.

- c) **Are there any other measures you believe DOJ and BOP could take to keep inmates and prison staff safe?**

As the United States Attorney for Northern Indiana, I am not aware of all of the measures taken by the many components of the Department of Justice and the Bureau of Prisons to keep inmates and prison staff safe during the COVID-19 pandemic. I am therefore unable to offer my opinion on what additional measures could have been taken.

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

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

It is never appropriate for a lower court to depart from Supreme Court precedent. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other lines of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decision.”).

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

Please see my response to Question 3(a). It may be appropriate for a circuit judge to identify areas in which Supreme Court cases appear to be inconsistent or in conflict. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting that a circuit judge had aptly described an earlier case’s inconsistencies with later jurisprudence).

**c) When, in your view, is it appropriate for a circuit court to overturn its own precedent?**

The Seventh Circuit may overturn its own precedent by following the procedures in Circuit Rule 40(e) or by sitting en banc. *See* Cir. R. 40(e) (“A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”); *Mojica v. Gannett Co.*, 7 F.3d 552, 557 (7th Cir. 1993) (“When sitting *en banc*, the full court has the power to change general rules stated in previous cases.”). Revisiting a prior decision through an en banc hearing is “not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure and maintain uniformity in the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a).

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

As a nominee to a lower court, it would be inappropriate for me to comment on when the Supreme Court should overturn its own precedent.

4) When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the *Roe* case law as “super-stare decisis.” One text book on the law of judicial precedent, co-authored by Justice Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, THOMAS WEST, p. 802 (2016)) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, THOMAS WEST, p. 802 (2016))

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

*Roe v. Wade* has survived challenges and is binding Supreme Court precedent that I would faithfully apply if confirmed.

b) **Is it settled law?**

*Roe v. Wade* is binding Supreme Court precedent, and I would follow it if confirmed.

5) 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?**

*Obergefell v. Hodges* is binding Supreme Court precedent that I would follow if confirmed.

6) 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?**

*District of Columbia v. Heller* is binding Supreme Court precedent that I would follow if confirmed. As a judicial nominee, it would be inappropriate for me to offer any personal view on any Supreme Court opinion, including any opinion of a particular Justice.

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

In *Heller*, the Court held that the “right secured by the Second Amendment is not unlimited” and, although “not undertak[ing] an exhaustive historical analysis today in the full scope of the Second Amendment, nothing in [the Court’s] opinion should be taken to

cast doubt on the 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.” 554 U.S. 570, 626-27 (2008).

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

The majority and dissenting opinions in *Heller* discussed the scope of applicability of the Court’s prior decisions interpreting the Second Amendment. Please also see my response to Question 6(a) above.

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

**a) Do you believe that corporations have First Amendment rights that are equal to individuals’ First Amendment rights?**

In *Citizens United*, the Supreme Court held that, “First Amendment protection extends to corporations.” 558 U.S. 310, 342 (2010). If confirmed, I would apply *Citizens United* and all other Supreme Court precedents. As a judicial nominee, it would be inappropriate for me to comment on issues that are or could be the subject of impending or impending litigation.

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

Please see my response to Question 7(a) above.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that certain corporations could assert claims under the Religious Freedom Restoration Act of 1993. The Court did not reach the First Amendment claim that had been raised in that case. *Id.* at 736. If confirmed, I would apply *Hobby Lobby* and all other Supreme Court precedents. As a judicial nominee, it would be inappropriate for me to comment on issues that are or could be the subject of impending or impending litigation.

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

The Supreme Court has clearly held that the Constitution contains guarantees of equal protection in a variety of contexts and protects the free exercise of religion. Because the intersection of these two fundamental guarantees is the subject of pending and impending

litigation, as a judicial nominee it would be inappropriate for me to opine or offer personal views on this issue. If confirmed, I am fully committed to applying Supreme Court equal protection and free exercise of religion precedent.

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

The Supreme Court has held that state laws prohibiting interracial marriage violate equal protection in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Please see my response to Question 8 above.

- 10) Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please see my response to Questions 8 and 9 above.

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

No.

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

At no point during the judicial selection process has anyone asked me a question seeking any form of assurance concerning my views on an issue of administrative law.

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

No.

**c) What are your “views on administrative law”?**

Administrative law is a vast body of law covering a wide array of issues. If confirmed, I will follow all statutory law and relevant precedent, including the Administrative Procedure Act and *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1994).

13) Do you believe that human activity is contributing to or causing climate change?

As a judicial nominee, it would be inappropriate for me to offer a personal opinion on this issue as it may be related to impending or pending cases that may come before me if confirmed. If I am confirmed, I will faithfully apply Supreme Court precedent in this and in every area of the law without regard to my personal opinion.

14) When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has explained that legislative history may be used to assist in determining the meaning of an ambiguous statutory text. *See, e.g., Milner v. Dep’t of Navy*, 131 S.Ct 1259, 1267 (2011); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992).

15) 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I reviewed the questions when I received them and prepared responses. I shared my draft responses with members of the Department of Justice, Office of Legal Policy and received their input. I finalized my answers, each of which is my own.

**Written Questions for Thomas Kirsch III**  
**Submitted by Senator Patrick Leahy**  
**November 25, 2020**

1. In October 2020, you stated that every citizen should have their “vote counted without it being stolen because of fraud.” Virtually all serious federal and state officials of both political parties have stated unequivocally that there was no widespread voter fraud in the 2020 election.

- (a) Are you aware of any reliable evidence showing that there was widespread voter fraud in the 2020 election? If so, what is that evidence?**

I am aware of widely circulated media reports concerning this topic. Beyond that, as a sitting United States Attorney, it would be inappropriate for me to comment on what I am or am not aware of concerning voter fraud.

- (b) President Trump’s own Department of Homeland Security has concluded that “there is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised” in the 2020 election. Do you agree with this assessment?**

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

- (c) Do you agree that when public officials voice concerns about widespread or significant voter fraud without citing evidence of such fraud it serves to undermine many Americans’ faith in our elections?**

As a sitting United States Attorney and as a judicial nominee, it would not be appropriate for me to comment on or offer my personal opinion on remarks or actions of public officials, other than to acknowledge their obligation to follow the law.

2. You have promoted the use of civil asset forfeiture, a law enforcement tool that I believe is important but that too often fails to afford property owners with sufficient due process protections.

- (a) Do you believe that it is consistent with basic notions of due process when the burden to prove innocent ownership is on the property owner? Does it matter in your view if the owner is never charged criminally, or never otherwise found to be connected to criminal activity?**

As issues concerning civil asset forfeiture are frequently litigated in federal courts, as a judicial nominee it would be inappropriate for me to

comment. Furthermore, it would be inappropriate for me to opine on a law or offer my policy viewpoints, which are irrelevant to the application of the law.

3. At your confirmation hearing, Senator Hirono asked if your office indicted any migrants under President Trump’s “zero-tolerance” policy. You stated that you did not know but would look into it.

- (a) **Since you have had time to look into this matter, what involvement did your office have, if any, in implementing the President’s “zero tolerance” policy? How many migrants, if any, did your office indict under the “zero tolerance” policy?**

My office charges hundreds of cases per year based on the facts and the law in every instance. I am not aware of any immigration cases filed under a zero-tolerance policy by my office during my time as United States Attorney. Attorney General Sessions’ April 6, 2018, memorandum was addressed to United States Attorneys along the Southwest Border.

- (b) **Do you believe that systematically and deliberately separating innocent migrant children from their parents comports with American values?**

As a judicial nominee it would be inappropriate for me to comment on political matters.

4. Thirty percent of the population in the three states under the 7<sup>th</sup> Circuit’s jurisdiction are people of color; 51 percent are women. Yet every sitting judge on the 7<sup>th</sup> Circuit is white, less than 36 percent is female, and none self-identifies as LGBTQ.

- (a) **Do you think it is important for our federal courts to be representative of the communities they serve?**

I think that diversity, which comes in many forms, is important on the federal bench. I have been committed to diversity throughout my career. Beyond that, as a judicial nominee, it would be inappropriate for me to opine on a political matter.

- (b) **Are 7<sup>th</sup> Circuit judges representative of the states they serve?**

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

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

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language

is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’”

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

The Supreme Court has held that when interpreting statutory text, a judge should consider the words of a provision within the broader context of the statute as a whole. *See, e.g., Sturgeon v. Frost*, 139 S.Ct. 1066, 1084 (2019). If confirmed, I would follow and apply Supreme Court precedent concerning the methods of statutory interpretation.

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

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

The independence of the federal judiciary is a key aspect of our constitutional structure. Article III provides protections to allow for judicial independence. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticism in the public arena.

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

Please see my response to Question 6(b) above.

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

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

The Supreme Court has held that courts can review decisions by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

8. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

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

As a judicial nominee, it would not be appropriate for me to comment on a hypothetical scenario about a president's non-compliance with a court order. See Code of Conduct of U.S. Judges, Canon 3A(6). If confirmed, if such a scenario were to come before me, I would carefully examine the facts and circumstances of the case and the relevant legal authorities that may bear upon the question.

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

- (a) **Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war? Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."**

The Constitution assigns powers over war and foreign affairs to the President and to Congress. In evaluating conflicts between the two branches, the Supreme Court has applied Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). In *Hamdi v. Rumsfeld*, the Court held that, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 542 U.S. 507, 536 (2004). If confirmed, I would apply applicable precedents, the Constitution, and any statutes that bear upon the President's exercise of authority, recognizing that under Supreme Court precedent, nobody is above the law.

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

Please see my response to Question 9(a) above.

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

Please see my response to Question 9(a) above.

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

The Supreme Court has held that it is “the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). In evaluating a challenge to Executive action, a court must consider relevant precedent, constitutional provisions, and any statutory provisions, as applicable, as set forth in my response to Question 9(a) above.

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

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

The Supreme Court has held that the Equal Protection Clause provides protections against discrimination against women. *See, e.g., Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1689-90 (2017). If confirmed, I would follow this and all applicable precedent.

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

The Supreme Court has made clear that the “historic accomplishments of the Voting Rights Act are undeniable,” and that “dramatic improvements” in voter registration and turnout “are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success.” *Nw. Austin Mun. Util. No. One v. Holder*, 557 U.S. 193, 201-02 (2009). If confirmed, I will follow Supreme Court precedent interpreting the Voting Rights Act.

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

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

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

the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

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

As a general rule, appellate courts consider the record that has been developed in the court below. Established standards of review govern an appellate court’s review of factual findings made in the district court. *See, e.g., Fed. R. App. P. 10(a)*. If confirmed, I would apply the binding precedent of *Shelby County v. Holder* and all precedent of the Supreme Court.

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

Each of these amendments provides that Congress has the power to enforce them “by appropriate legislation.” Under this enforcement power, the Supreme Court has “sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). If confirmed, I would follow Supreme Court precedent.

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

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

In *Lawrence v. Texas*, the Court held that “there is a realm of personal liberty which the government may not enter” that included, in that case, the right to engage in consensual “private sexual conduct.” 539 U.S. 558, 578 (2003) (citation omitted). If confirmed, I will follow *Lawrence v. Texas* and all other Supreme Court precedent.

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

**(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on**

**whether the question is one of statutory or constitutional interpretation?**

The Supreme Court has held that “the doctrine of *stare decisis* is of fundamental importance to the rule of law.” *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). It is never appropriate for lower courts to depart from Supreme Court precedent. *See, e.g., Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016). The Seventh Circuit may overturn its own precedent by following the procedures in Circuit Rule 40(e) or by sitting en banc. *See* Cir. R. 40(e) (“A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”); *Mojica v. Gannett Co.*, 7 F.3d 552, 557 (7th Cir. 1993) (“When sitting *en banc*, the full court has the power to change general rules stated in previous cases.”). Revisiting a prior decision through an en banc hearing is “not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure and maintain uniformity in the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a).

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

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

I would apply conflicts rules and ethical standards to assess whether a recusal is required or would be beneficial to the integrity of the judiciary. *See, e.g.,* 28 U.S.C. § 455; Code of Conduct of U.S. Judges, Canon 3C. As a specific example, I would recuse myself from any case or investigation in which I represented the government as the United States Attorney.

19. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous

footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

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

In footnote 4 of *Carolene Products*, the Supreme Court indicated that courts have a role in ensuring that democratic processes are open and work as intended and legislation does not undermine participation by citizens entitled to representation. In the footnote, the Supreme Court also introduced the idea of varied levels of scrutiny in assessing constitutionality depending on the constitutional issue presented. If confirmed, I will follow Supreme Court precedent on this and every other issue.

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

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

Yes.

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

I have not studied the limits on a president’s pardon power. As a judicial nominee, it would be inappropriate for me to opine on an issue that may require consideration in future cases or to comment on a hypothetical scenario of a president’s ability to pardon himself.

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

The Supreme Court has held that the Commerce Clause gives Congress the power to regulate activity that “substantially affects” interstate commerce, *United States v. Lopez*,

514 U.S. 549, 559 (1995), and that Congress has the power to enforce the Fourteenth Amendment where there is a “congruence between the means used and the ends to be achieved.” *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997). If confirmed, I would follow Supreme Court precedents concerning the scope of congressional powers.

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

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

In *Trump v. Hawaii*, the Supreme Court held that the President’s Proclamation was lawfully issued under 8 U.S.C. § 1182(f) and rejected plaintiff’s call for a searching inquiry into the justifications of the Presidential Proclamation at issue because such an inquiry would be “inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.” 138 S.Ct. 2392, 2409 (2018).

*Trump v. Hawaii* is binding precedent that, if confirmed, I would follow. As a judicial nominee, it would be inappropriate for me to grade a Supreme Court opinion or opine on legal issues that may require consideration and application in future cases.

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

In *Planned Parenthood v. Casey*, the Supreme Court held that an “undue burden” exists where “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” 505 U.S. 2292, 2309 (2016). In *Whole Women’s Health v. Hellerstadt*, the Court further held that “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right.” 136 S.Ct. 2292, 2309 (2016). I will apply *Casey*, *Whole Women’s Health*, and all Supreme Court precedent if confirmed. As a judicial nominee, it would be inappropriate for me to comment on particular examples that may arise in future cases or that may be the subject of pending or impending litigation.

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

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

The Supreme Court developed the modern doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). If confirmed, I will apply the Supreme Court’s precedents in the area of qualified immunity.

26. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology,” such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

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

In *Carpenter v. United States*, the Supreme Court recognized that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” 138 S.Ct. 2206, 2214 (2018) (internal quotation omitted); *see also, e.g., Riley v. California*, 573 U.S. 373, 402 (2014) (“Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”) (quotations and citations omitted). As a judicial nominee, it would be inappropriate for me to comment on particular

scenarios that may arise in cases that could come before me or that may be the subject of pending litigation.

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

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

In *Lincoln v. Vigil*, the Supreme Court explained that “a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish and legal requirements[.]” 508 U.S. 182, 192 (1993) (quotation omitted). In any case involving a conflict between legislative and executive power, I would apply Supreme Court precedent regarding the specific powers at issue and the separation of powers. As a judicial nominee, it would be inappropriate for me to comment or opine on hypothetical situations that could arise in future cases that may come before me or may presently be presented in pending or impending litigation.

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

The Constitution creates an independent judiciary with protections to insulate judges from political influence. Canon 1 of the Code of Conduct for United States Judges provides that, “An independent and honorable judiciary is indispensable to justice in our society.” These protections and the obligation that judges act independently and impartially, without favor to any interest beyond fair and impartial application of the law, are essential to the rule of law. I strongly believe that an independent judiciary free from political influence is a central feature of our constitutional system and that an independent judiciary promotes the rule of law. If confirmed, I will perform my role with fidelity to the judicial oath and the fundamental values of independence and impartiality.

**Senator Dick Durbin**  
**Written Questions for Kirsch**  
**November 25, 2020**

For questions with subparts, please answer each subpart separately.

Questions for Thomas Kirsch

1. In 2016, President Obama nominated former Indiana Supreme Court Justice Myra Selby to fill the Indiana 7<sup>th</sup> Circuit seat that you have now been nominated to fill. Justice Selby was the first African-American justice to sit on the Indiana Supreme Court, and if confirmed she would have been the first African-American judge to sit in an Indiana seat on the 7<sup>th</sup> Circuit.

Justice Selby was an outstanding nominee; however, she did not get a hearing in Committee because then-Senator Dan Coats did not return a blue slip for her nomination and, during the Obama Administration, Judiciary Committee Republicans respected the blue slip for circuit court seats. President Trump did not re-nominate Justice Selby for this seat; instead he first nominated Justice Barrett and now you.

- a. **Currently the 7<sup>th</sup> Circuit has no minority judges. Do you think it's a problem if litigants who appear before the 7<sup>th</sup> Circuit do not see the diversity of the Circuit's population reflected in the judges who hear their cases?**

Diversity, which comes in many forms, is important. I have been committed to diversity my entire career. All litigants who come before the Seventh Circuit and every court should be treated the same. All should be treated with dignity, respect, fairness, and receive impartial justice. If confirmed, I am committed to those principles.

- b. **Outgoing President Trump has made 53 circuit court appointments and three Supreme Court appointments during his term. Not a single one of these appellate court appointees is African-American. What is your reaction to that fact? Is that a track record that outgoing President Trump should be proud of?**

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

2. **Was President Trump wrong when he tweeted on November 15: "I won the election"?**

I am aware that media outlets have called the election for former Vice President Biden. I am also aware that states have begun certifying their election results. According to media reports, Indiana's election results were certified on November 24, 2020. As a pending judicial nominee, it would be inappropriate for me to comment on the statements of political figures, including President Trump.

3. During the recent Supreme Court confirmation hearing, I was troubled by then-Judge Barrett's refusal to answer simple questions about basic constitutional, legal, and scientific

principles. I am going to ask you some questions that were asked of Justice Barrett, and I hope you will answer them.

**a. Is a President obligated by the Constitution to conduct a peaceful transition of power to his successor?**

The Constitution, along with other applicable law, provides for the peaceful transfer of power from one duly elected President to that President's duly elected successor.

**b. On July 23, 2019, President Trump said "I have an Article II, where I have the right to do whatever I want as president." Is that statement legally accurate?**

The Supreme Court has held that there are limits to a president's authority, including those limitations contained in the Constitution. If confirmed, I would follow Supreme Court precedent.

**c. Is it illegal to intimidate voters at the polls?**

There are numerous laws and Supreme Court precedent that prohibit forms of voter intimidation at the polls. If confirmed, I would follow Supreme Court precedent and apply the law.

**d. Does the Constitution give the President the authority to unilaterally delay a general election under any circumstances? Does federal law?**

I have not studied this issue. As a judicial nominee, it would be inappropriate for me to offer a personal opinion on this issue as it may be related to impending or pending cases that may come before me if confirmed. If I am confirmed, I will faithfully apply Supreme Court precedent in this and in every area of the law without regard to my personal opinion.

**e. Does the use of masks inhibit the spread of COVID-19?**

Although I have not studied this issue, I am aware of widely circulated media reports stating that masks inhibit the spread of viruses transmitted by respiratory droplets, including COVID-19.

**f. Is climate change happening and do you believe human activity is accelerating it?**

As a judicial nominee, it would be inappropriate for me to offer a personal opinion on this issue as it may be related to impending or pending cases that may come before me if confirmed. If I am confirmed, I will faithfully apply Supreme Court precedent in this and in every area of the law without regard to my personal opinion.

4. During your hearing I asked you what you have done during your tenure as U.S. Attorney in the Northern District of Indiana to prevent Indiana's gun shows from being the source of a pipeline of gun trafficking into the City of Chicago. You responded by noting you've prosecuted gun crime cases and straw purchase cases, including cases where guns were found in Chicago, but you did not mention any enforcement or trafficking prevention efforts involving gun show abuses. **Please provide information about what you have done during your tenure as U.S. Attorney in the Northern District of Indiana to prevent Indiana's gun shows from being the source of a pipeline of gun trafficking into the City of Chicago.**

Since being appointed United States Attorney in October 2017, I have charged over 640 defendants with guns crimes in violation of 18 U.S.C. §§ 922 and 924. I have charged over 60 defendants with violations of 18 U.S.C. § 922(a)(6), which prohibits the illegal straw purchase of firearms. I have engaged in public outreach, including participating in the February 25, 2020, Federal Firearms Licensee training referenced in question 12(d) of my Senate Judiciary Questionnaire, issued press statements, and held press conferences. As United States Attorney and as a judicial nominee, it would be inappropriate for me to comment further on a political matter. Furthermore, as United States Attorney, I am not permitted to comment on pending cases or ongoing investigations.

5. I also asked during your hearing if you would provide evidence of cases you've prosecuted against those who have abused the lack of background checks for private sales at Indiana gun shows. You said you would provide that information. **Please provide this information.**

Please see my response to Question 4 above. I reference the information provided in response to question 12 of my Senate Judiciary Questionnaire.

6. Attorney General Bill Barr recently issued a memo authorizing federal prosecutors to "pursue substantial allegations of voting and vote tabulation irregularities prior to the certification of elections".

The Attorney General's memo represents yet another instance of his weaponizing the Department of Justice to serve the political interests of President Trump. In attempting to fabricate a veneer of legitimacy for the baseless claims of voter fraud made by President Trump, Attorney General Barr overrode longstanding DOJ policies that were put in place to prevent political interference in our elections.

The previous guidelines said: "Public knowledge of a criminal investigation could impact the adjudication of election litigation and contests in state courts. Accordingly, it is the general policy of the department not to conduct overt investigations."

The Barr memo prompted DOJ's Director of the Election Crimes Branch to step down from his position. In an email to his colleagues, Richard Pilger noted that Barr's memo "abrogate[d] the forty-year-old Non-Interference Policy for ballot fraud allegations in the period prior to elections becoming certified and uncontested."

**a. What was your reaction to the Attorney General’s memo?**

As a judicial nominee, it would be inappropriate for me to comment on my personal policy views, which are irrelevant.

**b. Are you aware of any substantial allegations of voting and vote tabulation irregularities in the 2020 election?**

As United States Attorney, it is inappropriate for me to comment on what steps my office may have or may not have taken in any criminal investigation or to confirm or deny the existence of any investigation. According to media reports, the State of Indiana certified its results from the 2020 election on November 24, 2020.

7. While the Constitution does provide sweeping pardon power to the president, the Justice Department’s Office of Legal Counsel issued an opinion in 1974 stating that: “Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.”

**In your view, does the statement of the Office of Legal Counsel resolve the question of whether a president can pardon himself? If not, what authorities would you consider to resolve the question of whether the Constitution authorizes a president to pardon himself?**

I have not studied the limits on a president’s pardon power. As a judicial nominee, it would be inappropriate for me to opine on an issue that may require consideration in future cases or to comment on a hypothetical scenario of a president’s ability to pardon himself. If confronted with a pardon case, I would approach it like I would any other case and apply the law and Supreme Court and other applicable precedent to resolve the case.

8. **When do you believe it is appropriate for the Supreme Court to overrule one of its precedents?**

As a nominee to a lower court, it would be inappropriate for me to comment on when the Supreme Court should overturn its own precedent.

9. **Should circuit court judges ever write opinions—whether majority opinions, concurrences, or dissents—calling for the Supreme Court to review and consider reversing its own precedents? Or is it improper for lower court judges to opine on what the Supreme Court should do?**

It is never appropriate for a lower court to depart from Supreme Court precedent. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other lines of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of

overruling its own decision.”). It may be appropriate for a circuit judge to identify areas in which Supreme Court cases appear to be inconsistent or in conflict. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting that a circuit judge had aptly described an earlier case’s inconsistencies with later jurisprudence).

**10. Do you believe that wealthy individuals or special interests that make undisclosed donations to organizations that help choose judicial nominees should make their donations public, so that judges can have full information when they make decisions about recusal in cases these donors may have an interest in?**

As a general matter, recusal is determined by application of the conflicts rules and ethical standards to assess whether a recusal is required or would be beneficial to the integrity of the judiciary. *See, e.g.,* 28 U.S.C. § 455; Code of Conduct of U.S. Judges, Canon 3C. If confirmed, I will follow these laws and rules, as well as Supreme Court and other applicable precedent in deciding whether to recuse myself from a certain case. As a judicial nominee, it would be inappropriate for me to comment further and opine on a political matter or share my personal policy views.

**Nomination of Thomas L. Kirsch II  
to the United States Court of Appeals for the Seventh Circuit  
Questions for the Record  
Submitted November 25, 2020**

**QUESTIONS FROM SENATOR WHITEHOUSE**

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

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I was not previously aware of this material, but reviewed it as requested.

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

As a judicial nominee, it would be inappropriate for me to opine on political matters relating to the nomination and confirmation of federal judges. *See* Code of Conduct of U.S. Judges, Canon 5.

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

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

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

No.

- e. Have you have any communications with Leonard Leo about your nomination to the Seventh Circuit, either before or after your nominations? Please specify.

No.

- f. Have you have any communications with Carrie Severino, President of the “Judicial Crisis Network,” about your nomination to either Seventh Circuit? Please specify.

No.

- g. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

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

- 2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

I agree that a judge’s job is to apply the law to the facts without regard to the result.

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

Practical considerations should be taken into account only when the law requires it. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (noting that courts look to whether the disposition required by a statute’s text is absurd).

Otherwise, practical considerations are more appropriately left to the political branches.

- 3. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court’s decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act’s individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, “came after weeks of negotiations and trade-offs among the justices.”

- a. In your view, what is the role of negotiating with other judges when deliberating on a case?

Open discussion of a case with other judges is a natural part of the appellate process, as multi-judge panels seek to reach agreement on the decision and reasoning of the decision. The discussions should focus on governing law, including precedent, and not on outside considerations.

- b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague’s, in another?

No. It would be inappropriate. Each case must be decided on its own.

- c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

It is non-negotiable that a judge follow the law, including binding precedents, no matter the result without imposing the judge’s own personal or policy preferences on the law.

Judges must be impartial and fair and treat all litigants with dignity and respect, and ensure equal treatment under the law.

4. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

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

Empathy is an important human trait, including for a judge. However, empathy for one party or another cannot govern judicial decision-making. *See* 28 U.S.C. § 453 (judges must "administer justice without respect to persons"). Cases must be decided objectively and impartially based on the facts and the governing laws. Judges should treat all litigants with dignity and respect, and ensure that all are provided equal treatment under the law.

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

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

5. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

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

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

I have spent my career in the courtroom. Juries play a central and invaluable role in our legal system. Trial by jury is a foundational feature of our justice system.

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

This issue is the subject of pending and impending litigation. Accordingly, as a judicial nominee, it would be inappropriate for me to comment.

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

Please see my response to Question 6(b) above.

7. What do you believe is the proper role of an appellate court with respect to fact-finding?

As a general rule, appellate courts consider the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. *See, e.g.,* Fed. R. App. P. 10(a). I will follow

all applicable rules, laws, and precedent with respect to the standards of review if confirmed.

8. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Please see my response to Question 7 above.

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

- a. Have you read Advisory Opinion #116?

Yes.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
- i. Determining whether the seminar or conference specifically targets judges or judicial employees.
  - ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
  - iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.
  - iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
  - v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

If confirmed, I commit to comply with the Code of Judicial Conduct, including the obligation to avoid impropriety or the appearance of impropriety. I will evaluate my participation in any activity to ensure compliance with my ethical and legal obligations. If I have any questions about whether an activity complies with the Code of Judicial Conduct, I will consult with the ethics attorneys at the Administrative Office of U.S. Courts.

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

Please see my response to Question 9(b) above.

## Questions for Mr. Kirsch, nominee to be U.S. Circuit Judge for the Seventh Circuit

As United States Attorney, you have prosecuted a number of federal criminal proceedings. Reforming sentencing laws and providing greater discretion to trial judges who sentence low-level drug offenders has been a priority for many over the last number of years, as the consequences of overly harsh sentences for low-level offenses becomes apparent.

- What have you learned about our criminal justice system during your time at the U.S. Attorney's Office, and what principles will guide your review of lower court sentencing decisions?

Serving as a United States Attorney, and previously as an Assistant United States Attorney, has been a great honor and privilege. My decisions in criminal and civil investigations and cases have tremendous consequences on others. I make these decisions by applying and following applicable precedent, rules, and law, after carefully considering all the available facts and law. In my roles as a government prosecutor, I have always strived to treat everyone in the criminal justice system, including defendants and their counsel, with fairness, dignity, and respect. Additionally, I served as defense counsel in numerous federal criminal matters, including many jury trials and sentencings between 2008 and 2017. I have represented individual clients and have seen criminal cases from the perspective of the accused and the convicted. These experiences have heightened and reinforced my awareness of the enormous and consequential responsibility of the government's authority to enforce the law.

If confirmed, I would faithfully apply and follow Supreme Court precedent and the law in every case before me, including when reviewing a lower court's sentencing decision, regardless of the outcome and irrespective of my personal policy views, which are irrelevant to the application of the law.

- If confirmed, will you respect a trial judge's discretion to sentence below the applicable guidelines when it is warranted?

If confirmed, I would faithfully apply and follow Supreme Court precedent and the law in every case before me, including when reviewing a lower court's sentencing decision, regardless of the outcome of the case and irrespective of my personal policy views, which are irrelevant to the application of the law.

In November 2018, Chief Justice Roberts released a statement that said, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

- Do you agree with Chief Justice Roberts's statement?

Yes.

- Do you agree that a judge's loyalty must be to the law and not to any particular President or political party?

Yes.

- If you were to hear a case in which a district court properly applied the law to the facts and enjoined a policy of this Administration, would you uphold the lower court's decision?

If confirmed, I would faithfully apply and follow Supreme Court precedent and the law in every case before me regardless of the outcome and irrespective of my personal policy views, which are irrelevant to the application of the law.

**Nomination of Thomas L. Kirsch II, to be United States Circuit Judge  
for the Seventh Circuit  
Questions for the Record  
Submitted November 25, 2020**

**QUESTIONS FROM SENATOR COONS**

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

I would apply the framework set forth in numerous Supreme Court decisions in the area of substantive due process.

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

Yes. I would also apply all binding precedent relevant to the issue.

- 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. I would apply Supreme Court precedents, consulting the historical sources the Supreme Court has identified, which include, among others, statutory laws and common law tradition. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

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

I would apply Supreme Court and Seventh Circuit precedent regarding the right at issue. I would also evaluate decisions from other circuits for their persuasive value. *See* 7th Cir. R. 40(e) (“A proposed opinion approved by a panel of this court adopting a position which would ... create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”)

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

Yes.

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

Yes, I would apply the binding precedents of *Casey* and *Lawrence*.

- f. What other factors would you consider?

I would consider all of the factors recognized by the Supreme Court and Seventh 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 Supreme Court has held that the Equal Protection Clause provides protections against gender discrimination. *See, e.g., Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1689-90 (2017); *United States v. Virginia*, 518 U.S. 515, 531-32 (1996). If confirmed, I would follow these and all applicable, binding precedent.

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

If confirmed, I will apply all Supreme Court precedent. Arguments or academic questions that are not consistent with binding precedent will not affect my decisions.

- 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 of the reasons why the *Virginia* litigation was not commenced until 1996. *Virginia* is binding Supreme Court precedent that all lower court judges are bound to follow.

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

The Supreme Court has held that same-sex couples have a right to marry “on the same terms” as opposite sex couples. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015). I will follow *Obergefell* and all other relevant, binding precedent. To the extent this question asks about legal issues that are pending or impending in litigation, as a judicial nominee, I cannot answer.

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

As a judicial nominee, it would be inappropriate for me to comment on an issue that is or may be the subject of pending or impending litigation.

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

The Supreme Court has recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will follow this precedent.

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

The Supreme Court recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that the Constitution protects a woman's right to an abortion. If confirmed, I will follow this precedent.

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court recognized this right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I will follow this precedent.

- 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 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*, 576 U.S. 644, 668 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

In some cases, such as *United States v. Virginia*, *Obergefell v. Hodges*, and *Roper v. Simmon*, the Supreme Court has looked to current views or societal changes. If confirmed, I would follow those and all Supreme Court precedent.

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

Consideration of such evidence has a role when it is relevant to a disputed issue and is reliable. See Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The Federal Judicial Center publishes an extensive reference guide to assist judges in addressing complex scientific and technical evidence. See *Reference Manual of Scientific Evidence* (2011).

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

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

The Supreme Court has held that same-sex couples have a right of privacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and a right to marry, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), and has instructed that “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” *Masterpiece Cakeshop Inc. v. Colo. Civ. Rights Comm’n*, 138 S.Ct. 1719, 1727 (2018). If confirmed, I will follow these and other relevant, binding Supreme Court and Seventh Circuit precedent.

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

Please see my response to Question 1 and its subparts above.

6. You previously were 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?

As I testified at my hearing, I believe that *Brown v. Board of Education* was correctly decided and holds a unique place in American jurisprudence. If confirmed, I would follow *Brown* and all Supreme Court precedent. I have not analyzed this academic issue in great detail, but I am generally aware that some originalist scholars assert that *Brown*'s holding comports with the original meaning of the Fourteenth Amendment. See, e.g., Michael McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”?
- Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Nov. 24, 2020).

While I have not studied this issue in great detail, I am generally aware that originalists have acknowledged and addressed similar concerns that determining a provision's original public meaning can be difficult. But, this is an academic question. If confirmed as a circuit judge, I will follow the interpretive approach and binding precedent that the Supreme Court has held applies to given constitutional provisions.

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

The Supreme Court has applied the original public meaning of certain constitutional provisions. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court's prevailing view of the Constitution is always dispositive. If confirmed, I will follow Supreme Court precedent.

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

Yes, in some circumstances. 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 follow Supreme Court and Seventh Circuit precedent on what sources are properly considered in applying constitutional provisions.

7. Last month, you appointed an official in the U.S. Attorney's Office for the Northern District of Indiana to oversee and respond to election fraud complaints and other voting rights issues associated with the November 3 election. You stated that “[e]very citizen must be able to vote without interference or discrimination and to have that vote counted without it being stolen because of fraud,” and that DOJ “will always act appropriately to protect the integrity of the election process.”

- a. Do you have any reason to believe the election results in your jurisdiction—or in any other jurisdiction—were tainted by widespread fraud or are otherwise subject to doubt in any way?

As a sitting United States Attorney, it is inappropriate for me to comment on what steps my office or any other United States Attorney's office may have or may not have taken in any criminal investigation or to confirm or deny the existence of any investigation. According to media reports, the State of Indiana certified its results from the 2020 election on November 24, 2020.

- b. Have you ever discussed pursuing allegations of voter fraud regarding the 2020 presidential election with anybody outside the U.S. Attorney's Office for the Northern District of Indiana?

No.

**Nominations**  
**Hearing before the Senate Committee on the Judiciary**  
**Questions for the Record**  
**November 18, 2020**

**QUESTIONS FROM SENATOR BLUMENTHAL**

**Questions for Mr. Thomas L. Kirsch II**

1. During your nomination hearing, you stated in response to a question from Senator Whitehouse about interpreting the Equal Protection Clause, “I would look at the language of the statute and consider the language of the statute, and what the words meant at the time they were written—not the intent of the legislatures that passed the law.”

- a. Please describe what the words of the Fourteenth Amendment’s Equal Protection Clause meant at the time they were written.

The Supreme Court has clearly held that the Constitution contains guarantees of equal protection in a variety of contexts. If confirmed, I am fully committed to applying Supreme Court equal protection precedent. Because the meaning and application of the Equal Protection Clause is the subject of pending and impending litigation, as a judicial nominee it would be inappropriate for me to opine or offer personal views on this issue.

During your nomination hearing, you also testified, “*Brown* is unique in our history, and I would agree that *Brown* is correctly decided—although . . . it’s not the role of a judicial nominee to grade Supreme Court opinions. But I can confidently say that *Brown* was correctly decided.”

- b. Please explain the legal and constitutional reasons for why you “can confidently say that *Brown* was correctly decided”.

As I testified at my hearing, I believe that *Brown v. Board of Education*, in striking down the doctrine of “separate but equal” in *Plessy v. Ferguson*, was correctly decided and holds a unique place in American jurisprudence. If confirmed, I would follow *Brown* and all Supreme Court precedent.

During your nomination hearing, Senator Kennedy asked you if you “think that the average American at the time the Constitution was adopted – after reading the Constitution – would say that the Constitution requires integrated public schools.” You answered: “I have to look into that issue . . . . I don’t think the answer will be yes.”

- c. Please explain why you “don’t think the answer” to Senator Kennedy’s question “will be yes”.

I have not studied this issue. But, the Fourteenth Amendment had not been passed at the time the Constitution was adopted. Furthermore, the Tenth Amendment, which was

adopted as part of the Bill of Rights, left to the States the powers not delegated to the United States by the Constitution.

The schools of the District of Columbia—which were under the direct control of the federal government—remained segregated by law during the entire period of the proposal, ratification, and early enforcement of the Fourteenth Amendment.

- d. Do the expectations and judgments of citizens at the time of enactment of a law regarding the application of that law to specific cases control the meaning of that law?

The Supreme Court has applied the original public meaning of certain constitutional provisions. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court’s prevailing view of the Constitution is always dispositive. If confirmed, I will follow Supreme Court precedent.

- e. Would the fact that those interpreting Title VII or the Equal Protection Clause did not envisage their extension to transgender or LGBTQ+ persons control the meaning of either provision?

See my response to Question 1(d) above. Furthermore, because the provisions of Title VII and because the meaning and application of the Equal Protection Clause are the subject of pending and impending litigation, as a judicial nominee it would be inappropriate for me to opine or offer personal views on this issue. If confirmed, I am fully committed to applying Supreme Court Title VII and equal protection precedent.

During your nomination hearing, Senator Whitehouse observed that it is “very hard to justify [*Brown*] under an analysis that required [the Equal Protection Clause] to be examined with a view to what was meant in 1868.” Your answer to Senator Kennedy suggests – noted above – why that is the case. To that end, Senator Whitehouse asked you how you reconcile your testimony that *Brown* was correctly decided with your view that the Equal Protection Clause should be read in light of what its words meant at the time they were written. You responded: “[I]f I were confirmed as a judge, I would apply the law. I would apply the text of the statute as I said and I would apply Supreme Court precedent.”

- f. Please answer Senator Whitehouse’s question: how do you reconcile your testimony that *Brown* was correctly decided with your view that the Equal Protection Clause should be read in light of what its words meant at the time they were written?

*Note:* Question 1(f) does not ask you if you would “apply the law,” “apply the text of the statute,” or “apply Supreme Court precedent.” Instead, it asks how you reconcile what are seemingly two inconsistent views that you articulated during your nomination hearing as a judicial nominee: that you can “confidently say” that *Brown v. Board of Education* was correctly decided but that – under your approach to constitutional interpretation in looking to the meaning of the words “at the time they were written” – you “don’t think” the meaning of the Equal Protection Clause of the Fourteenth Amendment at the time it was written required integrated public schools.

As I testified at my hearing, I believe that *Brown v. Board of Education* was correctly decided and holds a unique place in American jurisprudence. If confirmed, I would follow *Brown* and all Supreme Court precedent. I have not analyzed this academic issue in great detail, but I am aware that some originalist scholars assert that *Brown*'s holding comports with the original meaning of the Fourteenth Amendment. *See, e.g.,* Michael McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

2. During your nomination hearing Senator Durbin asked if “you think we have an issue when it comes to race and law enforcement in America.” You responded: “Senator, I think racism exists in America and I think that’s abhorrent.”

- a. Please define “racism.”

Racism is prejudice, discrimination, or antagonism directed against someone on account of their race. *See* The Oxford English Dictionary.

- b. Please explain why you “think racism exists in America” and why you “think that’s abhorrent.”

I have spent half my career representing the United States as the United States Attorney and as an Assistant United States Attorney, and working to make our communities safer. I have prosecuted and am aware of horrible crimes, some that have been committed due to racist motivations of the defendants. I have spent time with and consoled crime victims and have spent time with those whom have been discriminated against on account of their race. If I am confirmed, I am committed to enforcing every provision of the Constitution, including the Equal Protection Clause, consistent with Supreme Court and other applicable precedent.

- c. Please identify where you “think racism exists in America.”

Racism exists in a variety of institutions and areas of Americans’ daily lives.

- d. Please state whether you believe racism can be (i) implicit, (ii) systemic, or (iii) institutional. If not, please explain why not.

Racism may take a variety of forms.

- e. Please state whether you believe there is an issue when it comes specifically to race and law enforcement in America.

In law enforcement, like in other institutions, there are situational instances of racism. All litigants who come before the Seventh Circuit and every court should be treated the same. All should be treated with dignity, respect, fairness, and receive impartial justice. If confirmed, I am committed to those principles.

On November 16, 2020, the NAACP sent a letter to Chairman Graham and Ranking Member Feinstein opposing your nomination to the Seventh Circuit. The NAACP noted, “[I]n 2020, the Seventh Circuit is once again an all-white court. The court has eleven seats, and all ten judges currently sitting on the court are white. The Seventh Circuit is the only all-white appellate court in the country.”<sup>1</sup>

As Senator Hirono and I noted at your nomination hearing, the composition of the Seventh Circuit bench fails to look like American and it fails to represent the diversity of America. Your nomination – through no fault of your own – in no way expands that diversity.

The Code of Conduct for United States Judges states that “[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges.”<sup>2</sup>

- f. How might the lack of diversity on the Seventh Circuit bench impact “public confidence in the integrity and independence of judges”?

Diversity, which comes in many forms, is important. I have been committed to diversity my entire career. All litigants who come before the Seventh Circuit and every court should be treated the same. All should be treated with dignity, respect, fairness, and receive impartial justice. If confirmed, I am committed to those principles.

- g. Should the federal judiciary represent the diversity of America? Please explain why or why not.

Please see my response to Question 2(f) above. Beyond that, as a judicial nominee, it would be inappropriate for me to opine on a political policy matter.

- h. How does your nomination enhance the Seventh Circuit’s reflection of the diversity of America?

Please see my response to Question 2(f) above. Beyond that, as a judicial nominee, it would be inappropriate for me to opine on a political policy matter.

3. During your nomination hearing, I asked you about Attorney General Barr’s November 9, 2020 memorandum to United States Attorneys, the FBI Director, and the Assistant Attorneys General at the Criminal Division, Civil Rights Division, and National Security Division at DOJ on “post-voting election irregularity inquiries.” In it, the Attorney General authorized all U.S. Attorneys, including yourself as the U.S. Attorney for the Northern District of Indiana, to “pursue substantial allegations of voting and vote tabulation irregularities of elections in

---

<sup>1</sup> Letter from the NAACP to Chairman Graham and Ranking Member Feinstein on the Nomination of Thomas Kirsch to the Seventh Circuit (Nov. 16, 2020), available at <https://naacp.org/wp-content/uploads/2020/11/NAACPKirschLetter.pdf>.

<sup>2</sup> See United States Courts, *Code of Conduct for United States Judges* (Mar. 12, 2019), available at <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

your jurisdictions in certain cases,” including “clear and apparently-credible allegations of irregularities that, if true, could potentially impact the outcome of a federal election.”<sup>3</sup>

The Attorney General’s November 9 memo specifically referenced the Public Integrity Section’s Election Crimes Branch (ECB) and stated that “ECB’s general practice has been to counsel that overt investigative steps ordinarily should not be taken until the election in question has been concluded, its results certified, and all recounts and election contests concluded.”<sup>4</sup> In issuing this memo, the Attorney General upended a 40-year-old practice of non-interference.<sup>5</sup>

- a. Before this memo, how many cases involving “substantial allegations of voting and vote tabulation irregularities . . . that, if true, could potentially impact the outcome of the election” were being delayed as a result of the prior policy?

As a sitting United States Attorney, it is inappropriate for me to comment on what steps my office or any other United States Attorney’s office may have or may not have taken in any criminal investigation or to confirm or deny the existence of any investigation. According to media reports, the State of Indiana certified its results from the 2020 election on November 24, 2020.

- b. Is your office now engaged in any investigations, pursuant to the Attorney General’s revised guidance, that it had not previously been able to pursue?

As a sitting United States Attorney, it is inappropriate for me to comment on what steps my office may have or may not have taken in any criminal investigation or to confirm or deny the existence of any investigation.

- i. Has your office been made aware of any “clear and apparently-credible allegations” of post-voting election irregularities that “could potentially impact the outcome of a federal election”?

Please see my response to Question 3(b) above.

- ii. Has your office concluded that voting or vote tabulation irregularities impacted the outcome of the November 2020 election?

Please see my response to Question 3(b) above. According to media reports, the State of Indiana certified its results from the 2020 election on November 24, 2020.

---

<sup>3</sup> Memorandum from Attorney General Barr to United States Attorneys et al on Post-Voting Election Irregularity Inquiries (Nov. 9, 2020), available at <https://beta.documentcloud.org/documents/20403380-barrelectionmemo110920>.

<sup>4</sup> Memorandum from Attorney General Barr to United States Attorneys et al on Post-Voting Election Irregularity Inquiries (Nov. 9, 2020), available at <https://beta.documentcloud.org/documents/20403380-barrelectionmemo110920>.

<sup>5</sup> See Department of Justice, Public Integrity Section, Election Crimes Branch, *Federal Prosecution of Election Offenses* at pp. 8485 (8th Ed. 2017), available at <https://www.justice.gov/criminal/file/1029066/download>.

You were confirmed as the United States Attorney for the Northern District of Indiana in 2017.

- c. How many cases involving “post-voting election irregularities” in connection with the 2018 midterm election were you unable to pursue at the time as a result of the prior policy?

Please see my response to Question 3(b) above.

The same day the Attorney General issued this memo, the Director of the ECB, Richard Pilger, resigned from his position, specifically noting that the November 9 memo abrogated past ECB practice.<sup>6</sup> Days later, 16 other federal prosecutors – assistant U.S. attorneys from 15 different federal district courts across the country – assigned to monitor the election wrote to the Attorney General that they found no evidence of substantial allegations of voting and vote tabulation irregularities and asked him to withdraw his memo.<sup>7</sup>

- d. As the United States Attorney for the Northern District of Indiana, please state whether you are aware of any evidence of substantial allegations of voting and vote tabulation irregularities in connection with the November 2020 election.

Please see me response to Question 3(b)(ii) above.

---

<sup>6</sup> See Katie Benner and Michael S. Schmidt, *Barr Hands Prosecutors the Authority to Investigate Voter Fraud Claims*, N.Y. TIMES (Nov. 9, 2020), available at <https://www.nytimes.com/2020/11/09/us/politics/barr-elections.html>; see also Email from Richard Pilger to Colleagues (Nov. 9, 2020), available at <https://twitter.com/vanitaguptacr/status/1326001089997631488>.

<sup>7</sup> See Matt Zaptosky and Tom Hamburger, *Federal Prosecutors Assigned to Monitor Election Malfeasance Tell Barr They See No Evidence of Substantial Irregularities*, WASH. POST (Nov. 13, 2020), available at [https://www.washingtonpost.com/national-security/william-barr-election-memo/2020/11/13/6ed06d20-25e4-11eb-a688-5298ad5d580a\\_story.html](https://www.washingtonpost.com/national-security/william-barr-election-memo/2020/11/13/6ed06d20-25e4-11eb-a688-5298ad5d580a_story.html); Katie Benner and Adam Goldman, *Federal Prosecutors Push Back on Barr Memo on Voter Fraud Claims*, N.Y. TIMES (Nov. 13, 2020), available at <https://www.nytimes.com/2020/11/13/us/politics/justice-department-voter-fraud.html>.

**Questions for the Record for Thomas Lee Kirsch II**  
**From Senator Mazie Hirono**

1. At the hearing, I asked you about an event in June 2018, where you introduced then-Attorney General Sessions when he gave a speech on immigration in Fort Wayne, Indiana. During the speech, Attorney General Sessions defended the Trump Administration's 'zero-tolerance' policy, which resulted in thousands of migrant children being forcibly separated from their parents.

**a. I asked you to check whether your office prosecuted any migrants under the Justice Department's 'zero-tolerance' policy. Did your office prosecute any migrants under the 'zero-tolerance' policy?**

My office charges hundreds of cases per year based on the facts and the law in every instance. I am not aware of any immigration cases filed under a zero-tolerance policy by my office during my time as United States Attorney. Attorney General Sessions' April 6, 2018, memorandum was addressed to United States Attorneys along the Southwest Border.

**i. If so, how many people did your office prosecute under this policy?**

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

**ii. If so, how many children were separated from their parents because of those prosecutions?**

I am not aware of any children being separated from their parents as a result of a zero-tolerance illegal immigration case filed in the Northern District of Indiana.

**iii. If so, did your office keep track of the parents and the children so they could be later reunited? If not, why did you not take any steps to help ensure that there was a way for parents to be reunited with their children?**

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

**b. According to notes of your remarks, you pointed out the Attorney General was allocating more federal prosecutors to enforce immigration laws and other laws and expressed gratitude for his "strong support in prosecuting criminals." Were you grateful for DOJ allocation resources for the 'zero-tolerance' family separation policy?**

I have provided the entirety of my remarks in response to Question 12(d) of my Senate Judiciary Questionnaire. As a judicial nominee, it would be inappropriate for me to comment on Attorney General Sessions' statements or to share my personal policy views.

**c. When you introduced Attorney General Sessions or at any point in your tenure as U.S. Attorney, did you voice any opposition to the 'zero-tolerance' policy?**

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

2. In 2017, you reported that you have provided legal services to GEO Group – one of the largest for-profit prison companies that contracts with ICE to detain immigrants.

**a. How long have you had GEO Group as a client?**

I represented GEO Group in approximately 2016 and 2017, prior to my appointment as United States Attorney.

**b. GEO Group has a long history of inhumane treatment of its detainees, including those documented by the Justice Department's Civil Rights Division. More recently, there have been complaints of mistreatment of immigrants in GEO Group's detention centers, including excessive use of force, inadequate medical care, and abusive use of solitary confinement. Have you been involved in defending GEO Group in any of these allegations?**

No.

**c. You took on GEO Group as a client when you were a private attorney and had your choice of clients. What consideration did you give to their long record of inhumane and abusive treatment of its detainees when you agreed to represent them?**

It would be appropriate for me to comment on a characterization of a former client.

3. On November 9, 2020, after the major news networks called the presidential election for Joe Biden, Attorney General Barr issued a memo to U.S. Attorneys authorizing them to pursue allegations of voting irregularities in the 2020 Election, despite no evidence of widespread voter fraud. Richard Pilger, a longtime DOJ attorney who oversees election fraud crimes, stepped down from his position in protest over this memo.

Twenty-three state attorneys general—including those in Michigan, Wisconsin and Nevada, where President Trump has pursued or threatened legal challenges—sent Attorney General Barr a letter criticizing the policy change and noting that “so far, no plausible allegations of widespread misconduct have arisen that would either impact the outcome in any state or warrant a change in DOJ policy.”

Sixteen federal prosecutors assigned to monitor election misconduct in their districts reportedly sent Attorney General Barr a letter urging him to rescind his memo, saying the “policy change was not based in fact.”

**a. Do you agree with these sixteen federal prosecutors that the Barr memo should be rescinded?**

As a judicial nominee, it would be inappropriate for me to comment on my personal policy views, which are irrelevant.

**b. Do you agree with these sixteen federal prosecutors who stated they found no evidence of substantial irregularities in the 2020 Election?**

As a judicial nominee, it would be inappropriate for me to comment on my personal policy views, which are irrelevant. Furthermore, as a sitting United States Attorney, it would be inappropriate for me to comment on investigations conducted by prosecutors in other districts.

**c. Has your office taken any actions under the Barr memo? If so, what actions has your office taken?**

As United States Attorney, it is inappropriate for me to comment on what steps my office may have or may not have taken in any criminal investigation or to confirm or deny the existence of any investigation.

4. At the hearing, I asked you about your appointing an attorney to serve as the election officer to handle election fraud complaints in the Northern District of Indiana. In announcing this appointment, you stated that “every citizen must be able to vote without interference or discrimination and to have that vote counted without it being stolen because of fraud.”

**a. You stated that you could not talk about ongoing investigations, but I was not asking you about specific investigations. Do you have any evidence of *widespread* voter fraud or votes being stolen in the 2020 Election?**

Please see my response to Question 3(c) above. I note that according to media reports, the State of Indiana certified its results from the 2020 election on November 24, 2020.

**b. President Trump has repeatedly made baseless claims of voter fraud and spread lies of the election results. Do you agree with President Trump that the 2020 Election was “rigged” and “stolen” from him?**

According to media reports, the State of Indiana certified its results from the 2020 election on November 24, 2020.

5. You have significant experience prosecuting public corruption crimes.

**a. How important do you think whistleblowers are to exposing public corruption?**

Witnesses with knowledge of public corruption, including insiders, are very important to exposing public corruption. As United States Attorney, I have repeatedly made public calls for witnesses with knowledge of public corruption to come forward and report it to me or to the FBI.

**b. Do you believe whistleblowers, including those that come forward to report misconduct by the President or his cabinet members such as Attorney General Barr, should be protected from retaliation?**

Please see my response to Question 5(a) above. Pursuant to law, whistleblowers are protected from illegal retaliation.

**c. Do you think it is a crime to offer a pardon to someone to keep them from testifying against the person offering the pardon?**

I have not studied this area of the law. However, as a judicial nominee, it would be inappropriate for me to comment on matters that might come before me as a judge.

6. In 2017, a local paper reported that you strongly defended the use of civil asset forfeiture to seize assets allegedly tied to criminal activity. You described it as a “really important” tool, despite the lengthy process to handle forfeitures. But recent reports have shown abuses by law enforcement in seizing assets without an adequate basis.

In January 2020, the Washington Post reported that the Drug Enforcement Administration seized the life savings of an airline passenger’s father without alleging any crime. A 2017 review by the Justice Department’s Inspector General found only 44 of 100 seizures by the DEA were related to an ongoing investigation or resulted in a new investigation, arrest, or prosecution.

**a. Do you still believe there are sufficient safeguards in place to protect against abuse of civil asset forfeiture?**

As issues concerning civil asset forfeiture are frequently litigated in federal courts, as a judicial nominee it would be inappropriate for me to comment. Furthermore, it would be inappropriate for me to opine on a law or offer my policy viewpoints, which are irrelevant to the application of the law.

**b. If so, how do you explain the findings by the Justice Department Inspector General?**

Please see my response to Question 6(a) above.

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

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

I believe that diversity training is important.

**b. Have you ever taken such training?**

I do not specifically recall any such training on implicit bias, but I have complied with all Department of Justice training requirements. Furthermore, I may have taken such training as a lawyer in private practice but do not have specific recollection of all the training I have ever taken.

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

If confirmed, I commit to taking all required training of United States Judges.

**Nomination of Thomas L. Kirsch II**  
**United States Court of Appeals for the Seventh**  
**Circuit Questions for the Record**  
**Submitted November 25, 2020**

**QUESTIONS FROM SENATOR**

**BOOKER**

1. The federal judiciary became significantly more diverse under President Obama—but much less diverse under President Trump. According to a recent study, 42 percent of President Obama’s judicial appointees were women, and 36 percent were people of color. By contrast, only 24 percent of President Trump’s appointees have been women, and only 16 percent have been people of color.<sup>1</sup>

- a. 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.

- b. Are you troubled by the fact that the federal judiciary is becoming significantly less diverse, in terms of race, ethnicity, and gender, because of President Trump’s appointments to the bench?

Diversity, which takes many forms, is important in the judiciary.

- c. President Trump has nominated more than 50 individuals to the federal courts of appeals. Were you aware that just one of those nominees is Hispanic, and that not a single one is Black?<sup>2</sup>

I am not specifically aware of all of President Trump’s judicial nominees.

- d. Were you aware that, because of Senate Republicans’ obstruction against President Obama and then President Trump’s nomination choices, it has now been nearly seven years since a Black person was confirmed to a seat on any federal court of appeals?<sup>3</sup>

I am not specifically aware of all of President Trump’s judicial nominees.

2. In June 2018, you gave introductory remarks for a speech by then-Attorney General Jeff Sessions in Fort Wayne, Indiana. You praised him for his “strong support in prosecuting

---

<sup>1</sup> *Diversity on the Federal Bench*, AM. CONST. SOC’Y (Oct. 2020), <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench> (using data from the Federal Judicial Center).

<sup>2</sup> Madison Alder & Jasmine Ye Han, *Trump Nears Post-Nixon First: No Black Circuit Judges*, BLOOMBERG LAW (June 25, 2020), <https://news.bloomberglaw.com/us-law-week/no-black-judges-among-trumps-appeals-court-confirmations>; see *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/search/advanced-search>.

<sup>3</sup> See *African American Judges on the Federal Courts*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/search/african-american>.

criminals and all of his efforts to reduce crime in America.” During his speech, Attorney General Sessions also defended the Trump Administration’s “zero-tolerance” policy, which has led to hundreds of children being separated from their families. Attorney General Sessions said, “Our policies are discouraging people from making children endure that treacherous journey. . . . Everything the open borders lobby is doing is encouraging that and endangering these children.”<sup>4</sup>

- a. Did you agree with that statement by Attorney General Sessions?

I have provided the entirety of my remarks in response to Question 12 of my Senate Judiciary Questionnaire. As a judicial nominee, it would be inappropriate for me to comment on Attorney General Sessions’ statements or to share my personal policy views.

- b. The Trump Administration’s so-called zero-tolerance policy was squarely premised on increased prosecutions. As one Congressional Research Service report has explained, “Under the zero tolerance policy, [the Department of Justice] prosecuted 100% of adult aliens apprehended crossing the border illegally, making no exceptions for whether they were asylum seekers or accompanied by minor children. . . . DOJ’s ‘100% prosecution’ policy represented a change in the level of enforcement of an existing statute rather than a change in statute or regulation.”<sup>5</sup> Did you believe at the time that the zero-tolerance policy was part of what you called Attorney General Sessions’s “strong support in prosecuting criminals and all of his efforts to reduce crime in America”?

Please see my response to Question 2(b) above.

3. In October 2020, you said regarding election integrity that the Department of Justice “will always act appropriately to protect the integrity of the election process.”<sup>6</sup> On November 9, 2020, Attorney General William Barr issued a memorandum to U.S. Attorneys to pursue “substantial allegations” of voter fraud, even though there is no evidence of any widespread problem. This directive goes against longstanding guidance that the Department of Justice does not engage in these types of investigations before the election is certified.<sup>7</sup> Do you think that Attorney General Barr’s directive serves to “protect the integrity of the election process”—or undermine it?

As the United States Attorney for Northern Indiana, my office, working with our federal, state, and local law enforcement partners, strives to act appropriately,

---

<sup>4</sup> Megan Henry & Jordyn Hermani, *Attorney General Jeff Sessions: Zero-Tolerance Policy Isn’t About Being “Mean to Children,”* INDIANAPOLIS STAR (June 14, 2018), <https://www.indystar.com/story/news/2018/06/14/jeff-sessions-immigration-fort-wayne-attorney-general/698894002>.

<sup>5</sup> CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 1 (2019) (footnotes omitted), <https://crsreports.congress.gov/product/pdf/R/R45266/9>. Louis Fisher, Cong. Rsch. Serv., RL31340, *Military Tribunals: The Quirin Precedent* 30 (2002).

<sup>6</sup> Mary Freda, *Assistant US Attorney Appointed to Oversee Election Day Voting Complaints, Concerns*, NW. IND. TIMES (Oct. 20, 2020), [https://www.nwitimes.com/news/local/govt-and-politics/elections/assistant-us-attorney-appointed-to-oversee-election-day-voting-complaints-concerns/article\\_ff77169a-d23d-53d9-aa4e-3c906f0d0c6b.html](https://www.nwitimes.com/news/local/govt-and-politics/elections/assistant-us-attorney-appointed-to-oversee-election-day-voting-complaints-concerns/article_ff77169a-d23d-53d9-aa4e-3c906f0d0c6b.html).

<sup>7</sup> Katie Benner & Michael S. Schmidt, *Barr Hands Prosecutors the Authority To Investigate Voter Fraud Claims*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/us/politics/barr-elections.html>.

consistent with applicable federal law, to protect the integrity of the election process in Northern Indiana. As a judicial nominee, it would be inappropriate for me to comment on Attorney General Barr's statements or to share my personal policy views.

4. In April 2020, you said during a virtual press conference that the Department of Justice was taking "a proactive but lawful approach to expanding the use of home confinement [for the prison population] but only for those inmates who do not pose a danger to their communities. The Attorney General has made clear that public safety, including the safety of victims, is paramount."<sup>8</sup> Reported COVID-19 cases in state and federal prisons across the country have increased dramatically. As of November 10, there have been at least 182,776 reported positive cases.<sup>9</sup> Is the Department of Justice doing enough to protect individuals in correctional facilities?

Among other measures, I was referring to the Attorney General's March 26, 2020, Memorandum for the Director of the Bureau of Prisons on the prioritization of home confinement as appropriate in response to the COVID-19 pandemic. As the United States Attorney for Northern Indiana, I am not aware of all of the measures taken by the many components of the Department of Justice and the Bureau of Prisons to keep inmates and prison staff safe during the COVID-19 pandemic. I am therefore unable to offer my opinion on what additional measures could have been taken.

5. It has been reported that you provided legal services to the GEO Group,<sup>10</sup> a private prison operator that contracts with U.S. Immigration and Customs Enforcement to detain immigrants.<sup>11</sup> Please describe your representation of the GEO Group and the legal services you provided.

To the best of my recollection, I advised GEO Group on contractual matters.

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

Both originalism and textualism have various definitions. If confirmed, I would follow and apply Supreme Court precedent and apply the original public meaning in interpreting text. I believe this approach is consistent with the separation of powers established in the Constitution and the judiciary's role to say what the law is.

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

---

<sup>8</sup> Tom Kirsch, Participant, *Virtual Press Conference To Discuss Stimulus Checks, Scams, and Fraud Related to COVID-19 with IRS Special Agent in Charge Kathy Enstrom and FBI Assistant Special Agent in Charge Danny Youmara*, U.S. Attorney's Office (Apr. 28, 2020), in SJQ Attachments to Question 12(e), at 382.

<sup>9</sup> *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (Nov. 13, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

<sup>10</sup> Lee Fang, *Donald Trump Law Enforcement Appointees Previously Worked for ICE Contractors*, INTERCEPT (July 5, 2018), <https://theintercept.com/2018/07/05/donald-trump-law-enforcement-appointees-previously-worked-for-ice-contractors>.

<sup>11</sup> Esther Fung, *Donald Trump Has Been Very Good for Publicly Listed Prison Owners*, WALL ST. J. (Feb. 26, 2019), <https://www.wsj.com/articles/donald-trump-has-been-very-good-for-publicly-listed-prison-owners-11551189601>.

Please see my response to Question 6 above.

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

The Supreme Court has explained that legislative history may be used to assist in determining the meaning of an ambiguous statutory text. *See, e.g., Milner v. Dep't of Navy*, 131 S.Ct 1259, 1267 (2011); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

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

Please see my response to Question 8(a) above.

9. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes, I believe that judicial restraint is an important value for a judge in deciding a case and reflects the constitutional separation of powers. I believe that judicial restraint is the opposite of judicial activism.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>12</sup> Was that decision guided by the principle of judicial restraint?

*Heller* is binding Supreme Court precedent that I will follow and apply if confirmed. As a judicial nominee, it is inappropriate for me to opine on my views whether Supreme Court precedent was rightly decided.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>13</sup> Was that decision guided by the principle of judicial restraint?

*Citizens United* is binding Supreme Court precedent that I will follow and apply if

---

<sup>12</sup> 554 U.S. 570 (2008).

<sup>13</sup> 558 U.S. 310 (2010).

confirmed. As a judicial nominee, it is inappropriate for me to opine on my views whether Supreme Court precedent was rightly decided.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>14</sup> Was that decision guided by the principle of judicial restraint?

*Shelby County* is binding Supreme Court precedent that I will follow and apply if confirmed. As a judicial nominee, it is inappropriate for me to opine on my views whether Supreme Court precedent was rightly decided.

10. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>15</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>16</sup>

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

Cases concerning voter fraud and voter laws are impending and pending in federal courts. Accordingly, as a judicial nominee, it would be inappropriate for me to comment. Nor is it appropriate for me to comment on my personal policy views, which are irrelevant, or political issues. If confirmed, I will apply Supreme Court precedent and applicable law.

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

Please see my response to Question 10(a) above.

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

Please see my response to Question 10(a) above.

11. 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.<sup>17</sup> Notably, the

---

<sup>14</sup> 570 U.S. 529 (2013).

<sup>15</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>16</sup> *Id.*

<sup>17</sup> 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>.

same study found that whites are actually *more likely* than blacks to sell drugs.<sup>18</sup> 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.<sup>19</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>20</sup>

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

Regrettably, racism still exists in America. I have been committed to issues of diversity and inclusion my entire career, including as United States Attorney.

- 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 reviewed on this topic.

While I am aware of the issue of implicit racial bias and have reviewed articles and reports that touch and reflect on this issue, I do not recall the titles of these articles and reports. To the best of my recollection, I have not read any books on this topic.

- 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.<sup>21</sup> Why do you think that is the case?

As a judicial nominee, it would be inappropriate for me to comment on matters that are political or could be the subject of litigation.

- 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.<sup>22</sup> Why do you think that is the case?

Please see my response to Question 11(d) above.

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

---

<sup>18</sup> *Id.*

<sup>19</sup> 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>.

<sup>20</sup> *Id.*

<sup>21</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>22</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

In all cases, it is the fundamental duty of every judge to treat all litigants with dignity, fairness, respect, and equal justice. Judges must continually strive to strictly comply with that duty.

12. 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.<sup>23</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>24</sup>

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 am not familiar with the Pew Charitable Trust fact sheet, but I am aware that others have concluded that many factors contribute to fluctuating crime rates.

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.

Please see my response to Question 12(a) above.

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

Yes.

14. Do you believe that *Brown v. Board of Education*<sup>25</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. As I testified at my hearing, although it is generally not appropriate for judicial nominees to grade or give a thumbs up or down to Supreme Court precedent, *Brown v. Board of Education* holds a unique place in American jurisprudence and history.

15. Do you believe that *Plessy v. Ferguson*<sup>26</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

16. 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?

---

<sup>23</sup> 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>.

<sup>24</sup> *Id.*

<sup>25</sup> 347 U.S. 483 (1954).

<sup>26</sup> 163 U.S. 537 (1896).

No.

17. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”<sup>27</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Title 28 U.S.C. Section 455 does not list a judge’s race or ethnicity as a basis for recusal.

18. 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.”<sup>28</sup> 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 due process protections apply to all “persons” in the United States, including aliens regardless of their entry status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). I will apply this Supreme Court precedent if confirmed. Beyond that, as a judicial nominee, it would be inappropriate for me to opine on a political matter.

---

<sup>27</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

<sup>28</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.