

**Nomination of John Fitzgerald Kness to the United States District Court for the
Northern District of Illinois
Questions for the Record
Submitted July 24, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

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

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

As an “inferior court” established under Article III of the Constitution, district courts are bound to follow applicable precedent of the Supreme Court of the United States. Accordingly, it is never proper for a district judge to depart from any applicable Supreme Court precedent.

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

In rendering a judgment, a district court must apply all applicable precedents of the Supreme Court of the United States. Moreover, a district judge should typically refrain from criticizing precedent as a matter of due respect for judicial order. Where there is no applicable precedent or a gap in the law, however, and assuming circumstances exist that would allow an individual district judge the opportunity to write a concurring or dissenting opinion, a judge is permitted under established custom to analyze matters of law and, respectfully, to identify areas in which further appellate development may be beneficial.

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

Assuming that the “law of the case” doctrine is inapplicable, a district court is not bound by decisions of another district court. *See, e.g., Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005) (“[A] we have noted repeatedly, a district court decision does not have stare decisis effect; it is not a precedent”).

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

Sitting at the apex of our judicial system, the Supreme Court of the United States possesses sole authority and discretion to overturn its own precedent. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (“[I]t is this Court’s prerogative alone to overrule one of its precedents”). Given the Supreme Court’s command, it would be inappropriate for a nominee to an inferior court to suggest standards or

guidelines concerning when Supreme Court precedent should be overruled.

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

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

Roe v. Wade, 410 U.S. 113 (1973), is a binding decision of the Supreme Court of the United States. Accordingly, if I am confirmed as a district judge, I will apply *Roe v. Wade* as assiduously as I will any other applicable precedent.

- b. **Is it settled law?**

A district judge is bound to treat all precedent as settled law.

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

A district judge is bound to treat all precedent as settled law.

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

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

From the perspective of a district judge, the binding opinion of a superior court must be followed. Justice Stevens’s dissent in *Heller* was not adopted by the Supreme Court. If confirmed to the district court to which I have been nominated, I will faithfully apply all binding precedents of the Supreme Court and the Court of Appeals for the Seventh Circuit.

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

By its terms, *Heller* acknowledged that “the right secured by the Second Amendment is not unlimited” and explained that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

As a nominee to the district court, and given that the topic of firearms regulations may be the subject of pending or impending litigation, it would be inappropriate for me to comment on what specific regulations may or may not be constitutionally permissible. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

As explained in the answer to Question 1(d) above, the Supreme Court of the United States possesses sole authority and discretion to overturn its own precedents. A district judge (or a nominee) should therefore be reluctant to opine on the Supreme Court’s decision whether to follow one or more of its earlier decisions.

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

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

In *First Nat’l Bank of Boston v. Bellotti*, the Supreme Court found “no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove . . . a material effect on its business or property.” 435 U.S. 765, 784 (1978). In *Citizens United v. Federal Election Comm’n*, the Supreme Court further explained that it has “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’ ” 558 U.S. 310, 342 (2010). These decisions are fully binding on the inferior courts, and if I am confirmed, I will follow them carefully.

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

Please refer to my answer to Question 5(a) above.

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

Burwell v. Hobby Lobby Stores, Inc. concluded that the Religious Freedom Restoration Act applied to closely-held corporations. 573 U.S. 682 (2012). As a decision of the Supreme Court, *Hobby Lobby* is binding on inferior courts. That case did not, however, decide whether the Free Exercise Clause also applies to corporations. Accordingly, because this question is or may become the subject of litigation, I respectfully decline to elaborate further under Canon 3(A)(6) of the Code of Conduct for United States Judges. (“A judge should not make public comment on the merits of a matter pending or impending in any court”.)

6. In 2008, you submitted an amicus brief in *Riley v. Kennedy*, which challenged the application of Section 5 of the Voting Rights Act where a state supreme court strikes down an election practice. In your brief, you argued that “compliance with the preclearance procedure [under the Voting Rights Act] . . . is time-consuming and expensive.” (Brief for the States of Florida et al. as *Amici Curiae* in Support of Appellant, *Riley v. Kennedy*, 553 U.S. 406 (2008), 2008 WL 205091)

a. On what basis did you conclude that compliance with Section 5 of the Voting Rights Act is “time-consuming and expensive” for states?

I was the junior member of a team of lawyers that submitted an amicus brief in *Riley* seeking to persuade the Supreme Court to rule in favor of the Appellant, who ultimately prevailed in the appeal. Among other sections, pages 7-8 of the brief set forth the brief’s support for the argument quoted above, including references to “regulations [that] require the covered jurisdiction seeking administrative preclearance to submit relevant empirical data” and that “the covered jurisdiction frequently will provide statistical analyses from experts. . . .”

b. In 2008, at the time you submitted your brief, did the burdens of Section 5 preclearance outweigh the benefits? If so, how?

In their brief, the States of Florida et al. as *Amici Curiae* did not take the position that the burdens of Section 5 preclearance outweighed the benefits. *See, e.g.*, Brief for the States of Florida *et al.*, 553 U.S. 406 (2008), at 2 (“[*Amici*] do not here challenge the validity of Section 5 or seek to avoid the existing burdens of its preclearance procedure”).

7. In 2009, you submitted a brief in *Federal Trade Commission v. Trudeau* challenging the Federal Trade Commission’s (FTC) imposition of civil sanctions against Trudeau, who had been accused by the FTC of misrepresenting the simplicity of a weight-loss protocol that he detailed in one of his books. You argued in part that the sanctions were “impermissibly punitive in nature” and “grossly exceed[ed] any benefit” that Trudeau had

obtained by promoting his weight-loss protocol. (Brief for Defendant-Appellant Kevin Trudeau, *Federal Trade Commission v. Trudeau*, 662 F.3d 947 (7th Cir. 2011), 2009 WL 908690)

a. On what basis did you conclude that the civil sanctions imposed by the FTC were “impermissibly punitive in nature”?

As one of several members of the litigation team that represented Kevin Trudeau in this litigation, I participated in drafting a brief that set forth detailed and numerous citations to the factual record and to applicable case and statutory law in support of an argument in favor of reversal. To the best of my recollection, the arguments generally centered on the size of the sanction, the effect on the defendant, and the nature of the process that led to the award. To the extent further elaboration is sought, I respectfully submit that the statements made in the brief speak for themselves.

b. Please describe in detail the importance of civil sanctions as a tool used by agencies seeking to enforce consumer protection laws.

Although I have not worked extensively in the enforcement of consumer protection laws and thus am not qualified to explain in detail the importance of civil sanctions as an enforcement tool, I am generally aware that civil sanctions are an available remedy used to enforce consumer protection laws. If confirmed as a district judge, I would fully, fairly, and without hesitation apply the laws pertaining to the protection of consumers, including any available and appropriate remedial tools, without partiality toward any litigant.

8. While serving as an Assistant United States Attorney, you represented the government on appeal in *United States v. Rivera*, a case implicating several Fourth Amendment search doctrines. In that case, DEA agents worked with a confidential source who, wearing a recording device, pretended to buy cocaine from the defendant Rivera and two co-defendants. The drug “buy” occurred in a garage. After seeing the cocaine, the confidential source left the garage — the door of which remained opened — ostensibly to retrieve money from his car to purchase the drugs. He got in his car and “drove a few feet away” so that he could “turn the car around and put it in the garage.” In reality, he called DEA agents and told them he had seen cocaine in the garage, whereupon the agents descended on the garage, arrested the three defendants, and conducted a warrantless search of the garage, locating and seizing two kilograms of cocaine.

In arguing against a motion to suppress the cocaine seized by agents during the raid, you claimed in part that “the inevitable discovery doctrine precludes suppression.” Specifically, you argued that the DEA agents’ actions here met the doctrine’s two requirements — a search warrant would have been issued had the agents sought one, and “the DEA would have sought a warrant if [the lead agent] had thought or been informed [that a warrant] was necessary.” (Brief of the United States, *United States v. Rivera*, 817 F.3d 339 (7th Cir. 2016), 2015 WL 8069315)

The Seventh Circuit affirmed the denial of the suppression motion, but in a concurring opinion, Judge Hamilton cast doubt on whether the circumstances of the case met the “inevitable discovery” exception to the exclusionary rule. Hamilton specifically focused on the second requirement of the rule — that the government “would have conducted a lawful search absent the challenged conduct.” According to Judge Hamilton: “These agents had no plan to seek a search warrant and no interest in doing so. From the outset of the operation, they planned to claim consent once removed to justify a warrantless entry after the informant gave the signal.” In his concurrence, Judge Hamilton noted that he was bound by Seventh Circuit precedent on the inevitable discovery doctrine, and explained that the Seventh Circuit had rejected the “active pursuit requirement” to invoke that doctrine — proof from the government that “it was actively pursuing other, lawful grounds for obtaining the evidence.” (*United States v. Rivera*, 817 F.3d 339 (7th Cir. 2016) (Hamilton, J., concurring))

- a. On what basis did you conclude that “the DEA would have sought a warrant if [the lead agent] had thought or been informed [that a warrant] was necessary”?**

As cited in the government’s appellate response brief at pp. 14-15, the district court stated that it “ ‘did find [the agent’s] testimony credible that had he thought he had to obtain a warrant, he would have sought one.’ ” The quoted statement above was based on the district court’s crediting of the agent’s testimony on this point.

- b. In this case, what circumstance or fact made it impractical or impossible for the DEA agents to obtain a warrant before executing a search of the garage?**

As the Seventh Circuit explained in affirming the denial of the defendants’ motion to suppress, it would have been impractical or impossible for DEA agents to seek a search warrant in advance because, among other things: (1) detaining the defendants following notification by the confidential source that drugs were present in the garage would itself have constituted a warrantless seizure under the Fourth Amendment (see *Rivera*, 817 F.3d at 342); (2) a pause “to enable warrants to be obtained would have risked the disappearance of the contraband; and an attempt to obtain warrants before the informant phoned in the information that he’d found the contraband might well have been denied for lack of proof of probable cause” (*id.* at 344); and (3) the agents “had to move fast because [the defendants] might panic when they realized that the (unknown to them) informant might not be returning, and remove the drugs from the garage” (*id.* at 343).

- c. What additional burdens does the “active pursuit requirement” impose on law enforcement agents, if any?**

The Seventh Circuit has concluded that the government, in opposing a motion to suppress on the basis of the inevitable discovery doctrine, need not establish that law enforcement agents were actively pursuing a warrant at the time of the challenged search. *See, e.g., United States v. Tejada*, 524 F.3d 809, 812–13 (7th Cir. 2008). If I am confirmed to the district court, I will be bound to apply that decision as well as all other applicable precedents of the Supreme Court and the Seventh Circuit. I lack sufficient knowledge to opine on what burdens an “active pursuit requirement” might impose upon law enforcement agents.

9. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2004. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

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

Because I did not write the quoted language, I cannot elaborate upon the meaning of what the author(s) of the statement intended.

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

I neither wrote the quoted language nor am authorized to speak on behalf of the Federalist Society. Accordingly, I cannot explain how the Federalist Society seeks to act.

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

Please refer to my answer to Question 9(b) above.

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

Not that I recall.

10. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) from 1993 to 2017.

a. Why did you join the National Rifle Association?

In the early 1990s, I became interested in the sport of target shooting after being introduced to it by a relative. Because I enjoyed the sport and wanted to learn more about shooting as a hobby, I joined the National Rifle Association to gain access to its publications and resources. My involvement in the organization essentially consisted of my annual membership and receiving the monthly magazine, "American Rifleman."

b. Why did you allow your membership in the National Rifle Association to lapse in 2017?

I have periodically allowed my membership in the National Rifle Association to lapse based on my personal circumstances and relative interest and activity in shooting as a sport. By 2017, my ability to engage in shooting as a hobby, based on my increasing personal and professional obligations, had eroded to the point that I was rarely able to shoot more than once every couple of years. Accordingly, I determined that my continued membership in the National Rifle Association was no longer beneficial.

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

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

I do not recall that anyone in the Administration, including at the White House or the Department of Justice, has asked me about my views on any issue related to administrative law or my "views on 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”?

As a nominee to an inferior federal court, my duty, if confirmed, would be to apply all relevant statutes, regulations, and precedents of the Supreme Court and the United States Court of Appeals for the Seventh Circuit that pertain to administrative law.

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

I lack sufficient knowledge in this area to state definitively whether human activity is contributing to or causing climate change. In addition, because this matter is or may become the subject of pending or impending litigation, I do not believe it appropriate to comment further. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

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

The Supreme Court has explained that, where the text of a statute is ambiguous, legislative history can be appropriately considered. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). As a precedent of the Supreme Court, the rule of *Allapattah* and related cases is binding on inferior courts.

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

No.

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

I received these questions on Thursday, July 24, 2019. After reviewing them, I performed legal and other research and prepared draft responses, which I forwarded to personnel at the Department of Justice’s Office of Legal Policy. Following comments I received, including from attorneys at the Office of Legal Policy, I prepared a final draft of my answers on Monday, July 29, 2019, and authorized the Department of Justice to file them.

Written Questions for John Fitzgerald Kness
Submitted by Senator Patrick Leahy
July 24, 2019

1. 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?**

Yes. A district judge is bound to follow all binding rules of statutory interpretation, including the rule that statutory words must be read in the context of the overall statutory scheme. That rule has been recognized by the Seventh Circuit. *See, e.g., Ortega v. Holder*, 592 F.3d 738, 743 (7th Cir. 2010) (“[I]n interpreting the wording of a statute, we must consider not only the words of the statute, but also the statute’s structure”). If confirmed, I will follow all applicable precedents of the Supreme Court of the United States as well as the Seventh Circuit.

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

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

Respect for the rule of law is fundamental to the effective functioning of our entire judiciary. In the federal system, this respect is backstopped by the principle of judicial independence, which insulates judges from the pressures and influences of the political process through the tenure and salary provisions established in Article III. As an advocate, I have strived to treat all litigants, judicial officers, witnesses, and jurors with equal respect. If I am confirmed to be a district judge, I will continue to act that way, while also seeking to ensure that others in the courtroom act with equal respect for others.

- (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 refer to my response to Question 2(b) above.

3. 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?

It is well established that, as a general proposition, courts have the power to review national security-related decisions made by a President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

4. 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?

Various provisions help to ensure that district judges are empowered to ensure compliance with lawful orders issued in litigation. To the extent that the Question calls for comment on a scenario that is or may become the subject of litigation, I must respectfully decline to elaborate further. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

5. 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?

Yes.

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

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

In both the conduct of foreign affairs and war, the Constitution grants powers to both the President and the Congress. In attempting to effect a

judicial balancing of these powers, the Supreme Court has explained that the President's "authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.' " *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Where the President " 'takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,' and the [Supreme] Court can sustain his actions 'only by disabling the Congress from acting upon the subject.' " *Medellin*, 552 U.S. at 525 (quoting *Youngstown*, 343 U.S. at 637-638) (concurring opinion).

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

Please refer to my answer to Question 5(b) above.

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

As set forth in my answer to Question 5(b) above, the Supreme Court has articulated the standards by which Presidential actions in the fields of foreign affairs and war are subject to judicial review. In addition, as has been recognized since *Marbury v. Madison*, the Judiciary retains the power to "say what the law is." 1 Cranch (5 U.S.) 137, 177 (1803).

7. 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?

As the Supreme Court has concluded, classifications on the basis of sex "may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 534 (1996); *see also Hayden ex rel. A.H. v. Greensburg Community School Corp.*, 743 F.3d 569, 577 (2014) (7th Cir. 2014) ("Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context; the justification for a gender-based classification thus must be exceedingly persuasive"). These decisions are fully binding on the court to which I have been nominated, and if I am confirmed, I will follow them fully.

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

Voting is a foundational right, and I believe that the protection of voting rights is essential. The Voting Rights Act both was a landmark effort to protect voting rights and remains binding law. If confirmed, I will faithfully apply the Voting Rights Act as well as all applicable judicial precedent interpreting it.

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

10. 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?

In our federal court system, the factual record is developed principally at the district court level. Development of the factual record is primarily driven by the parties and overseen by the court, in accordance with applicable evidentiary rules and standards. Depending upon the nature of the litigation, factual findings are made either by the court, by a jury, or by both. Appellate review of the factual record is guided by well-established and recognized standards of review that are typically deferential to the findings made at the trial level. To the extent that the Question calls for comment on a scenario that is or may become the subject of litigation, I must respectfully decline to elaborate further. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

11. 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”?

It is generally accepted that the Reconstruction Amendments were intended to remedy the effects of racial discrimination. *See, e.g., Loving v.*

Virginia, 388 U.S. 1, 11 (1967) (the “object of the Fourteenth Amendment” was to eliminate “racial discrimination”). Each of the Reconstruction Amendments provides that Congress has the power to enforce them “by appropriate legislation.” U.S. Const. amend. XIII, section 2; U.S. Const. amend. XIV, section 5; U.S. Const. amend. XV, section 2.

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

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

Lawrence v. Texas is fully binding on the inferior federal courts, and if I am confirmed, I will follow it as carefully as all other binding precedents.

13. 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?

On many occasions, the Supreme Court has explained that “the doctrine of stare decisis is of fundamental importance to the rule of law.” *See, e.g., Hilton v. South Carolina Public Ry. Comm’n*, 502 U.S. 197, 202 (1991) (citations omitted). Because a district judge lacks the authority to depart from precedent of a higher court, the judge’s commitment to the principle of stare decisis must be absolute. *Bosse v. Oklahoma*, 580 U.S. —, 137 S. Ct. 1, 2 (2016); *cf. State Oil Co. v. Khan*, 522 U.S. 3, 20 (“[I]t is this Court’s prerogative alone to overrule one of its precedents”); *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005) (“[A] district court decision does not have stare decisis effect; it is not a precedent”). In the light of these precedents, it would be inappropriate for a district court nominee to suggest standards or guidelines concerning when a precedent of a superior court should be overruled.

14. 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.**

Federal judges are subject to well-established rules and canons that govern their conduct and that set forth the basis for recusal. *See, e.g.*, 28 U.S.C. § 455; Canon 3, Code of Conduct for United States Judges. If and when faced with a situation in which recusal may be necessary, I would determine whether to recuse by reference to these and all other applicable standards. In addition, as necessary, I would consult with judicial ethics officials and, as appropriate, colleagues within the judicial system. Although I cannot predict the specifics of any potential future recusal situation, I expect that there will be matters in which recusal may objectively be called for. Such situations might include: (a) cases in which I have appeared as counsel; (b) cases where I have a financial interest; (c) cases that, at least for a certain time, involve my current employer; and (d) cases where, based on my previous service in government employment, I participated as counsel concerning the proceeding or expressed an opinion concerning the merits of the particular case (*see* Canon 3(C)(1)(e), Code of Conduct for United States Judges).

15. 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?**

All courts must work to ensure that the constitutional rights of all are protected through the fair, impartial, and diligent application of the law. If I am confirmed, I will strive to discharge my duty in accordance with this important principle.

16. 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.

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

Article II, Section 2, Clause 1 of the Constitution states, "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Because I have not previously considered this issue in depth, I am unable to state definitively whether there are any discernible limits on the Presidential pardon power.

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

Article I, Section 8, Clause 3 of the Constitution sets forth the power of Congress to regulate commerce. As articulated in a line of cases synthesized in *United States v. Lopez*, Congress has the power generally to regulate the use of the channels of interstate commerce; to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce; and to regulate those activities having a substantial relation to interstate commerce. *See* 514 U.S. 549, 558-59 (1995).

Congress's power to legislate under Section 5 of the Fourteenth Amendment has been the subject of significant litigation and public debate, including before the Supreme Court. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Tennessee v. Lane*, 541 U.S. 509 (2004). Section 5 grants to Congress "the power to enforce, by appropriate legislation, the provisions of this article." As the Supreme Court has explained, Section 5 legislation "is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Lane*, 541 U.S. at 520 (quoting *Boerne*, 521 U.S. at 520).

19. 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?**

Trump v. Hawaii is a binding precedent of the Supreme Court and applies to all inferior courts. As such, if confirmed, I will be bound to apply *Trump v. Hawaii* along with all other binding precedent. Because this Question relates to a subject that is or may become the subject of litigation, I must respectfully decline to elaborate further. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

In *Whole Woman’s Health v. Hellerstedt*, the Supreme Court explained that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” 579 U.S. —, 136 S. Ct. 2292, 2309 (2016) (internal quotation marks and citation omitted). *Hellerstedt* also explained that “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992)).

With respect to specific examples of statutes that might present an undue burden on the right to abortion as defined by the Supreme Court, it would be inappropriate for me, as a judicial nominee, to comment further on hypothetical scenarios that are or may become the subject of litigation. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges. I can emphasize that, if confirmed, I will fully and faithfully apply all applicable Supreme Court and Seventh Circuit precedent.

21. 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?

In *Pearson v. Callahan*, the Supreme Court explained that the doctrine of qualified immunity “protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 555 U.S. 223, 231 (2009) (internal quotation marks omitted); *see also Torry v. City of Chicago*, 932 F.3d 579, 586 (7th Cir. 2019) (“The demanding standard that the law be clearly established for liability to attach protects all but the plainly incompetent or those who knowingly violate the law”) (quoting *District of Columbia v. Wesby*, 583 U.S. —, 138 S. Ct. 577, 589 (2018)) (citation and internal quotation marks omitted). Qualified immunity “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Id.* If confirmed, I will faithfully apply these precedents.

22. 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?

Application of the Fourth Amendment (in particular the warrant requirement) to new technologies has been the subject of recent Supreme Court litigation. *See, e.g., Carpenter v. United States*, 585 U.S. —, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014). These cases

establish that a search warrant is required for law enforcement to obtain data from certain technologies. As for specific examples, it would be inappropriate for me, as a judicial nominee, to comment further on hypothetical scenarios that are or may become the subject of litigation. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

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

Because I have not previously considered this issue in depth, I am unable to state definitively whether a president could ever lawfully allocate funds under the circumstances described in the Question above. To the extent the Question calls for the expression of an opinion on a policy matter subject to the legislative process, or on a matter that is or may become the subject of litigation, I respectfully defer under Canons 1, 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

Impartiality of judges—both actual and apparent—is a core obligation of our legal system. To meet this obligation, judges are subject to well-established rules and canons that govern their conduct and that set forth the basis for recusal where appropriate. *See, e.g.*, 28 U.S.C. § 455; Code of Conduct for United States Judges. These rules, as well as our constitutional order and the separation of powers doctrine, help to ensure that judges are insulated from the potential influence of public comments and political debates. If I am confirmed, I will remain vigilant to ensure that I act, not only with subjective impartiality, but also in a manner that promotes objective confidence in my impartiality. To the extent that a more detailed answer would require me, as a judicial nominee, to opine on a matter of political debate, I must respectfully decline to elaborate further. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

**Nomination of John Fitzgerald Kness
to the United States District Court for the Northern District of Illinois
Questions for the Record
Submitted July 24, 2019**

QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you were an “intermittent” member of the National Rifle Association (NRA) from 1993 to 2017.
 - a. What was your level of involvement with the NRA during those 24 years? Could you clarify what you mean when you say your membership was “intermittent?”

In the early 1990s, I became interested in the sport of target shooting after being introduced to it by a relative. Because I enjoyed the sport and wanted to learn more about shooting as a hobby, I joined the National Rifle Association to gain access to its publications and resources. My involvement in the organization essentially consisted of my annual membership and receiving the monthly magazine, “American Rifleman.” I have periodically allowed my membership in the National Rifle Association to lapse based on my personal circumstances and relative interest and activity in shooting as a sport. In other words, my membership in the organization was not continuous between 1993 and 2017. By 2017, my ability to engage in shooting as a hobby, based on my increasing personal and professional obligations, had eroded to the point that I was rarely able to shoot more than once every couple of years. Accordingly, I determined that any subjective benefits I derived no longer justified my continued membership in the organization.

- b. Why did you choose to leave the organization in 2017?

Please refer to my answer to Question 1(a) above.

2. Your questionnaire indicates that you have been an “intermittent” member of the Federalist Society for Law and Public Policy Studies since 2004.
 - a. What has your level of involvement with The Federalist Society been over the last 15 years? Could you clarify what you mean when you say your membership has been “intermittent?”

My membership in the Federalist Society has consisted of a series of one-year memberships. My membership has lapsed over the years for periods that, to the best of my recollection, have ranged from a duration of months to a year or more. My involvement in Federalist Society events has primarily consisted of receiving publications, attending occasional law school and bar-related panels as a spectator, and occasionally attending the Federalist Society annual convention. I estimate that I have attended approximately a half-dozen panel presentations over the years, and I estimate that I have attended the annual convention approximately three times over the years. To the best of my recollection, the last convention I attended was at least three years ago.

- b. If confirmed, do you plan to remain an active participant in the Federalist Society?

I have not fully considered or decided whether, if confirmed, I would remain an active or other participant in the Federalist Society.

- c. If confirmed, do you plan to donate money to the Federalist Society?

To the best of my recollection, I have not previously donated money to the Federalist Society. I have not fully considered or decided whether, if confirmed, I would consider donating money to the Federalist Society.

- d. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

No.

3. 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?

Yes.

- 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.

Although I am unfamiliar with the events described in the Washington Post’s article, I agree that everyone should be committed to ensuring the integrity of the federal judiciary. If I am confirmed, I will commit myself to acting with integrity, competence, and fairness, as I have tried to do throughout my life. To the extent the question calls for the expression of an opinion on a policy matter subject to the legislative process, or that may be the subject of pending or impending litigation, I respectfully defer under Canons 1, 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

- 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 refer to my answer to Question 3(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? If you do, please describe the circumstances of that advocacy.

No.

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

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

Please refer to my answer to Question 3(b) above.

4. 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?

Yes. The comparison of a judge to an umpire does not capture all facets of the judicial role, but it is instructive: like a good umpire, a good judge should always strive to make any “call” based on the judge’s assessment of the relevant circumstances and the applicable rule, without exceeding the judge’s legally proper role, and without partiality to the participants.

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

In discharging the judicial function, a judge must make rulings based upon applicable law, including relevant and binding precedent, regardless of whether the judge views the practical consequences of the ruling as subjectively undesirable. To the extent that the applicable authorities permit or require a judge to consider practical consequences—for example, whether “irreparable harm” supports the entry of a preliminary injunction—then a judge can correctly consider the practical consequences of a particular ruling.

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

When ruling on a motion for summary judgment, a district court is commanded to examine the factual record in the light most favorable to the nonmoving party and determine whether there is a “genuine” dispute as to a material fact: that is, whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In performing this function, a district judge is not permitted to “choose between competing inferences or balance the relative weight of conflicting evidence,” and the standard of review for a district court’s grant of summary judgment is *de novo*. *Hansen v. Fincantieri Marine Gp., LLC*, 763 F.3d 832, 836 (7th Cir. 2014). These standards establish that a district judge’s determination of whether a genuine dispute of material fact exists must be objective.

6. 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 emotional human condition, and a judge does not cease to possess the capacity for empathy upon assuming the judicial function. Indeed, empathy can help prevent other emotional traits from improperly influencing a judge’s decision in a given matter. Fundamentally, however, a district judge is always bound to follow statutory and

decisional law carefully and impartially, and a judge must not let personal feelings lead to a ruling at odds with the applicable rules of decision.

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

Personal life experiences are not a substitute for a judge's sworn duty to administer justice without respect to persons, to do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all the duties incumbent upon the judge under the Constitution and laws of the United States.

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

During my personal and professional lifetime, I have had the great privilege to engage with persons from all walks of life. Those experiences have left me profoundly grateful and have reinforced in me the need to treat every human being as an individual deserving of equal regard. Because I believe strongly in the need for our laws to be faithfully and impartially applied, and because I will commit to acting in that way to the best of my ability if confirmed to the district court, I believe that I am capable of treating all litigants as individuals deserving of equal and fair treatment.

- 7. 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.

- 8. The Seventh Amendment ensures the right to a jury "in suits at common law."
 - a. What role does the jury play in our constitutional system?

The jury is a critical element in our constitutional system. As Thomas Jefferson wrote in 1789, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

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

Any provision of the Constitution, statutory law, or precedent should always be of concern to a judge. Issues surrounding arbitration clauses have been litigated and decided in higher courts, and if I am confirmed to be a district judge, I would be bound to apply binding precedents on this topic. Because the enforceability of arbitration clauses will continue to be the subject of litigation, it would be inappropriate for me to comment further. *See* Canons 2(A), 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

- 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 refer to my answer to Question 8(b) above.

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

Several precedents of the Supreme Court address the level of deference owed to Congressional findings in this area. As with any applicable precedent, I will, if confirmed, fully and faithfully apply these precedents.

10. 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 will fully and faithfully abide by all applicable ethical rules.

- 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 refer to my response to Question 10(b) above. I add that the perception of a judge's impartiality is essential, and if I am confirmed, I will remain vigilant to ensuring that I act, not only with subjective impartiality, but also in a manner that promotes objective confidence in my impartiality.

**Nomination of John Fitzgerald Kness
United States District Judge for the Northern District of Illinois
Questions for the Record
Submitted July 24, 2019**

QUESTIONS FROM SENATOR BOOKER

1. In 2008, you were associate counsel on an amicus brief submitted by Florida and other states to the Supreme Court regarding the case *Riley v. Kennedy*.¹ In that case, the Court was asked to determine whether Alabama needed to seek preclearance under the Voting Rights Act after the Alabama Supreme Court invalidated a provision of an election law that had already obtained preclearance.² Your brief argued that “[f]or affected States, compliance with the preclearance procedure in the ordinary case is time-consuming and expensive.”³ The brief also argued that “applying Section 5 to State courts’ interpretations of state law would impose enormous additional burdens on states.”⁴ It also discussed “existing federalism and constitutional concerns” already presented by the preclearance provision of the Voting Rights Act.⁵ The Supreme Court ultimately agreed that Alabama did not need to seek additional preclearance for the law at question, but they did so largely due to “extraordinary circumstances not present in any past case.”⁶ Additionally, they stated that “[p]reclearance might well have been required had the court instead ordered the State to adopt a novel practice.”⁷

- a. Do these statements from your brief accurately reflect your views today on the Voting Rights Act and its preclearance requirement?

In the *Riley* case, I was the junior member of a team of lawyers that submitted an amicus brief seeking to persuade the Supreme Court to rule in favor of the Appellant, who ultimately prevailed in the appeal. As an advocate working on behalf of a client, my subjective views of the law were not relevant to the representation.

- b. What “existing federalism and constitutional concerns” were you referencing with respect to preclearance and the Voting Rights Act?

Among other sections, pages 20-21 of the brief set forth its support for the quoted argument, including references to statements in Supreme Court opinions concerning the federalism costs implicated by Section 5 of the Voting Rights Act.

- c. Shouldn’t we have laws in place that protect voters from unnecessarily restrictive or discriminatory state voting laws?

Voting is a foundational right. To the extent the question calls for a comment on the legislative process, I respectfully do not believe it appropriate to comment further. See Canons 2(A) and 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

2. In your Questionnaire, you described you membership in both the Federalist Society and the National Rifle Association as “intermittent.”⁸

- a. Please elaborate on your activities and membership status in both the Federalist Society and the National Rifle Association.

With respect to the National Rifle Association, I became interested in the sport of target shooting after being introduced to it by a relative in the early 1990s. Because I enjoyed the sport and wanted to learn more about shooting as a hobby, I joined the National Rifle Association to gain access to its publications and resources. My involvement in the organization essentially consisted of my annual membership and receiving the monthly magazine, “American Rifleman.” I have periodically allowed my membership in the National Rifle Association to lapse based on my personal circumstances and relative interest and activity in shooting as a sport. In other words, my membership in the organization was not continuous between 1993 and 2017. By 2017, my ability to engage in shooting as a hobby, based on my increasing personal and professional obligations, had eroded to the point that I was rarely able to shoot more than once every couple of years. Accordingly, I determined that any subjective benefits I derived no longer justified my continued membership in the organization.

With respect to the Federalist Society, my membership has consisted of a series of one-year memberships. My membership has lapsed over the years for periods that, to the best of my recollection, have ranged from a duration of months to a year or more. My involvement in Federalist Society events has primarily consisted of receiving publications, attending occasional law school and bar-related panels as a spectator, and occasionally attending the Federalist Society annual convention. I estimate that I have attended approximately a half-dozen panel presentations over the years, and I estimate that I have attended the annual convention approximately three times over the years. To the best of my recollection, the last convention I attended was at least three years ago.

¹ Brief for the States of Florida et al. as *Amici Curiae* in Support of Appellant, *Riley v. Kennedy*, 553 U.S. 406 (2008), 2008 WL 205091.

² *See Riley*, 553 U.S. at 411.

³ 2008 WL 205091 at 8.

⁴ *Id.* at 7 (capitalization omitted).

⁵ *Id.* at 21.

⁶ *See Riley*, 553 U.S. at 424–25.

⁷ *Id.* at 429.

⁸ SJQ at p. 5.

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

During my legal career, I have been reluctant to assign any labels to my approach to legal issues and analysis, as labels can often be defined only with respect to the subjective views of the individual perceiving the label. In certain cases of statutory and constitutional interpretation where there is no applicable precedent to which a lower court must adhere, reference to the original public meaning of a constitutional or statutory texts can both provide a valuable interpretive tool and ensure that the judge remains deferential to the authority of the democratic process. To that end, the Supreme Court has itself considered the original public meaning of texts in its majority opinions, concurrences, and dissents. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

Please refer to my answer to Question 3 above. In addition, as the Supreme Court has repeatedly explained, statutory interpretation begins with the text, and where the text is clear, the inquiry must cease once that clear meaning has been discerned. If confirmed, I will fully and faithfully apply all binding precedents of the Supreme Court and the Seventh Circuit, including precedent concerning constitutional and statutory interpretation.

5. 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, where the text of a statute is ambiguous, legislative history can be appropriately considered. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). As a precedent of the Supreme Court, the rule of *Allapattah* and related cases is binding on inferior courts.

- 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 refer to my answer to Question 5(a) above.

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

As a nominee to a trial level (not appellate) court, I believe that judicial restraint remains an

important value. It serves to impress upon the mind of a judge the need to confine the judge's actions to the case under adjudication and to be bound to the commands of statutory and decisional law.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁹ Was that decision guided by the principle of judicial restraint?

Heller remains a fully binding precedent of the Supreme Court. It applies to all inferior courts. As such, if confirmed, I will be bound to apply *Heller* along with all other binding precedent. Given the position of inferior courts in our constitutional order, I believe it is ordinarily inappropriate for inferior judges to characterize the nature and effect of binding precedent. Accordingly, I must respectfully decline to elaborate further in response to this question.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.¹⁰ Was that decision guided by the principle of judicial restraint?

Please refer to my answer to Question 6(a) above

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.¹¹ Was that decision guided by the principle of judicial restraint?

Please refer to my answer to Question 6(a) above.

7. 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.¹² 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.¹³

⁹ 554 U.S. 570 (2008).

¹⁰ 558 U.S. 310 (2010).

¹¹ 570 U.S. 529 (2013).

¹² *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹³ *Id.*

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

Although I believe that the protection of voting rights is essential, I have not studied in depth the specific matters referred to above. Because the question calls for an opinion on a matter that is or may become the subject of pending or impending litigation, and because it concerns a policy matter subject to the legislative process, I do not believe it appropriate to comment further. *See* Canons 2(A) and 3(A)(6), and 5(C) of the Code of Conduct for United States Judges.

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

Please refer to my answer to Question 7(a) above.

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

Please refer to my answer to Question 7(a) above.

8. 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.¹⁴ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁵ 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.¹⁶ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁷

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

Although I am not familiar with the study referred to above and thus lack sufficient knowledge on the topic to be certain, I presume that implicit racial bias exists in our criminal justice system.

- 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.

Beyond my own firsthand experiences in criminal law practice, I have not studied the issue of implicit racial bias in our criminal justice system. If confirmed, I will take the issue of implicit racial bias seriously and will review available resources on the 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.¹⁸ Why do you think that is the case?

Although I have not studied the issue of sentencing disparity in depth, my experience working in the criminal justice system has led me to believe that many disparate factors contribute to the length of sentences imposed upon defendants. That said, racial bias on the part of a sentencing judge should never be present, and it is legally impermissible. If I am confirmed, I will treat each defendant whom I sentence as an individual.

- 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.¹⁹ Why do you think that is the case?

Please refer to my answer to Question 8(d) above.

¹⁴ 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>.

¹⁵ *Id.*

¹⁶ 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>.

¹⁷ *Id.*

¹⁸ 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.

¹⁹ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

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

All judges—not merely appellate judges, but also district judges—should remain vigilant to avoid all biases. If confirmed, I will keep true to this essential responsibility, and I will discharge my duties impartially and with equal regard for all persons before me.

9. 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.²⁰ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.²¹

- 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.

My knowledge on this topic is not sufficient for me to state an opinion.

- 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 refer to my answer to Question 9(a) above.

10. 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.

11. 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.

12. Do you believe that *Brown v. Board of Education*²² was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

13. Do you believe that *Plessy v. Ferguson*²³ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

The Supreme Court made clear in *Brown* that *Plessy* was wrongly decided.

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

No.

15. 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”

²⁰ 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>.

²¹ *Id.*

²² 347 U.S. 483 (1954).

²³ 163 U.S. 537 (1896).

in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”²⁴ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Ensuring impartiality is a core obligation of our legal system. To meet this obligation, judges are subject to well-established rules and canons that govern their conduct and that set forth the basis for recusal. *See, e.g.*, 28 U.S.C. § 455. These rules, as well as our constitutional order and the separation of powers doctrine, help to ensure that judges are insulated from the potential influence of public comments and political debates. Because additional comments would require me as a judicial nominee to opine on a matter of political debate that may also be the subject of potential or current litigation, I respectfully decline to elaborate further. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

16. 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.”²⁵ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

It is well established that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Capric v. Ashcroft*, 355 F.3d 1075, 1087 (7th Cir. 2004) (“Aliens in the United States are entitled to due process”). If confirmed, I will follow these precedents fully and faithfully.

²⁴ 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>.

²⁵ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

Questions for the Record from Senator Kamala D. Harris
Submitted July 24, 2019
For the Nomination of

John F. Kness, to the U.S. District Court for the Northern District of Illinois

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

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

During the criminal sentencing process, a district judge possesses as much (and maybe more) discretion as any other area of the judicial function. And because this discretion comes in a proceeding that has great personal significance to the defendant, it is critical that a district judge discharge the sentencing function with great care, competence, and discernment. If confirmed, I will take this duty with the utmost seriousness, as indeed I did as a federal prosecutor charged not only to act as an advocate, but also to ensure, as then-Attorney General Robert H. Jackson stated in 1940, that “justice has been done.”

In any sentencing, a district judge must impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” of federal sentencing as established under 18 U.S.C. § 3553(a). To achieve that end, a district judge must first prepare for a sentencing hearing by studying the Presentence Investigation Report to understand the unique history and characteristics of the defendant. The district judge must also know the record of the case, the applicable statutes, and any written arguments submitted by the parties. The judge must then conduct a fair and procedurally correct hearing, including by resolving any contested facts relating to sentencing, correctly calculating the applicable Sentencing Guidelines range, hearing arguments by the parties, reviewing any statements from victims, and affording the defendant the opportunity to provide an allocution.

Only after the district judge has provided that fair process can the judge impose sentence. In general terms, under Section 3553(a), the judge must balance the complementary considerations of just punishment, deterrence (specific to the defendant and also more generally), protection of the public through incarceration or conditions of release, and rehabilitation. Those factors will be unique in every case, and the judge must always remain heedful that the sentence—including any term of supervised release and its conditions—be no greater than necessary to meet the purposes of sentencing.

Finally, a district judge must ensure that the record is sufficiently clear that the Court of Appeals can conduct a meaningful procedural and substantive review of the sentence imposed. To meet this goal, a district judge can, among other things, ask the parties on the record, before the close of the hearing, whether the parties

believe that the judge adequately considered the arguments of the parties.

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

Please refer to my answer to Question 1(a) above.

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

The Supreme Court and the Seventh Circuit have provided guidance to district courts regarding sentencing in general and whether non-Guidelines sentences are appropriate. If confirmed, I will fully and faithfully follow all applicable law and precedent when considering what sentence to impose upon a criminal defendant. In general, it is my understanding that district judges are required to take into account the applicable Sentencing Guidelines range, but that range is merely advisory, and the judge is permitted to depart from the range so long as the judge's reasoning is clear, the process leading to the sentence did not include reversible error, and the sentence imposed is substantively reasonable.

- d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹

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

I am not familiar with Judge Reeves's comments on mandatory minimum sentences. As a general matter, whether to require the imposition of a mandatory minimum sentence for the violation of a given statute is a decision committed to the legislative process. Accordingly, as a judicial nominee, I must respectfully decline to comment on this matter of public policy. *See, e.g.*, Canons 2(A) and 5(C) of the Code of Conduct for United States Judges.

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

Please refer to my answer to Question 1(d)(i) above.

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

Please refer to my answer to Question 1(d)(i) above.

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

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.¹ **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. Describing the injustice in your opinions?

If I am confirmed, and if confronted with the circumstances described in this question, I would carefully consider the law, my ethical obligations, and whether I possessed the judicial power and discretion to address in dicta any disagreement with a mandatory minimum sentence. In so doing, I would remain mindful of my obligation fully and faithfully to apply binding statutory and decisional law.

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

Our Constitution assigns the Executive Power to the President and his or her administration. This power includes the discharge of prosecutorial discretion. Accordingly, under the doctrine of separation of powers among the coordinate branches of government, a district judge should ordinarily be very reluctant to attempt to intrude on the exercise of prosecutorial discretion. If confirmed, I will respect this separation of powers. That said, if circumstances reflect that the government has committed an ethical violation or otherwise acted contrary to law, I would be bound to review the matter and to consider taking appropriate action consistent with the obligations of the judicial office.

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

Please refer to my answer to Question 1(d)(iv)(2) above.

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

¹ See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

Yes.

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

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

Yes.

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

As a matter of statistical fact, I am aware that there are racial disparities in our criminal justice system. For example, African-Americans are disproportionately represented in our criminal justice system.

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

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

Yes.

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

Yes. I take seriously the goal of ensuring opportunities for all qualified persons, including minorities and women.