Nomination of Kenneth Kiyul Lee to the United States Court of Appeals for the Ninth Circuit
Questions for the Record
March 20, 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?

   Never.

   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?

   No. But it may be appropriate for a Circuit court, for example, to identify areas or issues in which Supreme Court precedents may appear to be in conflict.

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

   In the Ninth Circuit, one panel cannot overturn the published and binding decision made by another panel. It can only be overturned by an *en banc* panel.

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

   The Supreme Court has identified factors that it considers in determining whether to overturn its own precedent (such as whether past precedent is not workable, whether there is a reliance interest in the precedent, etc.).

2. 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"? "superprecedent"?

   All Supreme Court precedents are binding on inferior courts, and they must be followed faithfully.

b. Is it settled law?

Yes, inferior courts must faithfully follow all Supreme Court precedents.

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

   Yes, inferior courts must faithfully follow all Supreme Court precedents, including *Obergefell.*

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?

   If I am fortunate enough to be confirmed, I would be bound by Supreme Court precedent and would have to follow the majority opinion in the case.

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

   The Supreme Court made clear that its opinion did not preclude certain regulations of guns, such as "longstanding prohibitions 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 Supreme Court in *Heller* stated that this question was "judicially unresolved." *Id.* at 625.

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

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

The Supreme Court held that the First Amendment "extends to corporations." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010). If I am lucky enough to be confirmed, I would faithfully follow all Supreme Court precedents.

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

It is my understanding that the scope of the First Amendment protections in this area is being litigated, and Canon 3A(6) of the Code of Conduct for United States Judges constrains me from answering a question that may appear before the court.

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

The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), held that closely held corporations have rights under the Religious Freedom Restoration Act of 1993. If confirmed, I would follow all Supreme Court precedents.

6. In a 1993 article about affirmative action, you wrote: "Black students will unfortunately be treated as inferiors because people will always assume they were accepted [to top universities] solely because of their race." (*The Review vs. MBSA, or Reasons against Silliness*, CORNELL REVIEW (Nov. 29, 1993))

a. On what basis did you reach this conclusion?

I have a vague recollection that in high school I read a book by Professor Shelby Steele, an African-American academic, who made that argument. I believe I was adopting Professor Steele's argument in my article.

b. Do you oppose the use of race as one of several criteria to be considered in higher education admissions?

The Supreme Court has held that universities in their admissions process can take race into account as long as it is done in a holistic fashion. *See Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If I am fortunate enough to be confirmed as a federal judge, I would faithfully follow these and other precedents.

7. In a 1994 article, you wrote: "Every single person in America considers themselves a 'victim.' Whenever minorities do not succeed, they cry racism. And when whites fail in their endeavors, they attribute it to 'reverse racism.' We have become a nation of whiners, and I deplore that." (*The Self-Hating Asian*, CORNELL REVIEW (Apr. 28, 1994))

a. On what basis did you conclude that any time minorities do not succeed, they attribute that lack of success to racism?

As an 18-year old, I was trying to articulate a gut feeling I had at the time — perhaps not in a nuanced or eloquent way — that too many people of *all* races were too quick to blame others. As I noted in the article, I wrote that "when whites fail in their endeavors, they attribute it to 'reverse racism.'" Looking back at what I wrote 25 years later, I believe the language I used was hyperbolic and the tone off-putting.

b. Do you believe that systemic racism exists in this country?

As I wrote in college, "[t]here is no doubt that United States has been racist against racial minorities." I believe that racial discrimination in this country is a serious issue, and racism still rear its ugly head in many forms — from virulent racism to subtle stereotypes.

8. In 2005 — five years into your time as a practicing lawyer — you wrote an article criticizing President George W. Bush's plan to establish a program whereby undocumented immigrants could work legally within the United States. In that article, you wrote: "By describing illegal immigrants as 'hard-working men and women' who are pursuing 'better lives,' [President Bush] blurs the distinction between illegals and those who came to America following the rules." (*Illegals v. Legals*, AMERICAN ENTERPRISE (Apr./May 2005))

a. Do you believe that only those who immigrate here legally do so to pursue "better lives"?

Almost everyone who seeks to come to the United States do so to pursue better lives, seek more economic opportunities, and enjoy political freedom.

b. If undocumented immigrants are not here to pursue "better lives," then why do you think they are here?

In that article, I was not making any judgments about immigrants who are here illegally without proper documentation. Rather, I was analyzing the politics of immigration policy, noting that in the past, "[b]y talking tough on illegals, politicians have been able to defend high levels of legal immigration." The article expressed concern that blurring the distinction between legal and illegal immigration could end up increasing the chances of "legal immigration restrictions in the future" and would "do no favors for the cause of continuing U.S. immigration."

9. At your nominations hearing, I asked you about an article you had written in 1994 about raising awareness regarding the spread of HIV/AIDS. In that article, you wrote that to prevent the spread of HIV/AIDS, "we must focus on values and responsibility," rather than to focus on finding a cure. You also argued that HIV/AIDS was prevalent in the gay community because "[h]omosexuals generally are more promiscuous than heterosexuals, and thus their risk factor increases exponentially." (*AIDS at RPU*, CORNELL REVIEW (Feb. 10, 1994))

a. What evidence did you have at the time that you authored this piece that LGBT individuals are "more promiscuous" than heterosexual individuals?

As I explained at the hearing, I am embarrassed by this article. I wrote that article as an 18-year old in a misguided attempt to defend President Reagan's policies, but I did not have any knowledge of relevant facts and was parroting something I had read. I would not write this today and regret writing this as a teenager.

b. How would focusing on "values and responsibility" prevent the spread of HIV/AIDS?

Please see response to Question 9a.

c. How would focusing on "values and responsibility" be more beneficial than working to find a cure for HIV/AIDS?

Please see response to Question 9a.

10. During your nominations hearing, you addressed the steps that you undertook to identify publications that you had written that are responsive to the Senate Judiciary Questionnaire (SJQ). You said that you went through your "personal files, my electronic files, Internet searches, online databases, my firm's library of articles. I even went to my mom's old house, went through the garage, through boxes of old baseball cards, scrapbooks." I have a number of additional questions about your efforts to identify responsive materials:

a. Did you or anyone working on your behalf, whether at the Justice Department or elsewhere, have any contact with the staff at any of Cornell University's libraries — or with anyone else working at or affiliated with Cornell — at any point during your nominations process in relation to identifying and obtaining materials responsive to the SJQ?

Yes.

i. If so, please detail the specific library or libraries or other Cornell affiliate(s) with which you worked, the dates you requested and received materials from the library or libraries, and the process used for identifying and obtaining the responsive materials.

My understanding that is the Department of Justice lawyers, as well as other individuals working on their behalf, went to the archives of Cornell University's library to search for and review additional materials.

b. Did you or anyone working on your behalf, whether at the Justice Department or elsewhere, request materials from any of Cornell's libraries or anyone else affiliated with Cornell in advance of your submission of materials to my or Senator Harris's in-state judicial vetting commissions? If not, why not?

No. Question 34 of the application used by the judicial vetting commission only asked for "legal" publications, and therefore I did not look for my college-era writings in response to the application.

11. On January 30, 2019, you signed an affidavit stating that the information provided in your SJQ was "to the best of [your] knowledge, true and accurate." In response to Question 12(a) of the SJQ, you listed 11 articles published in the *Cornell Review*. Your SJQ was transmitted to the Committee on January 31, 2019. **Please detail the methodology that you used to identify and obtain copies of these 11 articles.**

    As I explained at the hearing, I had initially provided over 500 pages of materials I had written since I was a teenager, and the bulk of them were from my college years over two decades ago. I did not have a master index of all the articles I had written during college over two decades ago, most of which were before the Internet era. In collecting my articles, I reviewed my personal files, searched my personal folder in my computer, collected articles held by my firm, conducted Internet keyword searches, reviewed Lexis/Nexis databases, and searched old boxes at my mom's house. I had not reviewed these articles in over two decades, and I frequently wrote about the same topics during my college years. Given the number of pages and articles I had collected, I believed that I had collected all of my articles.

12. On February 25, 2019, you provided the first of five supplemental productions to the Judiciary Committee, consisting of 27 articles you wrote, all of which were published in the *Cornell Review* and responsive to Question 12(a).

    a. Please detail the methodology that you used to identify and obtain copies of these additional 27 articles.

    It later came to my attention that there may have been additional articles I had written during my college, and I immediately turned them over to the Committee whenever a new article was found. My understanding is that Department of Justice lawyers, as well as others acting on their behalf, visited the archives at Cornell to search for and review materials. As I said at the hearing, I apologize for the inconvenience caused by the supplemental productions. I know it is frustrating for the Committee.

    b. How and when did you first come to learn that you had omitted 27 articles from the *Cornell Review* in your initial production to the Judiciary Committee?

    It came to my attention sometime in February that there was a push to double-check that all publications have been collected.

    c. What date did you or anyone working on your behalf, whether at the Justice Department or elsewhere, begin to collect additional articles — whether or not they were among these 27 supplemental pieces from the *Cornell Review*?

    Please see response to Question 12b.

    d. Have you now provided to the Committee all materials that you published, whether at Cornell or elsewhere, that are responsive to the SJQ?

    I believe that to be the case to the best of my knowledge.

13. Several of the articles that you included in your February 25 supplement to the Committee were from the same edition of the *Cornell Review* as articles you had included in your initial submission to the Committee. For example, your February 25 supplemental submission included an article entitled "The Review vs. MBSA, or Reason Against Silliness." This article was published in the November 29, 1993 edition of the *Cornell Review*. That same edition of the *Cornell Review* included another article that you had written entitled "And in Day Hall." You provided a copy of "And in Day Hall" to the Committee as part of your initial submission on January 31, 2019 but did not include "The Review vs. MBSA, or Reason Against Silliness."

    a. **Please explain the specific methodology that you used to identify and obtain a copy of "And in Day Hall."**

        That article was over written 26 years ago when I was 18-years old, but I found a copy of that article in my files and I provided it to the Committee.

    b. **Why did you fail to initially identify and provide to the Committee another article from the same edition of the *Cornell Review* in which "And in Day Hall" was published?**

        I did not have a copy of "The Review vs. MBSA" in my files.

14. During your hearing, you noted on more than one occasion that several articles responsive to the SJQ were obtained through a "private server."

    a. **Please identify all articles that you or anyone working on your behalf, whether at the Justice Department or elsewhere, obtained through a "private server."**

        I believe that a few articles published in *Heterodoxy* — a publication that became defunct about two decades ago — were found on what appears to be (based on the URL address) someone's private server in scanned non-searchable format.

    b. **How did you or anyone working on your behalf come to have access to this server?**

        I was advised of the URL where these scanned copies resided, and I began reviewing the scanned materials.

15. As part of a supplemental submission you made to the Judiciary Committee on March 2, 2019, you included a link — http://184.106.49.50/viewSubCategory.asp?id=337 — that provided access to articles you published in the journal *Heterodoxy*.

    a. **Please explain the specific methodology that you used to identify and obtain any articles you published in *Heterodoxy*. Please specifically identify any libraries or other resources that assisted in the process, as well as the date that you began to**

identify and collect materials published in *Heterodoxy* and who assisted you in that process.

I had copies of several *Heterodoxy* articles in my files, and I provided them to the Committee. I wrote these articles over two decades ago when I was a student (often on similar or same topics that I had written elsewhere), and I did not keep a master index of what I had written as a student over two decades ago. So it was my belief at the time that I had provided all relevant articles.

b. You included three articles from *Heterodoxy* in your January 31, 2019 submission to the Judiciary Committee. Supplemental productions that you made to the Committee included another four articles from this same publication. Why did you not provide these four articles as part of your original submission to the Committee?

I did not have copies of these articles from two decades ago in my personal files. I did not have a master index of articles I wrote as a student, and as evidenced by my 500+ page production, I was a prolific writer in my youth, often writing about similar or same topics repeatedly. Further, I did not remember these specific articles in *Heterodoxy* two decades ago because I had written about the same or similar topics or events in other publications during that same time period.

16. The link you provided to the Committee on March 2, 2019, referenced above, is to a website called "Discover the Left," which is a right-wing news source funded by the David Horowitz Freedom Center.

a. When and how did you first become aware of the website "Discover the Left"?

I was advised of the URL, http://184.106.49.50, on March 2, 2019.

b. When and how did you first become aware that articles you published in *Heterodoxy* are housed on the website?

Please see response to Question 16a.

c. Have you ever met or corresponded with David Horowitz or attended any meetings or conferences sponsored by Mr. Horowitz or any groups affiliated with him? If so, please provide the date(s) of any such meeting or correspondence, the date(s) of any conferences you attended, your role at any meeting(s) or conference(s) as well as the topic(s) of discussion.

To the best of my knowledge, I have not personally met Mr. Horowitz or attended any conferences or meetings sponsored by him or any groups affiliated with him. Further, to the best of my knowledge, I did not interact with Mr. Horowitz when I wrote the articles for *Heterodoxy* over two decades ago.

d. Did you work with or correspond with David Horowitz or anyone who works for him as part of the process of identifying and obtaining the articles you published in *Heterodoxy*? If so, when was the date of the first contact?

No. As noted above, I did not interact with Mr. Horowitz when I wrote the articles for *Heterodoxy* over two decades ago, and I have not personally met Mr. Horowitz.

17. Did you have any discussions or communications, electronic or otherwise, with any individual, whether at the Department of Justice, White House, an outside group, or elsewhere, about not producing materials, including but not limited to articles that you published while in college, to the Judiciary Committee? If so, identify the individual(s) with whom you had such discussions or communications; the date(s) of any such discussions or communications; and the nature of any such discussions or communications.

No.

18. Did any individual, whether at the Department of Justice, White House, an outside group, or elsewhere, ever advise you not to produce any materials, including but not limited to articles that you published while in college, to the Judiciary Committee? If so, identify the individual(s) who provided such advice; the date(s) any such advice was provided; and the specific advice provided.

No.

19. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 1997, intermittently. You also indicated that have been a member of the Federalist Society's Litigation Practice Group since 2010 and were a member of the Civil Rights Practice Group from 2001 until 2005. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I had not previously read that webpage, and I did not write that statement, so I do not know the meaning of that statement.

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

Please see response to Question 19a.

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

Please see response to Question 19a.

d. What did your role as member of the Civil Rights Practice Group entail?

I recall that there were quarterly or bi-monthly conference calls to discuss upcoming events, potential speakers for debates, and topics for the annual convention. My recollection is that I did not call in for most of the conference calls.

e. What does your role as member of the Litigation Practice Group entail?

There are bi-monthly conferences calls to discuss upcoming events, potential speakers for debates, and topics for the annual convention. I have not called in for most of the conference calls.

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

No.

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"?

My practice has not focused on administrative law, but I will faithfully follow all Supreme Court precedent in this area, including *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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

The Supreme Court has held that if the text of a statute is unambiguous, the analysis stops there. But the Supreme Court has relied on legislative history as one of the tools to determine the meaning of ambiguous statutes.

22. 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.

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

I was given these questions by the Department of Justice, and I answered them on my own to the best of my ability. In formulating my answers, I consulted with lawyers at the Department, including with respect to some of the questions about the process of finding documents that I did not have in my possession when I submitted my Questionnaire to the Committee. My answers are my own.

Written Questions for Kenneth Kiyul Lee
Submitted by Senator Patrick Leahy
March 19, 2019

1. In 2010, you wrote an article arguing that President Obama should use his power of pardon and clemency more often, noting that the President's "pardon power is an important tool to provide a second chance" for Americans.

    (a) Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims that he has an "absolute right" to pardon himself. Do you agree?

    I have not closely studied the extent of the Presidential pardon power. Further, because this question addresses a legal issue that may potentially arise in court, I cannot opine on it under Canon 3A(6) of the Code of Conduct for United States Judges.

    (b) Do you believe that a president could issue a pardon in exchange for a recipient's promise not to incriminate him in an ongoing criminal investigation?

    See response to Question 1(a).

2. In that same 2010 article, you argued that an important benefit of the pardon power is that it "restores forfeited civil rights such as the right to vote." But you have elsewhere defended felon disenfranchisement laws, arguing, for example, in a 2006 article, that such laws are justified on the "Lockean notion" that "someone 'who breaks the laws' may 'fairly have been thought to have abandoned the right to participate in making them.'"

    (a) How do you reconcile these views? Does the "Lockean notion" you describe no longer apply to a felon simply because they have been pardoned by the president? In other words, analyzed under the Lockean framework you posit, what makes a felon who receives a presidential pardon deserving of the right to vote but *not* a felon who does not receive such a pardon?

    This question implicates an ongoing political debate, and therefore Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion. But I can state that the 2006 article was largely adapted from an amicus brief that I had assisted on when I was an associate working for a particular partner. We had represented the widow and two daughters of a police officer slain in the line of duty. The officer's widow and daughters opposed the convicted murderer's argument that he should be able to vote while serving his life sentence in prison.

3. In 2010, you wrote an article lamenting the rise of congressional investigations, calling them an "unwelcome development."

    (a) Do you believe that the power of congressional investigations and oversight is inherent in congress's vested legislative powers? If not, why not?

    The power of oversight is inherent in Congress' legislative powers. I had described the rise of congressional investigations as an "unwelcome development" for clients that I may be representing.

4. In 1996, you wrote an article criticizing the Supreme Court's holdings with respect to the separation of church and state in *Wallace v. Jaffree* and *Lee v. Weisman*, arguing that the Bill of Rights was "only intended for the *federal* government, never the states."

    (a) Is it your view that the First Amendment has been incorporated against the states by the Supreme Court?

    Yes. The Supreme Court has made clear that the First Amendment has been incorporated against the states, and the First Amendment is a cornerstone of our constitutional rights.

(b) If so, do you still stand by your statement in the 1996 article referenced above?

I do not. I had written that article as a college student before I entered law school or studied constitutional law. Under the selective incorporation doctrine, the U.S. Supreme Court has incorporated most of the Bill of Rights against the states.

5. Again in 1996, you wrote an article in which you argued that women on Cornell's campus were exaggerating claims of sexual harassment and assault, and were making their claims "sound more alarming to win support for their political agenda."

(a) The National Sexual Violence Resource Center has found that between 20 and 25 percent of women become victims of sexual assault while on college campuses. Do you have any reason to doubt these statistics, or the seriousness of the sexual assault incidents comprising these statistics?

I do not. As the father of two young daughters, the issue of sexual harassment or assault is very concerning to me. Further, a close family member years ago ended an abusive relationship, but she did not tell me or other members of my family until the very end of that relationship. Unfortunately, the culture at that time (and even still somewhat today) discouraged survivors from speaking out. The #MeToo movement has been critical in encouraging and empowering survivors to speak out. It is an issue I care about deeply.

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

> **"oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions?'"**

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?

In construing statutes, it is important to review the text as well as the structure of the statute (assuming that there is no controlling precedent).

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

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

I believe that independence of the judiciary is a cornerstone of our Constitution and the doctrine of separation-of-powers. Article III guarantees life appointment in order to ensure impartiality of judges. If I am lucky enough to be confirmed as a federal judge, I will strive to show respect for the other branches and would hope that they would likewise respect the judiciary.

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

Please see response to Question 7(a) above.

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

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

While the U.S. Supreme Court has acknowledged that courts should tread carefully in areas of national security, it has made clear that it can and will review decisions by the President even during wartime. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 549 (1952); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

9. Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?

The First Amendment protects the rights of individuals to practice their faith – or no faith at all. The Establishment Clause also makes clear that there is no state religion in America. These are enduring and paramount principles. With respect to religious litmus tests for entry into the United States, Canon 3A(6) of the Code of Conduct for United States Judges bars me from opining on issues that are pending or may appear before the court.

10. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

    Separation-of-powers relies in part on comity and respect among the three co-equal branches of government. Accordingly, each branch should exhibit respect and deference to each other. If a party does not comply with a court order, the opposing party may seek injunctive relief or other remedies from the court to enforce that order.

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

    (a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

    The Constitution states that Congress has the power to declare war. Further, Congress enjoys the power of the purse to make — or deny — appropriations.

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

    The U.S. Supreme Court has acted to stop Presidential acts, even during time of war, because no one is above the law. I would faithfully apply Supreme Court precedents and any relevant constitutional or statutory provisions.

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

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

    The U.S. Supreme Court has held that heightened scrutiny applies to gender classifications, and that the government must show an "exceedingly persuasive justification" for them. *United States v. Virginia*, 518 U.S. 515 (1996). I would faithfully follow that precedent as well as other Supreme Court precedent.

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

The U.S. Supreme Court has recognized that the Voting Rights Act "directly pre-empted the most powerful tools of black disenfranchisement," and that the "historic accomplishments of the Voting Rights Act are undeniable." *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193 (2009). The right to vote is a fundamental right that helps secure other rights, and I would faithfully follow all precedent related to the Voting Rights Act.

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

I have not studied this issue, but I am aware that Article I, Section 9, Clause 8 of the Constitution states that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept any present, Emolument, Office, or Title, of any kind whatever, form any King, Prince, or foreign State."

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

the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

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

An appellate court should affirm the factual findings of the district court unless they are clearly erroneous.

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

The Reconstruction Amendments have been a powerful tool to combat racial discrimination, and Congress has the power to enforce these amendments by "appropriate legislation."

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

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

The Supreme Court's decision in *Lawrence v. Texas* is a landmark ruling, and I would faithfully follow that precedent and all other Supreme Court precedents if I'm lucky enough to be confirmed as a federal judge.

18. In the confirmation hearing for Justice Gorsuch earlier this year, 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 U.S. Supreme Court has held that "doctrine of *stare decisis* is of fundamental importance to the rule of law," and that "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991). Further, Circuit courts are bound to follow the existing precedent within that circuit. I will faithfully follow jurisprudence governing *stare decisis* if I am lucky enough to be confirmed as a federal judge.

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

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

Recusal is critical to maintain impartiality of federal judges. If I am confirmed as a federal judge, I would follow 28 U.S.C. § 455 as well as any other rules or practices. I would also consult with my colleagues.

20. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial

scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

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

Courts play a critical role in ensuring equal protection of the laws and upholding the constitutional rights of individuals. As a lawyer in private practice, I am proud of my twenty-year record of devoting hundreds of hours to pro bono matters representing indigent individuals who cannot afford legal representation and members of historically marginalized groups who may not have access to justice. In my pro bono practice, I have represented an individual fighting foreclosure, a death row defendant seeking new DNA testing, and racial minorities alleging abuse by authorities.

21. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. 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 Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

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

Yes. Congressional oversight is an important tool to ensure accountability.

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?

Under the U.S. Constitution, the federal government has enumerated powers, but the scope of such powers has been litigated repeatedly. The U.S. Supreme Court has provided guidance on scope of the Commerce Clause. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Nat. Fedn. Of Indep. Business v. Sebelius*, 567 U.S. 519 (2012). Likewise, the Supreme Court has provided guidance on the scope of Section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). If I am confirmed, I would faithfully follow these and other precedents to the specific facts of the case.

Senator Dick Durbin
Written Questions for Daniel Collins and Kenneth Lee
March 20, 2019

For questions with subparts, please answer each subpart separately.

Questions for Kenneth Lee

1. In June 2001, after you had graduated from law school, you wrote an op-ed in *The American Enterprise* entitled "Where Legal Activists Come From." In this piece you wrote, "the Left has for years been relying on courts to accomplish what it could not achieve in the voting booth." You said there were "thousands" of instances of this.

    a. **What did you mean by this statement?**

    The primary focus of my 2001 article was that law firms taking on politically charged pro bono cases — instead of the more traditional and less "glamorous" pro bono work focusing on indigents or historically marginalized groups without adequate access to justice — could potentially undermine public support for pro bono work. I had mentioned certain types of politically charged pro bono litigation to underscore that many members of the public would oppose such litigation, and that therefore there is a risk that the public would then view pro bono work as politically motivated. I also expressed concern later in the article that conservatives were beginning to engage in more politically tinged pro bono litigation as well. My concern was that pro bono work would lose support if too many people view it as too political, whether it's "liberal" or "conservative."

    b. **To what accomplishments were you referring?**

    Given that I wrote this article nearly twenty years ago, I do not recall exactly what I was referring to. But in re-reading the article now, I note that I gave an example of Tulane Law School students as part of a pro bono clinic opposing a plant being built in an impoverished area of Louisiana on the basis of an "environmental racism" theory. I noted that they succeeded in stopping the plant, but that the head of the local NAACP chapter opposed that litigation, saying that the plant would have provided jobs to the community.

    c. **Do you disavow this statement?**

    In hindsight, I would certainly state some of my points differently and more clearly, and in a more measured tone.

    d. You went on to write in this piece that:

    > From freeing the mentally ill in New York City to defending racial preferences in California to contesting the presidential election in Florida, left-leaning lawyers have successfully waged a "rights revolution" over

> the last three decades. Trial lawyers increasingly litigate new entitlements for favored groups, establish exotic new individual rights, and overturn well-established legal and legislative prerogatives.

Is it wrong to "overturn well-established legal and legislative prerogatives"?

It is not necessarily wrong for a lawyer, as an advocate, to seek to overturn well-established legal and legislative prerogatives if doing so is in the best interests of his or her client.

e. **To your knowledge, have conservative lawyers or judges ever "overturned well-established legal and legislative prerogatives"? For example, did the Supreme Court majority do so in the *Janus v. AFSCME* case by overturning a 40-year-old precedent?**

I have not studied the *Janus v. AFSCME* case, but lawyers on both sides of the political spectrum have at times tried to overturn well-established legal and legislative prerogatives. As I noted in the 2001 article, I wrote that conservatives were beginning to engage more in politically tinged pro bono litigation.

1. In a 1993 article in the *Cornell Review* entitled "Is America Evil," you wrote that "[c]harges of sexism often amount to nothing but irrelevant pouting."

   a. **What did you mean by this statement?**

   As an 18-year old, I was trying to express — perhaps not in the most nuanced or eloquent way — that America, while far from perfect, had a relative good track record in ensuring equal opportunity compared to other parts of the world. In the last paragraph of that article, I wrote, "So is America racist, sexist and homophobic? To a certain extent, yes. . . . [But] judged as a whole, America remains the beacon of opportunity and equality in a sea of bigotry." That was the point I was trying to express.

   b. **Do you disavow this statement?**

   Reading back what I wrote 26 years ago, I would not write that today. As the father of two young daughters, the issue of sexism concerns me greatly, and I do not like the tone or the language in that sentence. When I was a teenager, I thought that being snarky was the height of wit, but as I have become older, I have learned that snark too often comes off as insensitive and tone deaf. I regret that.

2. Also, in your article entitled "Is America Evil" you wrote that "[c]ries of racism often stem from isolated incidents or from unreliable studies based on statistical chicanery."

   a. **What was your basis for making this claim?**

I wrote that article as an 18-year old, and I was trying to express — perhaps not in the most nuanced or eloquent way — that America, while far from perfect, had a relative good track record in ensuring equal opportunity and that not every problem could be attributed to racism. In the last paragraph of that article, I wrote, "So is America racist, sexist and homophobic? To a certain extent, yes. . . .[But] judged as a whole, America remains the beacon of opportunity and equality in a sea of bigotry." That was the point I was trying to express.

b. **Do you disavow this statement?**
I would not write that today. Frankly, I did not have sufficient life experience, knowledge of facts, or even understanding of the history of our country as an 18-year old to intelligently opine on this issue. I was trying to say that America, despite her flaws, is still a wonderful country, but I did not communicate that thought in a nuanced or sensitive way in that sentence.

3. In a 1999 article in *The American Enterprise* entitled "Untruth in Academe," you wrote, "[f]rom Afrocentric claims of Cleopatra's being black to phony feminist statistics on rape, anorexia, and discriminatory treatment of girls, academia has in recent years been beset by revelations of fraudulent facts and spurious studies."

a. **What was your basis for dismissing statistics on rape, anorexia and discriminatory treatment of girls as, in your words, "phony feminist statistics"?**

I was summarizing a study by Professor Christina Hoff Sommers.

b. **Do you disavow this statement?**

I would not write that statement today because I do not have any basis to determine if Professor Christina Hoff Sommers' study is correct. As the father of two young daughters, the thought that they would ever be mistreated or not treated equally makes my stomach churn.

4. In a 1994 article in the *Cornell Review* entitled "The Self-Hating Asian," you wrote, in the context of a discussion about single mothers, that "when a single mother receives an AFDC welfare check and relies on public assistance, her 'private lifestyle' becomes a matter of public concern."

a. **Aren't there an array of reasons why a single mother might need public assistance that do not warrant making her private lifestyle decisions known to the public?**

Yes.

b. **Do you disavow this statement?**

I would not write that statement today. Looking back at what I wrote over 20 years ago as a student, I do not like the tone and language I used, which come off as insensitive and naïve. As a college student who did not have sufficient life experience or knowledge of issues, I did not appreciate the complexities of life and thought (wrongly) that I somehow knew the answers to every issue. There are single mothers in my immediate family and extended family, and I have witnessed first-hand the struggles they face and how they strive to overcome them.

c. You went on to write in this article that "A President should use the office as a bully pulpit to bring back a sense of shame in society." **Is it your view that public officials should seek to instill a sense of shame when single mothers rely on public assistance?**

No. As noted above, there are single mothers in my immediate and extended family, and I respect them tremendously for all the obstacles they have faced. I was responding to an argument that politicians should never speak of moral issues, and I mentioned in the article that General Colin Powell — a man I admire for his service to our country — stated that the President should use the office as a bully pulpit.

5. In a 1995 article in the *Cornell Review* entitled "In Defense of Playboy," you wrote that feminism "is not about extending equal rights and opportunities to women. Instead, it is about adhering to a stifling orthodoxy."

a. **Does this still represent your views?**

In that article, I was analyzing the consistency of positions from a legal rights perspective. At that time, some students on campus were protesting that women should not be able to pose for Playboy. While I did not condone the magazine, I was arguing that women have the same legal rights as men, and that feminists should recognize that women have the legal right to pose for the magazine if they wish.

b. **Do you disavow this statement?**
When you're young, you don't necessarily appreciate nuance and sometimes use broad brushstroke statements. As I've gotten older, I've matured, have become more humble, and try to use more measured language. I was trying to point out the inconsistency in an argument, but I would express myself differently today.

6. In a 1994 article in the *Cornell Review* entitled "End Racist Policies!" you wrote that "[e]thnic studies classes have stoked ths fire of intolerance by perpetuating the victimization culture."

a. **Does this still represent your views?**

In that article, my criticism was directed at certain professors who I had thought offered "only one-sided views" about America's flaws. As I put it in that article, "Instead of learning that no culture has a monopoly on either vice or virtue, students

are given the perspective that the West is implacably evil, while every other culture is an egalitarian utopia." I added that "[t]here is no doubt that United States has been racist against racial minorities," and said that my criticism "is not a blanket indictment against ethnic studies classes" because "many professors welcome unorthodox views and these classes should be an integral part of a student's career at Cornell."

b. **Do you disavow this statement?**

As noted above, I was trying to communicate the point that "there is no doubt that United States has been racist against racial minorities," but that "no culture has a monopoly on either vice or virtue." But as a teenager, I sometimes used hyperbolic language that I now regret.

c. You went on to write in this article about what you considered the "victimization culture in effect" at Cornell. You concluded: "This is not to suggest that racism does not exist in America; it does. Yet too many people have attributed all societal ills to racism. Any statistical disparity or problem somehow originates from the malefic intentions of the evil whitey." **Do you believe that statistical disparities and evidence of disparate impact can be evidence of discriminatory practices?**

As I wrote in that article, racism is real and we need to treat claims of discrimination seriously. The Supreme Court has held that disparate impact can be evidence of discrimination in the employment context, and I would faithfully follow that precedent.

7. In a 1993 article in the *Cornell Review* entitled "The Review vs. MBSA," you approvingly cited a fellow student who said "economic factors have virtually eliminated rampant racism." **Do you agree with this statement today?**

In that article, I was quoting the various viewpoints offered by the numerous participants in a debate about affirmative action, and I mentioned that one participant stated that he believed that "economic factors have virtually eliminated rampant racism." In that same article, I wrote that "bigots unfortunately will abound" in a large country like ours, and that "minorities grow up in more disadvantaged backgrounds in comparison with whites." I still believe that racial discrimination, unfortunately, exists today.

8. In a 1994 article in the *Cornell Review* entitled "Kulture Klash," you wrote, "The phenomena of multiculturalism is not exclusive to Cornell. This malodorous sickness has seeped into the hallowed halls of other universities."

a. **Why did you describe multiculturalism as a "malodorous sickness?"**

As an immigrant who was initially raised in Eastern culture, I have always appreciated the importance of learning and respecting all cultures. Indeed, I wrote in that same college newspaper that learning about other cultures is an "integral part" of

a student's education, and I enrolled in and enjoyed taking non-Western classes during college. My criticism in that article was directed at schools that required students to take non-Western classes but not American history classes, given that many students were woefully ignorant of American history. In that article, I cited a survey of 3,000 Ivy League students in which 8 out of 10 students did not know that it was Abraham Lincoln who spoke of a "government of the people, by the people, for the people" in the Gettysburg Address. That being said, the tone of that sentence I wrote as a teenager is hyperbolic and I would not write that today.

b. **Does this still represent your views?**

Please see response to Question 8a.

c. **Do you disavow this statement?**

Today, I would not write that statement because it is hyperbolic, and I do not like the tone that it suggests.

9. In your 1993 article in the *Cornell Review* entitled "The View v. MSBA," you wrote, "We agree that many of the minorities grow up in more disadvantaged backgrounds in comparison to whites. However, our stance on affirmative action has always been that it ultimately hurts the recipients instead of helping them…Black students will unfortunately be treated as inferiors because people will always assume that they were accepted solely because of their race."

a. **What was your basis for claiming that people will always make this assumption?**

I have a vague recollection that in high school I read a book by Professor Shelby Steele, an African-American academic, who made that argument. I believe I was adopting Professor Steele's argument in my article.

b. **Does this still represent your views?**

I certainly hope that everyone treats others as individuals and with respect that everyone deserves.

c. **Do you disavow this statement?**

Please see responses to Questions 9a and 9b.

10. In a 2002 article in American Enterprise entitled "Time to Fight Back," you referred to affirmative action as "liberals' most sacred shibboleth."

a. **Why did you describe affirmative action this way?**

I wrote that article 17 years ago, and I can't recall why I exactly chose the words, but I vaguely recall that I liked the alliteration.

b. **Does this still represent your views?**

Reasonable people with good intentions can disagree about affirmative action and other issues. More importantly, the Supreme Court has upheld many affirmative action policies, and I would faithfully follow all precedents in this area.

c. **Do you disavow this statement?**

Please see response to Question 10b.

11. Given the strong personal views you have expressed on affirmative action, including your criticism of the seminal 1978 *Bakke* decision by the Supreme Court, a reasonable observer could question your impartiality on matters involving affirmative action. **Would you commit, if confirmed, to recuse yourself from matters involving affirmative action issues?**

At the time I wrote the article about *Bakke*, there were questions whether *Bakke* was valid law because no other Justice had joined Justice Powell's opinion. Indeed, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) held that "Justice Powell's view in *Bakke* is not binding precedent" and that other Justices had "implicitly rejected Justice Powell's opinion." The Supreme Court has since made clear that universities in their admissions process can take into account race in a holistic fashion. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If I am lucky enough to be confirmed as a federal judge, I would faithfully follow these and other precedents.

I would also believe that a reasonable observer would recognize my twenty-year track record as an adult in championing diversity and inclusion. For example, after graduating from law school, I reached out to my college alma mater and asked them to match me with minority students because I believed that students of color were not provided sufficient career guidance. One of them — an African-American young man who I met when he was a high school student and who I've mentored for 13 years — has written a letter of support to the Committee. I have also served on my firm's Diversity and Inclusion Committee for a decade; in that capacity, I have spent weeknights attending minority job fairs to try to cast a wider net, and have spearheaded firm initiatives to ensure retention and advancement of lawyers of color. And I have taken special efforts to mentor minority attorneys, female attorneys, and LGBT lawyers at my firm. As a result of my efforts, the associates at my firm voted me Mentor of the Year.

12. In a 1995 article in the *Cornell Review* entitled "Asian Leftism," you wrote, "while most people can agree that gays should be accorded respect and equal rights, the creation of another 'ism' (like racism) is yet another way to portray people as victims in need of preferential treatment." **In your view, is equal treatment for LGBTQ Americans "preferential treatment"?**

It is not. As I wrote in that article, LGBT members should be "accorded respect and equal rights." And as I explained at my hearing, my twenty-year track record as a lawyer reflects my commitment that everyone should be treated with respect and equally. For example, I have represented LGBT individuals in a First Amendment pro bono case, and I proactively reached out to LGBT groups at local law schools in an attempt to recruit LGBT law students to my law firm.

13. In a 1994 article in the *Cornell Review* entitled "AIDS at RPU," you wrote that AIDS was prevalent in the gay community in part because "[h]omosexuals generally are more promiscuous than heterosexuals, and thus their risk factor increases exponentially." **What was your basis for making this claim?**

    As I explained at the hearing, I am embarrassed by this article. I wrote that article as an 18-year old in a misguided attempt to defend President Reagan's policies, but I did not have any knowledge of relevant facts and was parroting something I had read. I would not write this today and regret writing this as a teenager.

14. In 1997, you wrote an article in the *Cornell Review* entitled "Cornell: More Ethically Challenged than Newt." You wrote the following:

> Cornell spent thousands of dollars last year to send voter registration ballots to all its students. Some people may view this as an attempt to encourage civil responsibility. That would be too naïve. Considering that young people tend to be liberal and that professors and administrators routinely bash Republicans, Cornell knows that most students will vote Democratic. Maybe Cornell's Professional Ethics Committee should look into this matter—if it isn't too busy conducting sexual harassment witch hunts.

    a. **Is it your view that sending voter registration ballots to all students at a college is a partisan act?**

       It is not. The right to vote is a fundamental one that protects other rights.

    b. **Is it your view that sending voter registration ballots to all students is a matter that should be considered by a professional ethics committee?**

       It is not.

    c. **What in your view constitutes a "witch hunt," to use a term that you mentioned in this article?**

       That phrase refers to the investigation of a professor that I had admired and respected. As I explained at the hearing, I (as a 19-year old at the time) did not have sufficient life experience or knowledge of how the workplace works. The only job I had at that time

was as a "newspaper boy" a few years before, and I did not understand the power dynamics at play in the workplace. The professor in question was someone I had admired and respected, and I was naïve in believing that only "bad" people committed these awful acts. The #MeToo has shown not only how pervasive sexual harassment is, but how even the most respected and trusted people can engage in such reprehensible behavior. Over the past 25 years since I wrote that article, I have learned about power inequities in the workplace, and the importance of listening to complaints raised by survivors of sexual harassment, taking them seriously, and investigating thoroughly. And as the father of two young daughters, this is an issue I care about deeply as I want them to be treated equally and fairly.

15. In 2006, you co-authored an article entitled "The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes." You wrote that the case for letting released felons vote "is unconvincing and problematic both as a legal and policy matter." You also wrote, "Critics of felon disenfranchisement laws note that these laws have a disproportionate impact on certain racial minority groups. While society can be sensitive to such concerns, it is not a sufficient reason to abolish longstanding and justifiable laws in the attempt to achieve some form of racial balance." **In your view are there ever instances where disproportionate impacts on certain racial minority groups provide sufficient reasons to change laws to achieve racial balance? If so, what are some examples?**

    This question implicates an ongoing political debate, and therefore Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion. But I can state that the 2006 article was largely adapted from an amicus brief that I had assisted on when I was an associate working for a particular partner. We had represented the widow and two daughters of a police officer slain in the line of duty. The officer's widow and daughters opposed the convicted murderer's argument that he should be able to vote while serving his life sentence in prison.

    In 2010, I wrote an article in the *National Law Journal* urging President Obama to exercise his pardon power to give a "second chance" to "hard-luck Americans" and restore their rights, including the right to vote, which is a bedrock right that helps protect our other rights. (*Obama Should Exercise the Pardon Power*, Nat'l L.J., Apr. 12, 2010.) I also noted in that article the harsh impact that "mandatory minimums" had on individuals convicted of non-violent drug offenses.

16. You said in your questionnaire that you were first contacted by the White House about a judicial nomination in early 2017 and that you first interviewed with the White House in June 2017. You then met with Senator Feinstein's and Senator Harris' Judicial Advisory Commissions in November 2017 and March 2018 respectively. In other words, you had months to prepare for these meetings. However, you failed to disclose to the Advisory Commissions at least 70 articles that you had written.

    You also have made at least five supplemental filings with this Committee to provide articles that you did not initially disclose to the Committee. You have provided at least 40

articles in these supplemental filings, often after you were alerted to the existence of these article by the Committee.

In 2010, when 9th Circuit nominee Goodwin Liu failed to fully disclose articles he had written, the Republican members of this Committee said it was "potentially disqualifying." They wrote of Goodwin Liu that, "at best, this nominee's extraordinary disregard for the Committee's constitutional role demonstrates incompetence; at worst, it creates the impression that he knowingly attempted to hide his most controversial work from the Committee."

a. **Please provide a detailed chronology of your efforts to identify articles that you had written, starting with your first conversations with the White House in early 2017.**

   As I explained at the hearing, I had initially provided over 500 pages of materials I had written since I was a teenager, and the bulk of them were during my college years. I did not have a master index of all the articles I had written over the past 25 years, most of which were before the Internet era. In collecting my articles, I reviewed my personal files, searched my personal folder in my computer, collected articles held by my firm, conducted Internet keyword searches, reviewed Lexis/Nexis databases, and searched old boxes at my mom's house. I provided those to the Senate Judiciary Committee. I had not reviewed these articles in over two decades, and I frequently wrote about the same topics during my college years. Given the number of pages and articles I had collected, I believed that I had collected all of my articles

   It later came to my attention that there may have been additional writings during my college, and I immediately turned them over to the Committee whenever a new article was found. I reiterate the apology that I gave at the hearing for the inconvenience caused by the supplemental productions. I know it is frustrating for the Committee.

   With respect to Senator Feinstein's and Senator Harris' Judicial Advisory Commission, Question 34 of the application asked for only "legal" publications, and therefore I did not search for and provide non-legal writings I had written as a college student. Finally, it is my understanding that of the supplemental production, only 3 of them were identified by the Committee, which prompted me to try to find those articles through various means.

b. **Did you, or someone at your direction, ever travel to Cornell or request that someone at Cornell search through files at Cornell to identify articles you had written?**

   Yes.

c. During your hearing you said, "Later it came to my attention that there were additional articles. And again, I think they were found through non-public sources." **Were all of**

the articles that you disclosed in supplemental filings to the Committee only available through non-public sources?

I believe some articles were found on what appears to be a private server by virtue of the URL (http://184.106.49.50), and some others were found in library archives, some of which had been misfiled.

d. **Do you agree with the statement by the Committee's Republican members in 2011 that a nominee's failure to fully disclose articles he had written to the Committee is "potentially disqualifying"?**

Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion with respect to political issues.

17. You say in your questionnaire that you have been a member of the Federalist Society since 1997.

a. **Why did you join the Federalist Society?**
During college, I enjoyed studying separation-of-powers and the structural protections afforded by the Constitution. The prevailing political thought during the 1700s was that a republic could exist only in small countries, and that tyranny would inevitably reign in a vast country. James Madison upended that prevailing view, and believed liberty could be secured through separation-of-powers and ambition counteracting ambition. A college government professor (who knew I would be headed to law school) suggested that I join the Federalist Society in light of my interest in separation-of-powers.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion with respect to political issues.

c. **Please list each year that you have attended the Federalist Society's annual convention.**

I do not have written records of when I attended the annual convention, but to the best of my recollection, I believe I attended it in 2002, 2006-2009, and 2013.

18.

a. **Do you believe that judges should be "originalist" and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

The Supreme Court has indicated that the original public meaning of constitutional provision is relevant in construing their meaning.

b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

> …no Person holding any Office of Profit or Trust under [the United States], 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.

I have not studied this issue other than noticing headlines about litigation relating to this issue. Canon 3A(6) of the Code of Conduct for United States Judge indicates that I should not opine on pending litigation.

19.

a. **Is waterboarding torture?**

I have not studied this issue, but it is my understanding that waterboarding is torture if it were intentionally used to inflict "severe physical or mental pain or suffering." 18 U.S.C. § 2340(1).

b. **Is waterboarding cruel, inhuman and degrading treatment?**

Again, I have not studied this issue, but it is my understanding that waterboarding may constitute "cruel, inhuman, and degrading treatment" because Congress passed a law stating that no one in custody of the United States can be subjected to an interrogation technique not authorized by the Army Field Manual.

c. **Is waterboarding illegal under U.S. law?**

Please see responses to Questions 19a and 19b.

20. **To the best of your knowledge, was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion with respect to political issues.

21.

a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in**

support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.

Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion with respect to political issues.

b. **If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

Please see response to Question 21a.

c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see response to Question 21a.

22.

a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not closely studied the extent of the Presidential pardon power to answer this question. Further, because this question addresses a legal issue that may potentially arise in court, I cannot opine on it under Canon 3A(6) of the Code of Conduct for United States Judges.

b. **What answer does an originalist view of the Constitution provide to this question?**

Please see response to Question 22a.

Nomination of Kenneth Lee
to the United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted March 20, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Given your personal-capacity writings opposing affirmative action, how can you assure litigants that you will impartially apply Supreme Court precedent upholding these programs?

   When I wrote about affirmative action primarily in the 1990s, I was concerned that certain elite schools were using it to discriminate against Asian-American students like myself (during that time period, I was in the midst of applying to college or law school). Importantly, the constitutionality of affirmative action programs in universities remained unclear at that time because no other justice had joined Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978). The Supreme Court has since made clear that universities in their admissions process can take race into account as long as it is done in a holistic fashion. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If I am fortunate enough to be confirmed as a federal judge, I would faithfully follow these and other precedents, and any personal opinion I may have held in the past would play no role.

   Further, I would hope that litigants would be aware of my 20-year track record as a lawyer to promote diversity and inclusion. For example, after graduating from law school, I reached out to my college alma mater and asked them to match me with incoming minority students because I believed that students of color were not provided sufficient guidance. One of them — an amazing African-American young man who I met when he was a high school student and who I have mentored over the past 13 years — has written a letter of support to this Committee. I have also served on my firm's Diversity and Inclusion Committee for a decade; in that capacity, I have spent weeknights attending minority job fairs to try to cast a wider net, and have spearheaded firm initiatives to ensure retention and advancement of lawyers of color. And I have taken special efforts to mentor minority attorneys, female attorneys, and LGBT lawyers at my firm. As a result of my efforts, the associates at my firm voted me Mentor of the Year.

2. In an article you wrote after you graduated from law school, you criticized "legal activists" for "relying on courts to accomplish what [they] could not achieve in the voting booth."
   a. How do you define judicial activism?

      People have varying definitions of "judicial activism," but I define it as judges imposing their own personal views and not faithfully following the law.

   b. Please identify three cases that you believe exemplify the type of legal activism you decried.

      I wrote that article 18 years ago, and I cannot recall if I had in mind any specific cases that best exemplify the "legal activism." The main thrust of the article was expressing concern that too many lawyers were taking on politically charged pro bono work (instead of the more traditional pro bono work of helping the poor who lack financial resources or

members of marginalized group without access to justice). As someone who is committed to pro bono work, I feared that the public and the legal profession would no longer support pro bono work if it is viewed as too political, whether it be "liberal" or "conservative." In that article, I also mentioned that conservatives were beginning to engage in politically controversial litigation as well, and I feared that politically charged pro bono work would potentially endanger the broad support for pro bono work.

c. Do you believe it is judicial activism for a judge to opine, outside the scope of the question presented in a case, about the constitutionality of an unrelated law or doctrine?

I believe courts should rule on the specific issue(s) presented in the case, and should not reach to opine on constitutionality of unrelated law or doctrine.

d. Do you believe it is judicial activism for a judge to recast the questions presented in a case to reach an issue on which a factual record had not been developed below?

I believe appellate courts should give deference to the factual findings made by the district court, and should be cautious about opining on an issue on which the factual record has not been developed.

e. Do you believe it is judicial activism for a judge to ignore congressional findings of fact that support a law that has been challenged in court, and instead base an opinion on other facts?

I believe appellate courts should generally give deference to findings of facts.

f. In *Texas v. Azar*, was District Court Judge Reed O'Connor's judgment that the Affordable Care Act was unconstitutional an example of "legal activists…relying on courts to accomplish what [they] could not achieve in the voting booth?"

I have not read *Texas v. Azar*, but the U.S. Supreme Court has held that it is "our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 860 (1989).

3. Do you believe there are some circumstances where a person is "harmed by having the Ten Commandments on a school wall"? Describe those circumstances.

The U.S. Supreme Court has held that posting of Ten Commandments on a school wall "is not a permissible state objective under the Establishment Clause" if it serves "no educational function" and the effect is to "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Stone v. Graham*, 449 U.S. 39, 42-43 (1980). The Establishment Clause ensures that there is no state religion in America, and I would faithfully follow this and other precedents in this area.

4. You have been a member of the Federalist Society since 1997 and are currently a member of the Litigation Practice Group.
   a. If confirmed, do you plan to remain an active participant in the Federalist Society?

If confirmed, I would evaluate my membership in any organization, including the Federalist Society, in light of 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any other applicable laws or rules. I would also consult with my colleagues on this issue.

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

Please see response to Question 4a.

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

No.

5. 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 to the extent that the Chief Justice was implying that judges should try to be neutral arbiters in disputes and treat both sides fairly and equally.

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

   As a general matter, judges should not consider potential practical consequences and should adhere to what the law requires. But in some instances, the law may empower judges to take into account the practical impact of the court's decisions. For example, judges in the context of a preliminary injunction have to take into account factors such as irreparable harm, and judges also have certain latitude in criminal sentencing.

6. 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?

   In ruling on a summary judgment motion, the court must consider the evidence before it in determining whether there is a genuine issue of material fact. But courts should not be subjective to the extent it implies relying on their own subjective personal views.

7. 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 trait for any person, including judges. Judges must rule based on the law and the facts, but being empathetic can help judges ensure that they do not have a "blind spot" and that they are not making decisions based on subconscious assumptions or beliefs.

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

Judges must rule based on the law and facts before them. But a judge's personal life experience can make him or her more empathetic and therefore more aware of his or her "blind spots."

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?

As a racial minority and an immigrant, I can empathize with feeling like an outsider sometimes or suffering the sting of discrimination (though my personal experience likely pales in comparison to the travails faced by young teenage moms or poor African-Americans). If confirmed, I would rule based on the law and facts, but would do my best to be ensure that I am fair to everyone that I do not succumb to any "blind spots."

8. 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.

9. 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?

Juries play an integral role in safeguarding our rights.

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

Questions related to the enforcement of arbitration clauses frequently arise in litigation, and Canon 3A(6) of the Code of Conduct for United States Judge indicate that I should not provide my personal opinion on matters that may arise in potential litigation.

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 response to Question 9b.

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

As a general matter, appellate courts should rule based on the factual findings made by the district

courts.

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

    As a general matter, appellate courts should not engage in fact-finding because that is the province of district courts or administrative agencies.

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

    If confirmed, I would faithfully follow Supreme Court and other precedent regarding the level of deference afforded to congressional fact-findings in connection with expending or limiting individual rights.

13. 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?

       I reviewed it after reading this question.

    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 consult and take into account Advisory Opinion #116 before participating in any education seminars covered by that opinion.

    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?

       If confirmed, I will consult and take into account Advisory Opinion #116 before participating in any education seminars covered by that opinion.

Question for Kenneth Lee, Nominee to the Ninth Circuit Court of Appeals

During the hearing, we discussed the importance of disparate impact claims in discrimination cases. You mentioned that disparate impact has been used in the employment context. However, there are many other areas of the law in which disparate impact claims can be used to protect against discrimination, such as voting rights.

- Do you believe that voting laws that have a discriminatory effect on minority voters should be invalidated, even if those laws were not enacted with the intent to discriminate?

  The right to vote is one of the most fundamental rights because it allows citizens to protect their other rights. Any issue related to discrimination in the context of voting must be taken seriously. The Voting Rights Act of 1965, as amended, bans any voting prerequisite or qualification that "results in a denial or abridgement" of voting rights "on account of race or color." The Supreme Court in *Thornburgh v. Gingles,* 446 U.S. 55 (1980) held that the Voting Rights Act does not require specific discriminatory intent in the context of redistricting, but said that certain factors should be examined to determine if the "results" requirement has been met under the "totality of circumstances." I would faithfully apply all precedents and carefully examine the facts of each case if I were fortunate enough to be confirmed as a federal judge.

Nomination of Kenneth Kiyul Lee, to be United States Circuit Judge
for the Ninth Circuit
Questions for the Record
Submitted March 20, 2019

QUESTIONS FROM SENATOR COONS

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

   The Supreme Court has provided guidance on certain factors that should be considered in determining a right is fundamental and protected under the Fourteenth Amendment. *See, e.g., Obergfell v. Hodges,* 135 S. Ct. 2584 (2015); *Washington v. Glucksberg*, 521 U.S. 702 (1997). I would faithfully follow the precedents set by the Supreme Court.

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

      Yes. The Supreme Court has considered that factor in determining whether a right is fundamental.

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

      Yes. The Supreme Court has considered whether a right is deeply rooted in this nation's history and tradition. *See Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

      If confirmed as an inferior court judge, I would be bound by the precedents of the Supreme Court as well as the Ninth Circuit. Precedents of other circuits would have persuasive force.

   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*).

      Casey and *Lawrence* are binding precedents on all inferior courts, and I would

faithfully apply those precedents.

f. What other factors would you consider?

I would consider and follow all of the relevant factors set forth by the Supreme Court and Ninth Circuit in this area, and would consider the decisions of other Circuits as potentially persuasive.

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 equal protection applies to gender classifications. *See United States v. Virginia*, 518 U.S. 515 (1996).

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?

The Supreme Court in *United States v. Virginia*, 518 U.S. 515 (1996), made clear that heightened scrutiny applies to gender classifications, and that precedent is binding on all inferior courts.

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 not familiar with the litigation history behind *United States v. Virginia*, but I will faithfully follow this and other precedents.

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 the Fourteenth Amendment requires same-sex couples to enjoy the right to marry "on the same terms accorded to couples of the opposite sex." *Obergefell*, 135 S. Ct. at 2607.

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

It is my understanding that this issue is being litigated in courts across the country, and Canon 3A(6) of the Code of Conduct for United States Judges constrains me from answering a question that may appear before the court.

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

to use contraceptives?

Yes. The Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), held that that there is a right to use contraceptives, and if confirmed, I would faithfully follow that decision and other Supreme Court precedents.

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

   Yes. The Supreme Court held that there is such a right in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed that right in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). If I am fortunate enough to be confirmed, I would faithfully follow those decisions and all other Supreme Court precedents.

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

   Yes. The Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558 (2003), that there is such a right. If confirmed, I would faithfully follow that decision and all other Supreme Court 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 the answers above.

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

      If confirmed as an inferior court judge, I would follow all Supreme Court precedent and Ninth Circuit precedent. If those precedents require courts to consider evidence about changing understanding of society, I would faithfully follow such precedents.

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

Courts routinely consider scientific or expert evidence in the context of *Daubert* challenges to ensure that juries can appropriately take into account scientific or other expert evidence.

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?

      If I am fortunate enough to be confirmed, I would faithfully follow *Obergefell* and all other Supreme Court precedent.

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

      Please see response to Question 5a.

6. 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.
   a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

      I am generally aware that there has been robust scholarly discussion on this issue with prominent scholars such as Alexander Bickel and Michael McConnell reaching opposite conclusions. From my perspective, it is an academic point because *Brown* and other Supreme Court decisions are binding, and I would follow them faithfully.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Mar. 18, 2019).

      Scholars have debated how to apply originalism as an interpretive method, and one of the criticisms is the difficulty of trying to determine the original public meaning of certain words.

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 had held that the original public meaning of constitutional provisions is relevant in interpreting them.

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

Please see response to Question 6c.

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

Inferior courts must follow Supreme Court and Circuit precedent in discerning the contours of a constitutional provision. The Supreme Court has held that courts should also look at the text, structure, and history.

7. At your hearing, I asked you about your article for *The American Enterprise* called "Where Legal Activists Come From." You responded that the article was meant to express concern that lawyers might turn away from doing pro bono work if such work is increasingly regarded as "a political tool." With the chance to review your article, would you agree that you were, at least in part, arguing against the recognition of a broader understanding of rights?

The primary focus of my 2001 article was that law firms were taking on politically charged pro bono cases instead of the more traditional, but less glamorous, pro bono work focusing on indigents who cannot afford legal representation or historically marginalized groups without adequate access to justice. I expressed concern in the article that this shift could potentially undermine public support for pro bono work. I had mentioned certain types of politically charged pro bono litigation to underscore that many members of the public would oppose such litigation, and that therefore there is a risk that the public would then view pro bono work as politically motivated. As reflected in my two-decade track record as an attorney, I have dedicated hundreds of hours of pro bono work focusing on more "traditional" pro bono work (*e.g.*, fighting foreclosure for a client, representing an individual seeking asylum, representing racial minorities alleging mistreatment by authorities). In hindsight, I would certainly state some of my points differently and more clearly and in a more measured tone.

a. In the article, you state that "[t]rial lawyers increasingly litigate new entitlements for favored groups, establish exotic new individual rights, and over-turn well established legal and legislative prerogatives." What "new entitlements" and "exotic new individual rights" were you referring to?

Given that I wrote this article nearly twenty years ago, I do not recall exactly what I was referring to. But in re-reading the article now, I note that I wrote that Tulane Law School students as part of a pro bono clinic opposed a plant being built in an impoverished area of Louisiana on the basis of an "environmental racism" theory. I noted that they succeeded in stopping the plant, but that the head of the local NAACP chapter opposed that litigation, saying that the plant would have provided jobs to the community.

b. Is part of the role of the Constitution to guarantee minority rights that may not be achievable through the democratic process?

Yes. The Constitution — through the Bill of Rights as well as its structure — helps protect minority rights.

c. At your hearing, you stated that the article discusses both liberal and conservative legal activists. The article contains one sentence acknowledging that conservative legal foundations "engage in their own public policy litigation." However, this sentence follows: "But for the most part, the legal activism now being encouraged among students is of a distinctly left-wing variety." Do you believe that current "legal activism" is largely "of a distinctly left-wing variety"?

At the time I wrote the article in 2001, I believed that most of the politically tinged pro bono work came from the political left, but I noted that political right was beginning to engage in similar litigation. I have not carefully studied this issue since then.

8. In 2010, a nominee to the U.S. Court of Appeals for the Ninth Circuit, Goodwin Liu, omitted roughly 135 items from his original questionnaire to the Senate Judiciary Committee. In a letter to then-Chairman Leahy, several Republican Senators on the Committee wrote, "At best, this nominee's extraordinary disregard for the Committee's constitutional role demonstrates incompetence; at worst it creates the impression that he knowingly attempted to hide his most controversial work from the Committee." Liu was not confirmed. You omitted over 40 articles from your original questionnaire.
   a. Please explain in detail the process you used to identify materials responsive to the Senate Judiciary Committee Questionnaire and to correct your questionnaire when omissions were discovered.

As I explained at the hearing, I had initially provided over 500 pages of materials I had written since I was a teenager, and the bulk of them were during my college years. I did not have a master index of all the articles I had written over the past 25 years, most of which were before the Internet era. In collecting my articles, I reviewed my personal files, searched my personal folder in my computer, collected articles held by my firm, conducted Internet keyword searches, reviewed Lexis/Nexis databases, and searched old boxes at my mom's house. I provided those to the Senate Judiciary Committee. It later came to my attention that there may have been

additional writings during my college, and I immediately turned them over to the Committee whenever a new article was found. I reiterate the apology that I gave at the hearing for the inconvenience caused by the supplemental productions. I know it has been frustrating for this Committee.

b. Federal judges receive lifetime appointments, and diligence and a rigorous commitment to accuracy are necessary attributes for these positions. If your omissions were simply an oversight, then do you agree with me that they do not reflect the diligence and rigorous commitment to accuracy required for service on the federal bench?

I made a good-faith effort to find all of my articles and provided over 500 pages with my Senate Judiciary Questionnaire. The additional articles dated back over two decades ago, were not easily located, and were not in my possession. I did not have recollection of these additional articles because I did not maintain a master index of articles I wrote during college, and I frequently wrote about the same or similar topics during my years. I again apologize for the inconvenience caused by the supplemental production, and I understand the Committee's frustration.

9. You have repeatedly criticized race-conscious admissions policies in higher education. In a 2003 *American Enterprise* article titled "The Supreme Court's Previous Dodge," you suggested *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), should be overturned.
   a. Is that still your view?

At the time I wrote the article, there were questions whether *Bakke* was valid law because no other Justice had joined Justice Powell's opinion. Indeed, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) held that "Justice Powell's view in *Bakke* is not binding precedent" and that other Justices had "implicitly rejected Justice Powell's opinion." The Supreme Court has since made clear that schools in their admissions process can take race into account in a holistic fashion. *See Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If I am lucky enough to be confirmed as a federal judge, I would faithfully follow these and other precedents.

   b. Do you believe that any consideration of race in admissions is unconstitutional?

No. The Supreme Court has held that universities can consider race in a holistic manner in their admissions process. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If confirmed, I would faithfully follow these and other precedents.

   c. Do you believe that ensuring a diverse environment can be a compelling interest?

The U.S. Supreme Court has held that having a diverse student body in universities may be a compelling government interest. And throughout my two-decade career as an attorney, I have championed diversity initiatives. For example, after graduating from law school, I reached out to my college alma mater and asked them to match me with minority students because I believed that students of color are not provided sufficient career guidance. One of them — an amazing African-American young man who I've mentored for 13 years — has written a letter of support to the Committee. I have also served on my firm's Diversity and Inclusion Committee for a decade; in that capacity, I have spent weeknights attending minority job fairs to try to cast a wider net, and have spearheaded firm initiatives to ensure retention and advancement of lawyers of color. And I have taken special efforts to mentor minority attorneys, female attorneys, and In lawyers at my firm. As a result of my efforts, the associates at my firm voted me Mentor of the Year.

10. In your 2002 article called "Time to Fight Back: An Antidiscrimination Campaign Waiting to Happen?," you asserted that Republicans could legally challenge the hiring practices of universities "by using the logic and law of the civil rights movement." Do you believe that the discrimination that people of color have faced in the United States is comparable to the alleged discrimination faced by conservatives in academia?

    In that 2002 article, I wrote that diversity in all aspects — racial, gender, religious, socioeconomic, viewpoint, etc. — is important in the university, and noted that some schools did not have a single Republican professor in their history or political science departments. I recognized, however, that political belief is not a protected class under federal law. In contrast, the discrimination historically endured by people of color, especially by African-Americans, was systematic, cruel, and unconscionable.

11. In a 2005 article, "Illegals vs. Legals," you wrote that President George W. Bush's description of "illegal immigrants as 'hard-working men and women' who are pursuing 'better lives' . . . blurs the distinction between illegals and those who come to America following the rules." Do you stand by this opinion?

    In that article, I was not making any judgments about immigrants who may be here illegally without proper documentations. Rather, I was analyzing the politics of immigration policy, noting that in the past "[b]y talking tough on illegals, politicians have been able to defend high levels of legal immigration." The article expressed concern that blurring the distinction between legal and illegal immigration could end up increasing the chances of "legal immigration restrictions in the future" and would "do no favors for the cause of continuing U.S. immigration."

Questions for the Record for Kenneth Kiyul Lee
from Senator Mazie K. Hirono

1. Chief Justice John Roberts has recognized that "the judicial branch is not immune" from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer two questions.

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

   No.

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

   No.

2. In a conservative college newspaper, you called the "phenomenon of multiculturalism" a "malodorous sickness".

Is that still your view of the idea of adding the experience of non-Western cultures to university curricula?

As an immigrant who was initially raised in Eastern culture, I have always appreciated the importance of learning and respecting all cultures. Indeed, I wrote in that same college newspaper that learning about other cultures is an "integral part" of a student's education, and I enrolled in and enjoyed taking non-Western classes during college. My criticism in that article was directed at schools that required students to take non-Western classes but not American history classes, given that many students were woefully ignorant of American history. In that article, I cited a survey of 3,000 Ivy League students in which 8 out of 10 students did not know that it was Abraham Lincoln who spoke of a "government of the people, by the people, for the people" in the Gettysburg Address. That being said, the tone of that sentence I wrote as a teenager is hyperbolic and I would not write it today.

3. You also published a pretty juvenile piece, renaming American sports teams so they wouldn't offend anyone. I know that you wrote this as a much younger man, and this is supposed to be a joke, but at the heart of the joke is some truth -- that you thought people taking offense to names like the Cleveland Indians, the Atlanta Braves or the Washington Redskins was silly.

That attitude worries me, and if I had a case that involved, for instance, charges of employment discrimination against a workplace that allowed employees to harass me using ethnic slurs, I might not be able to trust you to hear it fairly. And the Ninth Circuit covers an area that is home to more than 400 federally recognized tribes, and of course home to many Native Hawaiians.

a. **What is your view now? Do you still think it is laughable that indigenous people don't like slurs on their identities being used for these purposes?**

I believe that we need to take these concerns raised by Native American groups seriously, and we need to put ourselves in the shoes of others to better understand their concerns. Further, it is critical that everyone be treated with respect and dignity.

b. What in your record can you point to that demonstrates you understand the harm racist language does?

I fully understand the pain and harm caused by racist language. As a racial minority and an immigrant, I grew up being subjected to racial slurs and being bullied for the shape of my eyes or because I spoke my native language to my parents. It cuts deeply, and I remember feeling helpless at being mocked for something that I cannot control.

4. You wrote an article critical of what you called "legal activists" "relying on courts to accomplish what [they] could not achieve in the voting booth." You said that, '[t]rial lawyers increasingly litigate new entitlements for favored groups, establish exotic new individual rights, and overturn well-established legal and legislative prerogatives."

Do you have the same criticism of those on the right who have gone to the 5th Circuit to challenge DACA, DAPA and the ACA in an attempt to undo the accomplishments of the Obama Administration?

Because this question implicates an ongoing political debate and matters that may come before me if I were to be confirmed, Canons 3A(6) and 5 of the Code of Conduct for United States Judge indicate that I should not provide my personal opinion with respect to political issues or specific litigation. More generally, as someone who believes strongly in pro bono work, I expressed concern in that 2001 article that too many lawyers were taking on politically charged pro bono work (instead of the more traditional and less "glamorous" pro bono work of helping the poor who lack financial resources or members of marginalized group without access to justice). I feared that the public and the legal profession would no longer support pro bono work if it is viewed as too political, whether it be "liberal" or "conservative." In that article, I also mentioned that conservatives were beginning to engage in politically controversial litigation as well, and I feared that politically charged pro bono work would potentially endanger the broad support for pro bono work.

5. When you were in college, you once wrote that you agreed that "economic factors have virtually eliminated rampant racism."

a. Do you think racism, rampant or otherwise, still exists in this country?

In that article, I was quoting the various viewpoints offered by the numerous participants in a debate about affirmative action, and I mentioned that one participant stated that he believed that "economic factors have virtually eliminated rampant racism." In that same article, I wrote that "bigots unfortunately will abound" in a large country like ours, and that "minorities grow up in more disadvantaged backgrounds in comparison with whites." I still believe that racial discrimination, unfortunately, exists today.

b. **IF SO, what forms do you think it takes? Do you think the racist way the President talks about non-white people has an effect on the way his followers talk? On the way they behave?**

Unfortunately, racial discrimination still exists today, and they come in many forms — from blatant racism to subtle stereotypes. Whatever form it takes, racial discrimination is harmful and wrong. With respect to the latter two questions, they implicate an ongoing political debate, Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion.

c. What in your record can you point to that demonstrates you understand the role racism plays in American life today?

As an immigrant and racial minority, I have faced racial discrimination — from racial slurs being directed at me to being stereotyped by others. It is real, and it is painful. I'm also aware that the discrimination I've faced pales in comparison to what others have faced, especially by African-Americans.

In my two decades as a lawyer, I've devoted hundreds of hours to civil rights cases to ensure that everyone receives due process and equal protection under the law. For example, I represented before the Ninth Circuit an African-American individual on death row in a bid to get new DNA testing to exonerate him. As Nicholas Kristof of the *New York Times* wrote about the case (One test could exonerate him. Why won't California do it?, N.Y Times, May 17, 2018, https://www.nytimes.com/interactive/2018/05/17/ opinion/sunday/kevin-cooper-california-death-row.html), there are credible allegations that racial bias infected the criminal investigation. I've also tried a case representing an African-American inmate who alleged that he had been abused by approximately dozen white prison officials. I convinced the jury to rule in my client's favor, including the awarding of punitive damages. I have also written an amicus brief on behalf of the Los Angeles Urban League to ensure that African-American and Latino school children have the same educational opportunities as their white counterparts.

6. In college you wrote a defense of a professor accused by students of sexual harassment. What bothers me in that article is how you dismiss the women because some continued to work for him after the incidents they alleged, and because they did not confront the professor. I don't know anything about this particular case, but I am disturbed by the ignorance displayed here.

a. Have your views changed since then? Do you now understand the different ways that survivors of sexual harassment react because of their fear of not being believed or their fear of retaliation?

As I testified at Senate Judiciary Committee hearing, I would not write that piece today and I regret doing so. As a 19-year-old student at the time, I did not have enough real world experience or knowledge of how the workplace works. The only job I had at that time was as a "newspaper boy" a few years before, and I did not understand the power dynamics at play in the workplace. The professor in question was someone I had admired and respected, and I

was naïve in believing that only "bad" people committed these awful acts. The #MeToo has shown not only how pervasive sexual harassment is, but how even the most respected and trusted people can engage in such reprehensible behavior. Over the past 25 years since I wrote that article, I have learned about power inequities in the workplace, and the importance of listening to complaints raised by survivors of sexual harassment, taking them seriously, and investigating thoroughly. My wife has also shared stories of how she endured mistreatment and harassment, even at non-profit organizations where her work colleagues are supposed to be the "good" people. And as the father of two young daughters, I shudder at the thought of them not being treated fairly or equally.

b. What in your record can you point to that demonstrates you understand the phenomenon of sexual harassment and the behavior of survivors?

Over the past 25 years, I have had many professional and personal experiences that have made me more sensitive to this issue. As the father of two young daughters, I feel strongly about this issue because I love them so much and want them to be treated fairly and equally. Also, years ago, a close family member became a single mother after ending an abusive relationship. Sadly, she did not tell me or other members of my family until the very end of that relationship. Unfortunately, the culture at that time (and even still somewhat today) discouraged survivors from speaking out. The #MeToo movement has been critical in encouraging and empowering survivors to call out bad behavior. And at work, I've made extra efforts to mentor and guide lawyers of color and female attorneys in light of unique challenges that they may face (*e.g.*, glass ceiling). The associates at my firm voted me Mentor of the Year as a result of my efforts.

Nomination of Kenneth Kiyul Lee
United States Court of Appeals for the Ninth Circuit
Questions for the Record
Submitted March 20, 2019

QUESTIONS FROM SENATOR BOOKER

1. You coauthored an article in 2006 entitled *The Bullet* and *the Ballot? The Case for Felon Disenfranchisement Statutes*. You laid out a vigorous defense of laws that take the right to vote away from millions of Americans—including people who have completed their sentences and have paid their debt to society. These laws also disproportionately affect African Americans and Latinos. You wrote that "the legal and political left has championed felon voting rights as its latest cause célèbre."[1]

    a. Because of these laws, there were around 4.7 million Americans in 2016 who live in our communities, work at our businesses, and pay taxes—but can't cast a ballot in our elections.[2] If someone has been released from prison and paid his or her debt to society, why is it fair to deny that person the right to vote?

    This question implicates an ongoing political debate, and therefore Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion. But I can state that the 2006 article was largely adapted from an amicus brief that I had assisted on when I was an associate working for a particular partner. We had represented the widow and two daughters of a police officer slain in the line of duty. The officer's widow and daughters opposed the convicted murderer's argument that he should be able to vote while serving his life sentence in prison.

    In 2010, I wrote an article in the *National Law Journal* urging President Obama to exercise his pardon power to give a "second chance" to "hard-luck Americans" and restore their rights, including the right to vote, which is a bedrock right that helps protect our other rights. (*Obama Should Exercise the Pardon Power*, Nat'l L.J., Apr. 12, 2010.) I also noted in that article the harsh impact that "mandatory minimums" had on individuals convicted of non-violent drug offenses.

    b. Last fall, the people of Florida voted to amend the state's constitution to restore the right to vote for roughly 1.4 million people with past felony convictions who have completed their sentences. This was the largest single expansion of the right to vote

[1] Roger Clegg, George T. Conway III, & Kenneth K. Lee, *The Bullet* and *the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. UNIV. J. OF GENDER, SOC. POL'Y & LAW 1, 4 (2006), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1274&context=jgspl.
[2] Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6- million-lost-voters-state-level-estimates-felony-disenfranchisement-2016.

in our country since the Voting Rights Act of 1965. Does Florida's decision change your view that "letting . . . felons vote is unconvincing and problematic both as a legal and policy matter"?[3]

Please see response to Question 1a.

c. You also wrote that "felon disenfranchisement laws are deeply rooted in the Western tradition as well as American history," and that "[t]hat long history refutes any suggestion that felon disenfranchisement provisions are racially motivated."[4] But look at the law that the people of Florida just repealed. Florida's ban was enacted in the late 1860s, just after the Civil War. And there is a terrible, well-documented history from the time showing that this law was precisely intended to reduce the number of African Americans who could vote.[5] A century and a half later, in 2016, 1 in 5 African Americans in Florida still couldn't vote because of this law.[6] So how could you argue that these disenfranchisement laws were *in no way* "racially motived"?

Please see response to Question 1a. The cited article discusses the history of felon-disenfranchisement laws at length. *See* 14 Am. U. J. Gender Soc. Pol'y & L. 1, 5-71 (2006).

d. In addition, you wrote that "society considers convicts, *even those who have completed their prison terms*, to be less trustworthy than non-convicted citizens."[7] Why would that vague notion of "trustworthiness" be enough of a reason to deny someone the fundamental right to vote?

Please see response to Question 1a.

e. You also engaged in some troubling speculation in this article. You wrote, "In fact, the abolition of felon disenfranchisement laws may have the unintended effect of creating 'anti-law enforcement' voting blocs and victimizing the vast majority of law-abiding minority citizens who live in high-crime urban areas."[8] In fact, a number of states have repealed various restrictions on the right to vote based on past felony convictions.[9] Is there any empirical evidence for your claim?

Please see response to Question 1a.

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[3] Clegg, Conway & Lee, *supra* note 1, at 4.
[4] *Id.* at 5-6.
[5] Tim Elfrink, *The Long, Racist History of Florida's Now-Repealed Ban on Felons Voting*, WASH. POST (Nov. 7, 2008), https://www.washingtonpost.com/nation/2018/11/07/long-racist-history-floridas-now-repealed-ban-felons-voting.
[6] Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6- million-lost-voters-state-level-estimates-felony-disenfranchisement-2016.
[7] *Id.* at 23 (emphasis added).
[8] *Id.* at 24.
[9] *See* Uggen, Larson & Shannon, *supra* note 2.

f. Given your speculation about "creating 'anti-law enforcement' voting blocs and victimizing the vast majority of law-abiding minority citizens who live in high-crime urban areas," were you suggesting that would happen in states around the country where people who have paid their debt to society are finally gaining the chance to cast a ballot again?

Please see response to Question 1a.

2. In an article for the American Enterprise Institute, you criticized the use of disparate impact claims in the workplace—where someone can show a consistently adverse discriminatory effect of an employment policy, as opposed to requiring an outright discriminatory intent to be found. You had trouble with the "novel" idea that someone filing suit "need not even allege that the employer has a biased bone in his body," even though a hiring policy clearly has had an adverse impact.[10]

a. Do you believe that disparate impact claims are a legitimate legal tool in areas like housing and employment?

Discrimination in any form is wrong, and the U.S. Supreme Court has held that plaintiffs can sue employers under a disparate impact theory to combat discriminatory effects of certain policies. If I am fortunate enough to be confirmed as a federal judge, I would follow all precedents related to disparate impact.

b. You expressed doubt in that article about an important Supreme Court decision from 1971 on disparate impact claims in employment, *Griggs v. Duke Power Co.*[11] Do you believe that case was correctly decided?

Please see response to Question 2a.

c. What about disparate impact claims in the housing context? Do you believe that the Supreme Court's 2015 ruling in the *Inclusive Communities* case, that businesses can be held liable under the Fair Housing Act for housing and lending practices that have a discriminatory effect, was correctly decided?[12]

I am not familiar with the *Inclusive Communities* case, but I am aware that the U.S. Supreme Court in other contexts has held that plaintiffs can sue under a disparate impact theory to combat discriminatory effects of certain policies. If I am fortunate enough to be confirmed as a federal judge, I would follow all precedent related to disparate impact.

3. In another article for the American Enterprise Institute entitled *Illegals vs. Legals*, you

[10] Kenneth Lee, *Time To Fight Back: An Anti-Discrimination Campaign Waiting To Happen?*, AM. ENTER. (Sept. 2002), *in* SJQ Attachment to Question 12(a), at 123.
[11] 401 U.S. 424 (1971).
[12] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015).

criticized President George W. Bush for expressing sympathy for undocumented immigrants. You specifically called him out for "describing illegal immigrants as 'hard-working men and women' who are pursuing 'better lives.'" And you wrote, "Never before has a prominent U.S. politician, let alone a President, rationalized illegal immigration that baldly."[13]

a. Do you stand by those statements today?

In that article, I was not making any judgments about immigrants who are here illegally without proper documentation. Rather, I was analyzing the politics of immigration policy, noting that in the past "[b]y talking tough on illegals, politicians have been able to defend high levels of legal immigration." The article expressed concern that blurring the distinction between legal and illegal immigration could end up increasing the chances of "legal immigration restrictions in the future" and would "do no favors for the cause of continuing U.S. immigration."

b. Here are the words that President Bush spoke that you criticized so strongly: "We see millions of hard-working men and women condemned to fear and insecurity in a massive, undocumented economy. . . . The search for a better life is one of the most basic desires of humans beings." Why, in your view, was it so wrong for the President of the United States to say that?

Please see response to Question 3a.

c. You've been nominated to the Ninth Circuit—a court that handles an especially large number of immigration appeals. Based on these statements, what assurances can you provide that you will be able to appreciate the basic humanity of undocumented immigrants who may come before you, and judge their cases fairly?

As noted above, my article was not making any judgments about immigrants who are here illegally without proper documentation. Rather, I was analyzing the politics of immigration policy, noting that "[p]ro-immigration legislators" have defended the United States' generous immigration policy by "draw[ing] sharp contrasts between illegal and legal immigration." As I explained in the hearing, the article expressed concern that blurring the distinction between legal and illegal immigration may "backfire and increase public frustration toward all immigration," thereby harming all immigrants.

As an immigrant and a naturalized American myself, it is my core belief that everyone should be treated with respect and dignity, especially those who come to this country seeking a better life. As part of my pro bono practice, I have represented numerous immigrants seeking asylum or fighting removal.

4. 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,

[13] Kenneth Lee, *Illegals vs. Legals*, AM. ENTER. (Apr./May 2005), in SJQ Attachment to Question 12(a), at 115-16.

bring them back from where they came."[14] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Because this question implicates an ongoing political debate, Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion. But the Supreme Court has stated that immigrants facing an exclusion hearing are entitled to "minimum requirements of due process." *Landon v. Plasencia*, 459 U.S. 21 (1982).

5. In the past, you have expressed controversial views about the role of race in America and the use of affirmative action. In another article for the American Enterprise Institute, you wrote that the Supreme Court's landmark 1978 decision on affirmative action in *Regents of the University of California v. Bakke*[15] was "practically unfeasible."[16] You concluded that "[t]he Supreme Court can no longer hide behind the wishful thinking of *Bakke*."[17]

    a. You wrote that *Bakke* was "practically unfeasible" and "wishful thinking." Doesn't that mean you thought *Bakke* was wrong? Otherwise, please explain how else we should understand your arguments here.

    At the time I wrote the article, there were questions whether *Bakke* was valid law because no other Justice had joined Justice Powell's opinion. Indeed, the U.S. Court of Appeals for the Fifth Circuit in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), held that "Justice Powell's view in *Bakke* is not binding precedent" and that other Justices had "implicitly rejected Justice Powell's opinion." The Supreme Court has since made clear, however, that schools in their admissions process can take race into account in a holistic fashion. *See Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If I am fortunate enough to be confirmed as a federal judge, I would faithfully follow these and other precedents.

    b. Do you believe that *Bakke* was correctly decided?

    The Supreme Court has held that universities can consider race in a holistic manner in their admissions process. *See Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016). If confirmed, I would faithfully follow these and other precedents.

    c. Do you think the Supreme Court has continued to engage in "wishful thinking" in its subsequent decisions upholding race-conscious admissions programs, such as *Grutter*

[14] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump /status/1010900865602019329.
[15] 438 U.S. 265 (1978).
[16] Kenneth Lee, *The Supreme Court's Previous Dodge*, AM. ENTER. (Apr./May 2003), in SJQ Attachment to Question 12(a), at 120.
[17] *Id.*

v. Bollinger[18] and *Fisher v. University of Texas*[19]?

The U.S. Supreme Court in *Grutter, Fisher I*, and *Fisher II* has provided further guidance on how universities can properly take race into account in the college admissions process. If confirmed, I would faithfully follow these and other precedents.

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

The U.S. Supreme Court has held that having a diverse student body in universities may be a compelling government interest. And throughout my two-decade career as an attorney, I have championed diversity initiatives. For example, after graduating from law school, I reached out to my alma mater and asked them to match me with minority students because I believed that students of color are not provided sufficient career guidance. One of them — an amazing African-American young man who grew up in Newark and who I've mentored for 13 years — has written a letter of support to the Committee. I have also served on my firm's Diversity and Inclusion Committee for a decade; in that capacity, I have spent weeknights attending minority job fairs to try to cast a wider net, and I have spearheaded firm initiatives to ensure retention and advancement of lawyers of color. And I have taken special efforts to mentor minority attorneys, female attorneys, and LGBT lawyers at my firm. As a result of my efforts, the associates at my firm voted me Mentor of the Year.

6. In another article for the American Enterprise Institute, you criticized "legal activists" for "relying on courts to accomplish what [they] could not achieve in the voting booth."[20]

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[21] Was that an "activist" decision?

In that 2001 *American Enterprise* article, I was not criticizing any Supreme Court decision as "activist." Rather, as I explained at the hearing, I was expressing concern that too many lawyers were taking on politically charged pro bono work (instead of the more traditional pro bono work of helping the poor who lack financial resources or members of marginalized group without access to justice). As someone who is committed to pro bono work, I feared that the public and the legal profession would no longer support pro bono work if it is viewed as too political, whether it be "liberal" or "conservative." In that article, I also mentioned that conservatives were

[18] 539 U.S. 306 (2003).
[19] 136 S. Ct. 2198 (2016).
[20] Kenneth Lee, *Where Legal Activists Come From*, AM. ENTER. (June 2001), *in* SJQ Attachment to Question 12(a), at 124.
[21] 554 U.S. 570 (2008).

beginning to engage in politically controversial litigation as well, and I feared that politically charged pro bono work would potentially endanger the broad support for pro bono work.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[22] Was that an "activist" decision?

Please see response to Question 6a.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[23] Was that an "activist" decision?

Please see response to Question 6a.

d. 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?

Judicial restraint is an important attribute for an appellate judge. To me, judicial restraint means faithfully applying the law, regardless of one's personal opinion, and ruling on the specific issues presented in the case.

7. In the same article, you also appeared to criticize "left-leaning lawyers" who "have successfully waged a 'rights revolution' over the last three decades."[24] You referenced, as examples, lawyers engaged in cases involving reproductive rights (specifically invoking a successful legal challenge adjudicated by the New Jersey Supreme Court), the rights of the mentally ill, the rights of people of color, and the right to vote.[25] Please explain why, if you're confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case concerning these rights.

As noted above, my 2001 article focused on my concern that too many lawyers were taking on politically charged pro bono work (instead of the more traditional pro bono work of helping the poor who lack financial resources or members of marginalized group without access to justice). As someone who is committed to pro bono work, I feared that the public and the legal profession would no longer support pro bono work if it is viewed as too political, whether it be "liberal" or "conservative." In that article, I also mentioned that conservatives were beginning to engage in politically controversial litigation as well.

My two-decade track record as a lawyer shows my commitment to equal protection and due process for everyone. I have devoted hundreds of hours to pro bono cases representing the poor and members of historically marginalized groups. For example, I represented before the Ninth Circuit an African-American individual on death row in a bid to get new DNA testing to exonerate him. As Nicholas Kristof of the *New York Times*

[22] 558 U.S. 310 (2010).
[23] 570 U.S. 529 (2013).
[24] Lee, *Where Legal Activists Come From, supra* note 20, at 124.
[25] *Id.*

wrote about the case, there are credible allegations that racial bias infected the criminal investigation. (*One test could exonerate him. Why won't California do it?*, N.Y Times, May 17, 2018, https://www.nytimes.com/interactive/2018/05/17/opinion/sunday/kevin-cooper-california-death-row.html.) I've also tried a case representing an African-American inmate who alleged that he had been abused by a dozen white prison officials. I convinced the jury to rule in my client's favor, including the awarding of punitive damages. I have also represented pro bono individuals seeking asylum in the United States, an openly LGBT individual in a First Amendment case, and a religious minority seeking to exercise his religious rights. Moreover, I have served on my firm's Diversity and Inclusion Committee for a decade, and the associates at my firm voted me as Mentor of the Year in large part for my efforts in mentoring lawyers of color, women lawyers, and LGBT lawyers.

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

   I generally eschew labels because different people ascribe different meanings to labels. But the Supreme Court has used the original public meaning of the text of the Constitution to interpret that text.

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

   As noted above, I'm generally wary of labels. But the Supreme Court has held that if the text of a statute is unambiguous, the analysis generally stops there (assuming there is no binding precedent). If the statute is ambiguous, courts have many tools to try to determine the meaning of the statutory language.

10. 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 held that if the text of the statute is unambiguous, the analysis generally stops there. But if the language is ambiguous, the Supreme Court has indicated that courts have other tools and sources that they can consult, including legislative history.

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

Please see response 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.[26] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[27] 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.[28] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[29]

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

    While I have not studied this issue, I am aware of statistics showing racial disparities in our criminal justice system. In my pro bono practice, I have represented numerous African-American individuals who have alleged abuse by law enforcement; I recall one of them telling me that he becomes uneasy whenever he sees law enforcement. And if some of us do not have faith in our justice system, it should concern us all.

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

    Again, while I have not studied this issue, I am aware of statistics showing racial disparities in the jail and prison population.

    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.

    I have not studied this issue, but I recall reading newspaper articles referencing racial disparities in the criminal justice system. I do not recall which specific articles.

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

    I have not studied this issue enough to opine intelligently on it. But I have represented pro bono an African-American on death row who has made credible allegations that racial bias may have infected his criminal investigation. So I am

[26] 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.
[27] *Id.*
[28] 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.
[29] *Id.*
[30] 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.

sensitive to this issue, and I believe that if some people lose faith in our justice system, it should concern everyone.

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

Please see response to Question 11d.

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

Federal judges must rule based on the law and facts of each case, but they should be mindful of any "blind spots" that all of us may have and ensure that no one is making any subconscious assumptions or decisions.

12. During the century before President Trump came into office, the Senate had *never* confirmed a judicial nominee over the objections of *both* home-state Senators, according to the Congressional Research Service.[32] If you're confirmed, you would be part of a major break from that longstanding Senate tradition of respect for the views of home-state Senators through the blue slip process.

a. Do you think the Trump Administration meaningfully consulted with your home-state Senators about your nomination?

Because this question implicates an ongoing political debate, Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion.

b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

Because this question implicates an ongoing political debate, Canon 5 of the Code of Conduct for United States Judge indicates that I should not provide my personal opinion.

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

[32] BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), http://www.crs.gov/Reports/pdf/R44975; MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT 7-22 (2003), https://fas.org/sgp/crs/misc/RL32013.pdf.

13. 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.[33] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[34]

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

       I have not studied this issue to opine on it intelligently, but I am generally aware that the issue of crime is highly complex with many causal factors.

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

       I have not studied this issue to opine on it intelligently, but I am generally aware that the issue of crime is highly complex with many causal factors.

14. 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.

15. Do you believe that *Brown v. Board of Education*[35] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

    Brown v. Board of Education is a landmark ruling that ensured equality and repudiated the odious principle of separate-but-equal. As I noted at the hearing, the *Brown* opinion has personal meaning to me because that decision is the reason why I had a constitutional right to attend schools with students of other races.

[33] 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.
[34] *Id.*
[35] 347 U.S. 483 (1954).

16. Do you believe that *Plessy v. Ferguson*[36] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. The Supreme Court in *Brown v. Board of Education* repudiated *Plessy* and the odious principle of separate-but-equal.

17. 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?

Like most nominees, I met with lawyers from the Department of Justice who provided guidance about, among other things, the Code of Conduct for Judges. But my responses to all questions are my own.

[36] 163 U.S. 537 (1896).

Questions for the Record from Senator Kamala D. Harris
Submitted March 20, 2019
For the Nomination of

Kenneth Lee, to the U.S. Court of Appeals for the Ninth Circuit

1. During your hearing, I asked whether courts could consider disparate impact when deciding on the validity of a law. You responded that there is precedent for disparate impact analysis in the employment context.

    a. **Do you believe that courts can consider disparate impact when deciding on the validity of a housing law? If no, please provide citations.**

    I am aware that the Supreme Court has held that a disparate impact theory is permissible for Title VII claims under the Civil Rights Act. I, however, am not familiar whether courts can consider disparate impact in other areas. But I would faithfully follow all precedents in the area of disparate impact.

    b. **Do you believe that courts can consider disparate impact when deciding on the validity of an education law? If no, please provide citations.**

    Please see response to Question 1a.

    c. **Do you believe that courts can consider disparate impact when deciding on the validity of a voting law? If no, please provide citations.**

    The Voting Rights Act of 1965, as amended, bans any voting prerequisite or qualification that "results in a denial or abridgement" of voting rights "on account of race or color." U.S. Supreme Court in *Thornburgh v. Gingles,* 446 U.S. 55 (1980) has held that the Voting Rights Act does not require specific discriminatory intent in the context of redistricting, but said that certain factors should be examined to determine if the "results" requirement has been met under the "totality of circumstances." It is also my general understanding that there is litigation surrounding this requirement. I would faithfully apply all precedents and carefully examine the facts of each case if I were fortunate enough to be confirmed as a federal judge.

    d. **Do you believe that courts can consider disparate impact when deciding on the validity of a lending law? If no, please provide citations.**

    Please see response to Question 1a.

2. In 2010, you co-authored an article titled "California, Home of Wage and Hour Lawsuits," which noted that a state court jury in Oakland had ordered Wal-Mart to pay damages for failing to provide 30-minute meal breaks to its employees. The article stated

that wage and hour lawsuits could "dent the bottom line of Fortune 500 companies and potentially cripple smaller businesses."

a. **Does the financial burden of complying with these laws outweigh an employee's right to be free from abuse and exploitation in the workplace?**

Employees should not be subject to abuse or exploitation in the workplace. In that article, I was advising clients and potential clients of potential liability if they did not comply with California's wage and hour laws.

b. **Do you believe that the federal minimum wage is constitutional? If no, please explain why not.**

I have not studied this issue, but I have no reason to doubt the constitutionality of federal minimum wage law.

3. As a student at Cornell, you wrote an article titled "Dumb and Dumber," which stated that "when a single mother receives a . . . welfare check . . . her 'private lifestyle' becomes a matter of public concern." In the same article, you wrote that the President should "use the office as a bully pulpit to bring back a sense of shame in society."

a. **What did you find "shameful" about poverty and single motherhood?**

I do not believe there is anything shameful about poverty or single motherhood. I, however, would not write that statement today. Looking back at what I wrote over 20 years ago as a student, I especially do not like the tone and language, which come off as insensitive and naïve. As a college student who did not have sufficient life experience or knowledge of issues, I did not appreciate the complexities of life and thought (wrongly) that I somehow knew the answers to every issue. There are single mothers in my immediate family and extended family, and I have witnessed first-hand the struggles they face and how they strive to overcome them.

b. **Do you still believe that the President of the United States should use the office as a "bully pulpit" to target and shame poor single mothers?**

As noted above, there are single mothers in my immediate and extended family, and I respect them tremendously for all the obstacles they have faced. In that article, I was responding to an argument that politicians should never speak of moral issues, and I mentioned in the article that General Colin Powell — a man I admire for his service to our country — stated that the President should use the office as a bully pulpit.

4. As a student at Cornell, you wrote an article titled "The Native Americans vs. The Indigenous People," which made light of the use of Native American names and imagery in popular culture—a practice that many believe is offensive. You mockingly wrote that

"to display our sincere contrition and our commitment to our PC brethren, the [Cornell] Review suggests renaming the following athletic teams: Cleveland Indians [to] Cleveland Indigenous Peoples, Minnesota Vikings [to] Minnesota Norwegian Immigrants, Dallas Cowboys [to] Dallas Indians."

a. **Do you understand why Native Americans and indigenous people find the use of such names and images demeaning? If yes, please explain why.**

   I believe that we need to take the concerns raised by Native American groups seriously, and we need to put ourselves in the shoes of others to better understand their concerns. Further, it is critical that everyone be treated with respect and dignity.

b. **Do you still believe that people who object to the use of racial caricatures in professional sports and elsewhere are being too politically correct?**

   Please see response to Question 4a.

5. In 1995, you wrote an article defending a Cornell professor who posted flyers on campus advocating for conversion therapy—the practice of trying to change someone's sexual orientation. You wrote that "while [the professor's] views may seem eccentric, even somewhat parochial, it would be hard to construe them as hateful . . . . But when the radical fringe elements of the gay community saw the flyers, they became apoplectic."

   a. **Is it still your position that it is hard to construe support for conversion therapy as "hateful"?**

      I strongly opposed the content of the professor's views, and described them as "eccentric." But I also opposed efforts to have the professor dismissed from his job or to punish him for his odd and objectionable views because I believed that free speech protects even offensive speech.

   b. **Do you believe that the only people who oppose conversion therapy are "the radical fringe elements of the gay community"?**

      I strongly objected to the professor's views, and I understand how many people would rightfully be offended by it. The article was discussing certain students who wanted to punish the professor and/or have him dismissed from his job for his eccentric and objectionable views. I wrote that free speech protects even offensive and dumb speech; the best way to counteract offensive and dumb speech is through smarter and better speech that points out why the other speaker is wrong.

6. 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. **If confirmed, what steps will you take to help ensure that our justice system is a fair and equitable one?**

I will judge each case on the facts and the law, and bring no agenda or personal views to any case. Further, I would hope to use the bully pulpit of the judiciary to encourage more law firms, especially the large law firms, to undertake pro bono work to provide access to justice to indigent individuals and members of historically marginalized groups.

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

I have not studied this issue carefully, but I have read articles outlining racial disparities in sentencing and other facets of our criminal justice system. In my pro bono practice, I have represented numerous African-American individuals who have alleged abuse by law enforcement; I recall one of them telling me that he becomes uneasy whenever he sees law enforcement. And if some of us do not have faith in our justice system, it should concern us all.