

**Nomination of Sherri A. Lydon to the United States District Court for the  
District of South Carolina  
Questions for the Record  
Submitted October 23, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. According to your Questionnaire, you have spoken several times about the importance of federal gun laws and keeping guns out of the hands of those convicted of crimes, including domestic violence crimes. You have also spoken about the need to prevent gun violence from ever reaching our schools. (Q&A with South Carolina Justice Academy (Oct. 31, 2018); Welcoming Remarks, 2019 National Threat Assessment Program (June 11, 2019))

**a. What role can federal judges play in helping to prevent gun violence in schools?**

A federal judge must interpret and apply the laws passed by Congress, including those pertaining to gun restrictions.

**b. What role can federal judges play more generally in helping to keep guns out of the hands of those convicted of crimes?**

A federal judge must apply the laws passed by Congress that restrict or prohibit the ownership or possession of guns by those convicted of crimes.

2. You have spent the last year-and-a-half serving as the United States Attorney for the District of South Carolina. Your role is to serve as the state's top federal prosecutor. But if confirmed, your role will be entirely different.

**a. If confirmed, what steps will you take to ensure that you leave behind any biases or stances that favor the prosecution?**

Prior being appointed as United States Attorney, I practiced in the area of criminal defense for over thirteen years. I have an appreciation for the challenges facing a criminal defense attorney, and I do not believe that I have biases or stances that favor the prosecution.

**b. What role do you believe the federal judiciary can play in ensuring that indigent criminal defendants receive quality legal representation?**

A federal judge must ensure that all criminal defendants have effective counsel and receive a fair trial as mandated by the Sixth Amendment of the United States Constitution. A judge can ensure that this occurs by evaluating the preparation by counsel at all stages of the case.

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

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

### **Court precedent?**

It is never appropriate for an inferior court to depart from Supreme Court precedent.

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

District court judges are under a duty to observe and apply binding Supreme Court precedent. While it is generally improper for a district court judge to question Supreme Court precedent, there may be instances where respectfully identifying an issue well-positioned for Supreme Court review could be beneficial.

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

District courts are bound by precedents of the Supreme Court and the Circuit Court where the district court sits, but not by decisions of the other district courts. As such, a district court does not create precedent. Under the principal of the Rule of Law, however, a district court judge should render similar decisions when faced with similar facts. If the Fourth Circuit or the Supreme Court overrules a district court's decision, the district court must faithfully apply that precedent when ruling in a subsequent case involving the same issue.

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

The Supreme Court has made clear that "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Adhering to prior precedent, while not an "inexorable command," constitutes "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. *See Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

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

802 (2016)).

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

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Roe v. Wade*.

**b. Is it settled law?**

Yes, *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Roe v. Wade*.

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

Yes, *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Obergefell*.

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

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

I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Heller*. As far as commenting on Justice Stevens’s dissenting opinion, as an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

The Supreme Court in *Heller* recognized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). In *Heller*, the Supreme Court specifically stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying firearms in sensitive places such as schools and government buildings, or

laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27.

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

*Heller* does not expressly overrule or abrogate any prior Supreme Court precedent. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

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

In *Citizens United*, the Supreme Court identified over twenty prior instances in which it had “recognized that the First Amendment protection extends to corporations.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (2010). In the context of the specific issue in *Citizens United*, limits on corporate expenditures for electioneering communications, the Supreme Court held that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.” *Id.* at 365. Beyond that, it is, as a general rule, inappropriate for me to opine on Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

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

See my response to Question 7.a.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2012), the Supreme Court addressed whether the protections afforded by the Religious Freedom Restoration Act applied to corporations, but the issue of the applicability of the Free Exercise Clause to corporations was not resolved in that case. Because there may be litigation implicating this unanswered question, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

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

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

I was not asked my views on administrative law.

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

No one has asked me about my views on any issues related to administrative law.

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

I am aware of a number of relevant Supreme Court decisions that touch on the area that would be characterized as or related to administrative law, and as in all other areas of law, I would fully and faithfully apply all binding precedents.

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

I have not had any contact with anyone at the Federalist Society about my nomination to any federal court.

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

It is my understanding that there is currently pending or impending litigation which involves theories based on the allegation of injuries caused by climate change. Because there may be litigation related to this question, it would not be appropriate for me to opine on this issue. See Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.")

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

The Supreme Court has made clear that if a statute is ambiguous, as statutes can be, *see, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015) (examining whether the term “tangible object” as used in the Sarbanes-Oxley Act includes undersized red groupers caught by fishermen in the Gulf of Mexico), then it is permissible for a court to look to legislative history to understand the meaning of the ambiguous term, as both the plurality and the dissent did in *Yates*. *See id.* at 1084 (plurality op.) (Ginsburg, J.) (citing to legislative history); *id.* at 1093 (Kagan, J., dissenting) (“And legislative history, for those who care about it, puts extra icing on a cake already frosted.”)

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

No.

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

I received these questions on Thursday, October 24, 2019. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy, and I considered those comments in making final revisions on Monday, October 28, 2019. Each answer herein is my own.

**Written Questions for Sherri Lydon  
Submitted by Senator Patrick Leahy  
Wednesday, October 23, 2019**

1. According to public record you have donated over \$18,000 to Republican candidates between the years of 1994 and 2013. While I do not fault anyone for supporting political candidates they believe in, such a significant sum of money may cause litigants to question your ability to act impartially.

**(a) What assurances can you give this committee that, if confirmed, you will be able to act in a manner free from political influence?**

Title 28, U.S.C. Section 455, and the Code of Conduct for United States Judges require a judge to be impartial and objective and to decide matters absent any political influence. Judges must remain free from political influence in order to ensure the principal of an independent judiciary. Political influence should never affect the way a judge decides an issue or a case. If confirmed, I would abide by 28 U.S.C. Section 455 and the Code of Conduct for United States Judges, and I will faithfully uphold the integrity and independence of the judiciary.

2. 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?**

As an inferior court judge, my first and foremost obligation is to binding precedent on the meaning of any statutory term. Beyond that, I believe that looking to the text and structure of a statute is a salutary method of analysis, as the Supreme Court has repeatedly recognized.

3. 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?**

The independence of the federal judiciary is established in Article III of the Constitution. Consistent with the Free Speech and the Free Press Clauses of the First Amendment, judges may from time to time be subject to criticism, but that does not erode the independence of the federal 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 my response to Question 3(a).

4. 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?**

In *Webster v. Doe*, 486 U.S. 592 (1988), the Supreme Court held that due to national security concerns, the plaintiff's case under the Administrative Procedure Act could not proceed, but the Supreme Court permitted the plaintiff's constitutional claims to proceed, explaining that “where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.” *Id.* at 603 (quotations omitted).

5. Many are concerned that the White House's denouncement 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 principles rely 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.

6. 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 as well as the power of the purse to make or deny appropriations. As observed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), “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.” *Id.* at 536.



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?**

The Supreme Court has acted to enjoin Executive Branch actions, even during time of war, because no one is above the law. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent in this area.

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

See my response to Question 6(b).

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

On occasion, a conflict arises in court as to the Executive Branch's expertise in national security. *See, e.g., Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). If such an issue arises, as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

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

The Supreme Court has applied the Equal Protection Clause to classifications that discriminate against women. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

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

No.

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

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

11. 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?**

As a general rule, appellate courts do not engage in fact-finding; rather they evaluate the record on appeal. Federal Rule of Appellate Procedure 10(a) addresses the composition of the record on appeal. Under that rule, “[t]he following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk. See also Fed. R. App. P. 32(b) (providing requirements for the appendix). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent.

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

Each of those amendments contains an enforcement clause, *see, e.g.*, U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2. Those enforcement clauses provide Congress the ability to enforce the amendment by appropriate legislation.

13. 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?**

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Lawrence v. Texas*.

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

- (a) **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

The Supreme Court has summarized the importance of adhering to precedent in its observation that “*Stare decisis* – in English, the idea that today’s Court should stand by yesterday’s decisions, is ‘a foundation stone of the rule of law,’” and that “[r]especting *stare decisis* means sticking to some wrong decisions.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014)). Adhering to prior precedent, while not an “inexorable command,” constitutes “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tenn.*, 501 U.S. 808, 827 (1991). In determining whether to deviate from that preferred course of adhering to precedent, the Supreme Court may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance interests at stake, and the quality of the prior reasoning. See *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent.

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

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

I would apply conflict rules and ethical standards to assess whether a recusal is required or would be beneficial to the integrity of the judiciary. For instance, I would recuse myself from any case in which I have participated as an attorney. In addition, the District of South Carolina has a pre-screening process to avoid case assignments with a judicial conflict. As a sitting judge, I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel including recusal where necessary.

16. 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?**

Footnote 4 of *Carolene Products* is one of the most significant footnotes in constitutional law due to its role in the development of tiers of constitutional scrutiny. Specifically, the footnote contemplated more exacting judicial scrutiny in certain spheres, such as the right to vote, while the opinion itself employed rational basis review for economic legislation. For context, the full sentence quoted above from footnote 4 states, “It is unnecessary to consider now whether legislation which restricts those political process 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.” *United States v. Carolene Prods.Co.*, 304 U.S. 144, 152 n.4 (1938).

17. 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 and the events discussed in the Mueller report 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, it can be.

18. **Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

As a sitting judge, it is not appropriate for me to comment or opine publicly on this speculative and hypothetical scenario about a President’s ability to self-pardon. *See* Canons 2 and 5, Code of Conduct for United States Judges.

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

The Constitution confers to Congress certain enumerated powers, including the two identified in this question. The Supreme Court has addressed the scope of those powers on a number of occasions. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

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

- (a) **What do you believe is the “appropriate weight” that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court rejected the plaintiff’s request for a searching inquiry into the justifications for Presidential Proclamation No. 9645, 82 Fed. Reg. 45161, because such an inquiry would be “inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.” *Trump v. Hawaii*, 138 S. Ct. at 2409. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent in this area.

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

In *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court, in articulating the undue burden standard, quoted two passages from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): (i) “a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends,” *Whole Woman’s Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877), and (ii) “unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,” *Whole Woman’s Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Whole Woman’s Health*. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which

directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

22. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

**(a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

The Supreme Court developed the modern doctrine of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and has refined it over time in cases such as *Pearson v. Callahan*, 555 U.S. 223 (2009). As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent on qualified immunity.

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

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

The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), recognized that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). In a similar vein, Congress has enacted the Electronic Communications Privacy Act, which imposes several statutory restrictions above and beyond those required by the Fourth Amendment on searches involving certain types of electronic communications. *See* 18 U.S.C. § 2518. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should

not make public comment on the merits of a matter pending or impending in any court.”  
*See also* Canons 2 and 5, Code of Conduct for United States Judges.

24. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

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

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court explained that “a fundamental principle of appropriations law is that where ‘Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements. . . .’” *Id.* at 192 (quoting *LTV Aerospace Corp.*, 55 Comp. Gen 307, 319 (1975)). Because there may be litigation implicating this question, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

25. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

**(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?**

Judicial independence is incredibly important, and this has been long and continuously recognized: from Federalist No. 78, which observed that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution,” to Canon 1 of the Code of Conduct for United States Judges, which provides that “[a]n independent and honorable judiciary is indispensable to justice in our society.”

**Nomination of Sherri A. Lydon  
to the United States District Court for the District of South Carolina  
Questions for the Record  
Submitted October 23, 2019**

**QUESTIONS FROM SENATOR WHITEHOUSE**

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

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

I had not read the article previously, but I have now reviewed it in response to the above request.

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

Judicial independence and impartiality are fundamental and essential principles underlying the American judicial system. Otherwise, it is inappropriate for me to comment because this is an issue that could come before the courts in pending or impending litigation.

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

See response to Question 1(b) above.

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

No.



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

See response to Question 1(b) above.

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

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

To the extent Chief Justice Roberts was using this analogy to indicate that the judge’s role is to resolve disputes presented by the parties based on the applicable law and not on the judges’ personal views or preferences, I do agree with this analogy.

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

Judges should understand the facts and circumstances of the cases brought before them so that they also understand the impact or consequences of their decisions.

- 3. 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?

No. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.”).

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

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

There is some role for empathy to play in a judge’s decision-making process. For instance, a judge can be empathetic in exercising his or her discretion in setting court dates and schedules so as to avoid unduly burdening parties, counsel, witnesses, victims, or jurors. Empathy, however, does not supersede a judge’s obligation to follow the law.

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

Several components of a judge's experience can affect the judge's decision-making process, such as a judge's knowledge, education, training, and ability to respect all persons and to treat them with respect and dignity. A judge's personal preferences, however, have no place in a judge's decision-making process; a judge should follow the law.

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

No.

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

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

The right to jury trial is a bedrock principle in the American judicial system. The Declaration of Independence listed denial of the right to jury trial as one of the grievances against England that justified separation, and the Constitution enshrines the right to jury trial in both criminal and civil cases. U.S. Const. Amend. V, VI, VII. The role of the jury is to decide the facts of the case and, in so doing, serve as a check on the power of government.

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

Preservation of the right to jury as provided under the Constitution should always be a concern for the courts. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care."). I will apply Supreme Court and Fourth Circuit precedent regarding the scope of the Seventh Amendment right to a jury if confirmed.

- 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?

See response to Question 6(b).

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

The Supreme Court has addressed this issue in *Whole Woman's Health v. Hellerstedt* and other cases. In *Whole Woman's Health*, the Court held that courts "must review legislative 'factfinding under a deferential standard'" but not give them "'dispositive weight.'" 136

S. Ct. 2292, 2310 (2016). I will apply this and all other Supreme Court and Ninth Circuit precedent addressing this issue if confirmed.

8. Earlier this year, the Federal Judiciary’s Committee on the Codes of Conduct issued “Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates.” I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

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

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

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

See response to Question 8(b).

**Nomination of Sherri A. Lydon, to be United States District Judge  
for the District of South Carolina  
Questions for the Record  
Submitted October 23, 2019**

**QUESTIONS FROM SENATOR COONS**

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

I would look to the Supreme Court and the Fourth Circuit for the governing framework, starting with cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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

Yes, the Supreme Court has considered that factor.

- 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. Please see my response to Question 1.

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

Yes as to the first question. As to the second question, as an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent, and in the absence of any controlling precedent, I would look to precedent of other circuit courts.

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

Yes.

- 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*).

As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent, including *Lawrence* and *Casey*.

- f. What other factors would you consider?

Please see my response to Question 1.

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 applied the Equal Protection Clause to race-based classifications and to gender-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (gender-based classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race-based classification); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender-based classification).

- 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?

On several occasions, the Supreme Court has addressed the proper means for interpreting and applying the Fourteenth Amendment, and as an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent regarding the Equal Protection Clause.

- 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 understand that *United States v. Virginia* was not the first time that the Supreme Court struck down a gender-based classification relating to educational opportunities. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). I do not know why there was not an earlier challenge to Virginia Military Institute's former male-only admission policy.

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

In *Obergefell v. Hodges*, the Supreme Court held that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." 135 S. Ct. 2584, 2607 (2015). As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent regarding the Fourteenth Amendment.

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

Because there may be litigation implicating this issue, I must refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

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

The Supreme Court found a right for married couples to use contraceptives in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and later in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court overturned a conviction under a law banning the distribution of contraceptives, without regard to marital status. As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent in this area.

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

The Supreme Court has repeatedly recognized such a right. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent in this area.

- 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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court struck down a state criminal law based on the liberty interest protected by the Due Process Clause for “two adults who, with full and mutual consent from each other engaged in sexual practices. . . .” *Id.* at 578. As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent in this area.

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3(a), and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry.

Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, and when applicable precedent makes it appropriate to consider such evidence, I will do so in accordance with controlling precedent.

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

Under Rule 702 of the Federal Rules of Evidence as well as precedent in the *Daubert / Joiner / Kumho Tire* line of cases, expert opinions from these disciplines may be admissible into 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?

Because there may be litigation implicating this issue, I respectfully refrain from further responding to this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” See also Canons 2 and 5, Code of Conduct for United States Judges.

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

I would look to the Supreme Court and the Fourth Circuit for the governing framework, starting with cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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?

This is a topic of academic debate among legal scholars. As an inferior court judge, I would follow all binding Supreme Court and Fourth Circuit precedent regarding *Brown* and its progeny.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited Oct. 22, 2019).

Please see my response to Question 6.a.

- 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?

Yes, *see, e.g.*, U.S. Const. art. 1, § 3, cl. 3 (requiring Senators to be at least thirty years old), and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent regardless of whether that precedent is based on the original public meaning of a constitutional provision.

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

Please see my response to Question 6.c.

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

I would observe and apply all relevant Supreme Court and Fourth Circuit precedent that identifies the appropriate sources to use to discern the contours of a constitutional provision.

- 7. In remarks during an October 2018 question and answer session at the South Carolina Criminal Justice Academy, you expressed your desire to improve the U.S. Attorney’s Office’s relationship with law enforcement, stating, “[U]nder the prior administration, those relationships with law enforcement were not as strong as I knew them to be when I was here.” Please explain what you meant by this statement, including why you believe relationships with



law enforcement became less strong during the Obama administration, and please describe any changes you made when becoming the U.S. Attorney to strengthen relationships with law enforcement.

My remarks were not intended to disparage the Obama Administration. Law enforcement officials expressed concerns directly to me about local issues which occurred prior to my assuming responsibilities as United States Attorney for the District of South Carolina. I meant no disrespect to others who served before me. I simply was intent on strengthening relationships with our state and local law enforcement partners.

As United States Attorney for the District of South Carolina, I work closely with my law enforcement partners. I regularly attend and participate in programs, trainings, and public service events sponsored by federal, state, and local law enforcement agencies. I reinstated an executive board of select sheriffs, police chiefs, and federal law enforcement agency heads. This board meets to discuss issues threatening the safety of South Carolina citizens and how best to address those issues. I also conduct more training events for law enforcement and work hard to get federal resources for my state and local law enforcement partners. In furtherance of these efforts, the lawyers in our office understand the importance of being responsive to the needs of law enforcement.

**Questions for the Record for Sherri A. Lydon  
From Senator Mazie Hirono**

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
  - a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.
  - b. **Have you ever faced discipline, or entered into a settlement related to this kind of conduct?**

No.
2. As U.S Attorney for the District of South Carolina and as an Assistant U.S. Attorney in that office, you personally prosecuted or otherwise oversaw a number of public corruption cases, including in relation to an FBI investigation known as Operation Lost Trust in which 27 lawmakers and lobbyists were convicted of participating in vote buying and other corruption.

**Based on your experience, why is it important to expose and prosecute corruption at all levels of government?**

The Rule of Law only works if it applies equally to all. We are a nation of laws, not of men. A nation of laws means that laws, not people, rule. Everyone is to be governed by the same laws, regardless of their station; whether it is the most common American or those who hold public office, all must be held to the just laws of America. It promotes public confidence in government and the Rule of Law when we hold accountable public officials who violate the law.

3. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.
  - a. **Do you agree that training on implicit bias is important for judges to have?**

Judges are ethically and morally bound to decide cases without regard to bias, prejudice, or preference. I agree that training to help judges understand and fulfill this obligation is important.
  - b. **Have you ever taken such training?**

Yes. I am a graduate of the Diversity Leaders Initiative of the Riley Institute at Furman University. The programs presented by the Institute included education and training on implicit bias.

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

If confirmed, I will participate in any training opportunities offered to assist me in learning my role and performing it to the best of my ability.

**Nomination of Sherri A. Lydon**  
**United States District Court for the District of South**  
**Carolina Questions for the Record**  
**Submitted October 23, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. In *United States v. Swinton*, your office argued against a motion to suppress several post-arrest statements the defendant made to law enforcement officers after asking for an attorney.<sup>1</sup> Specifically, your office argued that the request for an attorney was not unequivocal, therefore, the statements were admissible.<sup>2</sup>

- a. How did the court rule in that case on the motion to suppress?

The district court suppressed the statement in an order dated July 23, 2018.

- b. What role did you play in the argument against the motion to suppress?

I was not involved in the preparation of the memorandum opposing the suppression motion. I had been United States Attorney for less than a month when the memorandum was filed.

2. In 2019, your office filed an appellate brief with the U.S. Court of Appeals for the Fourth Circuit arguing in favor of sweeping police authority to investigate citizens.<sup>3</sup> Specifically, the brief argued that the traffic stop in question never evolved into a scenario requiring *Miranda* warnings because only one officer was present for most of the traffic stop and the officer had not brandished his firearm.<sup>4</sup> In short, your office characterized the law enforcement officers' interactions with the driver as "simply convers[ing] with him for a brief period about his travel and activities," despite the fact that the officers disclosed that they believed were interrogating the individual.

- a. What role did you play in drafting and approving this brief?

I was not involved in the drafting and approval of this brief. In accordance with our district's normal procedures, the line Assistant United States Attorney prepared the brief and the brief was reviewed, edited, and approved by the Appellate Division in the office.

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<sup>1</sup> Government's Response to Motion to Suppress, *United States v. Swinton*, No. 9:17-945-RMG (D. S.C. June 15, 2018), 2018 WL 8261879.

<sup>2</sup> *Id.*

<sup>3</sup> Opening Brief of Appellant, *United States v. Simmons*, No. 18-4349, (4th Cir. Dec. 21, 2018), 2018 WL 6734994, at 2.

<sup>4</sup> *Id.*

- b. Did you have any concerns with the argument put forward in the brief? If so, what were those concerns?

I have no concerns about the argument put forward in the brief. In fact, the Fourth Circuit affirmed the ruling of the district court and agreed with the argument put forward in our brief. *See United States v. Simmons*, 763 Fed.Appx. 331, 332-33 (4th Cir. April 2019 (unpublished)).

- 3. Based on a review of your record while U.S. Attorney for the District of South Carolina, your office frequently argued against downward departures in sentences recommended by the Sentencing Guidelines.

- a. What accounts for the high propensity of arguing against downward departures?

I do not believe the District of South Carolina has a higher propensity of arguing against downward departures than other offices. The office agrees to downward departures when the sentencing guidelines call for them. In particular, our office agrees to and moves for downward departures in many cases when a defendant provides substantial assistance to the government.

- b. Did your office have a policy regarding arguing against downward departures from the Sentencing Guidelines' recommended sentence? If so, what was that policy?

The office agrees to a downward departure when justified by the law and facts of the individual case and defendant in accordance with the sentencing guidelines.

- 4. Following the passage of the First Step Act, your office submitted a number of legal briefs with the District of South Carolina and the Fourth Circuit arguing against sentence reductions sought pursuant to the law.

- a. What was your office's rationale for arguing against the sentence reductions or modifications in those cases?

The Department of Justice promulgated detailed guidance for U.S. Attorney Offices in handling First Step Act motions. My office followed this guidance in responding to First Step Act motions. When an AUSA had a question about a difficult issue he was instructed to reach out subject matter experts at Main Justice for advice and direction. According to the U.S. Sentencing Commission, at the end of July 2019, more defendants were given relief under the First Step Act in the District of South Carolina than in any other district in the United States.

- b. What role did you play these cases involving First Step Act sentencing modifications?

I made sure all AUSAs in the District of South Carolina received the detailed guidance for handling First Step Act motions. I delegated to the Criminal Chief and the Appellate Chief the responsibility of making sure our responses were handled expeditiously and according to the law and the guidance from DOJ. Our office has handled over 450 First Step Act motions since January 2019.

5. In 2018, you participated in a question and answer session for the South Carolina Criminal Justice Academy. At the event, you said “under the prior administration, those relationships with law enforcement were not as strong as I knew them to be when I was here.”<sup>5</sup>

- a. These comments seem to suggest that the Obama Administration did not have good relations with law enforcement. Is that an accurate take away from those remarks? If not, what did you mean?

My remarks were not intended to disparage the Obama Administration. Law enforcement officials expressed concerns directly to me about local issues which occurred prior to my assuming responsibilities as United States Attorney for the District of South Carolina. I meant no disrespect to others who served before me. I simply was intent on strengthening relationships with our state and local law enforcement partners.

- b. Do you believe that the Obama Administration had a strained relationship with law enforcement? If so, why?

I do not have any knowledge or information regarding the Obama Administration’s relationship with law enforcement. My concerns were specific to the relationship between federal prosecutors and law enforcement officials in the District of South Carolina.

6. In 2018, you presented an award named after Senator Strom Thurmond that recognizes achievement by law enforcement officials in South Carolina. In presenting that award you said, “There is no statesman who cared more about serving his state than Strom Thurmond and there can be no prouder name for these awards which recognize exceptional service.”<sup>6</sup> Strom Thurmond was a segregationist who opposed the advancement of civil rights for African Americans. In fact, holds the record for the longest filibuster in U.S. Senate history after filibustered the Civil Rights Act of 1957 for 24 hours and 18 minutes. Do you at all regret saying that “there can be no prouder name for these awards which recognize exceptional service”? If not, please explain why.

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<sup>5</sup> Q&A with South Carolina Criminal Justice Academy, at 8:36-8:46, 8:52-9:04 (Oct. 31, 2018) (video on file with Committee staff).

<sup>6</sup> Sherri Lydon, Welcoming Remarks, Strom Thurmond Awards (Oct. 26, 2018) (SJQ Attachment 12(d) at p. 139).

My comments were intended to recognize Senator Thurmond's dedication and years of public service to South Carolina and to law enforcement specifically. My comments were not an endorsement of all of the positions that he took during his seventy years of public service. If confirmed, I will treat all who come before me equally, and with dignity and respect.

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

I tend not to label myself because the term "originalist" may mean different things to different people. As an inferior court judge, my first and foremost obligation is not to any specific interpretative method, but to binding precedent. Beyond that, the Supreme Court has indicated that that looking to the original public meaning of the terms in the Constitution is a salutary method of analysis in some cases. For example, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the majority opinion by Justice Scalia and the dissenting opinion by Justice Stevens were based on their respective understandings of the original public meaning of the Second Amendment.

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

For reasons similar to those articulated in my response to Question 7, I tend not to label myself in light of the different meanings that people may ascribe to the term "textualist." As an inferior court judge, my first and foremost obligation is to binding precedent on the meaning of any statutory term. Beyond that, the Supreme Court has indicated that looking to the text and structure of a statute is a salutary method of analysis in some cases. In addition, in a 2015 lecture on statutory interpretation, Justice Kagan said, "we're all textualists now."

9. 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?

I would consider the arguments presented by parties in briefing, and I recognize that the Supreme Court has made clear that when a statute is ambiguous, it is permissible for a court to consider 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?

Yes, consistent with my response to Question 9a, I would evaluate arguments presented by the parties regarding legislative history.

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

I view judicial restraint as the opposite of judicial activism, and yes, as defined, I believe that judicial restraint is an important value for all judges to possess.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>7</sup> Was that decision guided by the principle of judicial restraint?

*Heller* is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>8</sup> Was that decision guided by the principle of judicial restraint?

*Citizens United* is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, I respectfully refrain from further responding to this question.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>9</sup> Was that decision guided by the principle of judicial restraint?

*Shelby County* is binding Supreme Court precedent, and as an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent. As an inferior court judge, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions, and for that reason, respectfully refrain from further responding to this question.

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<sup>7</sup> 554 U.S. 570 (2008).

<sup>8</sup> 558 U.S. 310 (2010).

<sup>9</sup> 570 U.S. 529 (2013).



11. Since the Supreme Court’s *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>10</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>11</sup>

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

I have not studied this issue in depth. Because there may be litigation implicating this issue, as a sitting judge, I respectfully refrain from further responding pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges, which directs that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” *See also* Canons 2 and 5, Code of Conduct for United States Judges.

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

Please see my response to Question 11.a.

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

Please see my response to Question 11.a.

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<sup>10</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>11</sup> *Id.*

12. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>12</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>13</sup> These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>14</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>15</sup>

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

I have not studied this issue in depth, but the conclusion that members of the criminal justice system have acted with implicit social cognition on the basis of race would not surprise me.

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

I have not studied this issue in depth, but generally yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not studied the issue of implicit racial bias in our criminal justice system. However, as a participant in the Diversity Leadership Initiative at Furman University, I attended programs and training on the issue of implicit bias, and these issues are important to me.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.<sup>16</sup> Why do you think that is the case?

Those disparities concern me, and in recognition of the depth of this interdisciplinary issue, I look forward to updates and explanations that the Sentencing Commission may provide – those would be very important to me.

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<sup>12</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.<sup>13</sup>

*Id.*

<sup>14</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

<sup>15</sup> *Id.*

<sup>16</sup> U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.<sup>17</sup> Why do you think that is the case?

Those disparities concern me, and I look forward to updates and explanations on this significant issue as they become available – those would be very important to me.

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

In addition to ensuring the correctness of the sentencing guidelines range and the rulings on any departures, appellate judges can review the record to ensure a meaningful evaluation of statutory factors, *see* 18 U.S.C. § 3553(a), that consider the individual circumstances of the defendant to ensure that the sentence is “sufficient, but not greater than necessary.”

- 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.<sup>18</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>19</sup>

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

I have not studied this issue in depth, but I recognize that it is difficult to distinguish causation from correlation, especially on a multivariate issue such as this one.

- 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.

See my response to Question 13.a.

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<sup>17</sup> Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

<sup>18</sup> Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

<sup>19</sup> *Id.*

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

Yes.

16. Do you believe that *Brown v. Board of Education*<sup>20</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, I believe *Brown v. Board of Education* was correctly decided. As I have noted before, *Brown* corrected an abominable wrong in our nation's history by ending the false doctrine of separate but equal that was established in *Plessy v. Ferguson*.

17. Do you believe that *Plessy v. Ferguson*<sup>21</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, *Plessy v. Ferguson* was an abominable wrong in our nation's history. In *Brown v. Board of Education*, the Supreme Court correctly ruled in a unanimous decision that *Plessy* was not correctly decided.

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

No.

19. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."<sup>22</sup> Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself, *see* 28 U.S.C. § 455. In my experience, I am not aware of an instance in which a judge was recused or disqualified based on his or her race or ethnicity.

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<sup>20</sup> 347 U.S. 483 (1954).

<sup>21</sup> 163 U.S. 537 (1896).

<sup>22</sup> Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

20. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”<sup>23</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court explained that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* at 693. As an inferior court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Fourth Circuit precedent, including *Zadvydas*.

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<sup>23</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris  
Submitted October 23, 2019  
For the Nomination of**

**Sherri A. Lydon, to the U.S. District Court for the District of South Carolina**

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

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

I understand the importance for a district court judge to make an individualized assessment based on the facts and arguments presented in order to fashion an appropriate sentence that is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a). As such, I would carefully study the relevant materials, including the Presentence Investigation Report, the recommendation of the United States Probation Office, the sentencing memoranda and evidence submitted by the parties, letters submitted on behalf of the defendant, any victim impact statements, and any allocution of the defendant. I would take into consideration the Sentencing Guidelines and specifically follow the three steps set forth in *Gall v. United States*, 552 U.S. 38 (2007). First, I would calculate the guideline range; second, I would formally rule on any departure or variance motions and state how those rulings affect the guideline range; and finally, I would consider the statutory factors in 18 U.S.C. § 3553(a). I would adhere to the principles set forth in *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (en banc) and give arguments of counsel meaningful consideration by acknowledging and responding to “any properly presented sentencing argument which has colorable legal merit and a factual basis.”

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

I would follow the steps outlined in my response to Question 1(a), however, I would also bring my experience from participating in hundreds of sentencing hearings where numerous district court judges determined what constituted a fair and proportional sentence. In addition, I would avail myself to available sentencing data for comparative convictions, as needed.

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

The Sentencing Guidelines are discretionary; however, a district court judge must carefully consider the advisory guideline calculation in every case. A district judge may determine that a departure from the guidelines is warranted based on the facts and circumstances presented in a particular case, such as based on the inadequacy of the criminal history category, or for substantial assistance to authorities or upon a finding

of “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b).

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

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

Congress has established certain mandatory minimum sentencing requirements for certain crimes, and if confirmed, I would follow the law established by Congress, regardless of my personal views. As a judicial nominee, I must respectfully refrain from responding to this question which is asking for my personal views on a matter of policy reserved for Congress.

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

See my response to Question 1(d)(i).

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

See my response to Question 1(d)(i).

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.<sup>2</sup> **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

I do not believe it is appropriate for me to commit to doing so at this time.

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

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

<sup>2</sup> See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

In general charging decisions are entrusted to the Executive branch. To the extent applicable case law and ethical rules permit me to discuss charging policies with members of the Executive branch, I would consider doing so under certain, limited circumstances where the policies undermine confidence in the criminal justice system.

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

See my response to Question 1(d)(iv)(2).

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

If confirmed, I would consider all sentencing options permitted by statute and in accord with the Sentencing Guidelines, including alternatives to incarceration in the appropriate situations.

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

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

Yes.

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

Yes, I am aware of the statistics from many sources, including from the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men and that sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I will do everything in my power to guard against racial disparities in cases that come before me. I commit that all persons that come into my courtroom will be treated fairly, respectfully and equally.

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

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

Yes.



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

I intend to make staffing decisions on a case-by-case basis, and in doing so I would look for opportunities to hire and promote qualified minorities and women.