Nomination of Matthew Walden McFarland to the United States District Court for the Southern District of Ohio
Questions for the Record
July 3, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

    It is never appropriate for a lower 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?**

    A district court judge must fully and faithfully apply all Supreme Court precedent and it is not proper to question that precedent. A district court generally does not author a dissent unless sitting on a panel.

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

    The Federal Rules of Civil Procedure provide standards for a district court to set aside its prior rulings in a specific case in Fed. R. Civ. P. 59(e), 60 and when appropriate I would follow those rules.

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

    The decision to overrule Supreme Court precedent rests only with them.

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

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

    If I am so fortunate to be confirmed as a district court judge, all Supreme Court decisions, including *Roe v. Wade,* are binding precedent that I will faithfully follow.

b. Is it settled law?

Yes, all Supreme Court precedent is settled law.

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

   Yes.

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

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

   The decision in *Heller* is binding precedent and if confirmed I will faithfully apply this precedent. It would be inappropriate for me to opine further.

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

   As a sitting Ohio Appellate judge and district court nominee, it would be inappropriate for me to opine on how *Heller* may apply in future cases.

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

Please see my response to Question 4.a.

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

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

   As a sitting Ohio appellate judge and district court nominee, it would be inappropriate for me to opine on this topic consistent with my ethical obligations.

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

   Please see my response to Question 5.a.

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

Please see my response to Question 5.a.

6. 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?

No.

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

No.

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

If I am so fortunate to be confirmed, I will follow my oath of office and faithfully apply all Supreme Court and Sixth Circuit precedent in this area, as well as all others.

7. When you initially submitted your Senate Judiciary Questionnaire, you stated that you were a member of the Scioto County Right to Life organization in 1997 only. In February 2019, you sent a letter to the Committee amending your dates of membership in the Scioto County Right to Life from 1997 to 2004.

a. Please explain why you omitted your membership in the Scioto County Right to Life organization from 1998-2004.

It was a clerical error. When I realized the error I made, along with the dates of my membership on the Shawnee State University Development Board, I immediately amended my responses to correctly reflect the dates of my membership in those organizations. I wanted to be fully transparent to this committee and the full U.S. Senate.

b. Please explain the nature of your involvement with the Scioto County Right to Life organization during this time period, including any events and activities you attended or functions you performed for the organization.

My wife and I attended an informational meeting in 1997 and signed up on their email list. That was the only meeting I recall ever attending. I was not on their Board and never served as an officer.

8. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2017. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I am not familiar with that statement and accordingly cannot comment on its meaning. And, consistent with my ethical obligations under Canons 2 and 5 of the Code of Conduct for United States Judges must respectfully decline to answer further.

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

Please see my response to Question 8.a.

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

Please see my response to Question 8.a.

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

During this process, I have had general discussions with various member of the legal community about my nomination, some of whom are also members of the Federalist Society.

e. You indicated on your Questionnaire that you joined the Federalist Society

in 2017, 25 years after you began practicing law. Why did you decide to join the Federalist Society in 2017?

Because my practice and judicial experience has been in the courts of the State of Ohio, I wanted to expand my knowledge of federal law and practice with the continuing education programs they offer and for the networking opportunities.

9. On your Senate Judiciary Questionnaire, you state that you have been a member of the National Rifle Association (NRA) in 2004 and from 2015 to 2018.

   a. Are you currently a member of the NRA?

   No.

   b. If confirmed to the District Court, will you remain a member or renew your membership with the NRA?

   I am not a member and at this time do not plan on renewing my membership.

   c. Do you commit to recusing yourself from any cases that come before you that present legal issues upon which the NRA has taken a position? If not, why not?

   As I have done for the past 19 years as common pleas court magistrate and state appellate judge, I review recusal issues on a case by case basis and will continue that practice if confirmed.

   d. Can you cite any issue areas where you disagree with the NRA's publicly stated positions?

   Because this question calls for me to opine on issues that may be in litigation or may likely come before me if confirmed, I must respectfully refrain from comment consistent with my ethical obligations under Ohio Code of Judicial Conduct and Code of Conduct for United States Judges.

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

    Generally, if the statute is clear and unambiguous, the inquiry ends there. If confirmed, I will follow all Supreme Court and Sixth Circuit precedent in the use of legislative history.

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

    No.

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

I received these questions on July 4, 2019. I conducted limited research and drafted my answers. I shared my draft answers with the Office of Legal Policy at the Department of Justice and revised my answers as I thought appropriate. After my answers were finalized, I authorized the Department of Justice to file my answers.

Written Questions for Matthew W. McFarland
Submitted by Senator Patrick Leahy
July 2, 2019

1. **Please describe any experience you have either practicing or adjudicating questions of federal law.**

I have been very fortunate to have a very diverse legal background in State courts in Ohio. I started my legal career as a court appointed public defender and then served as a criminal prosecutor at the municipal, juvenile, and county levels. In each role, I litigated many questions of federal law in the criminal context. On the bench, I have sat at each level in the Ohio judiciary by serving as a common pleas court magistrate, elected three times to a 14 county appellate court and sat 4 times as a visiting judge by selection of the Ohio Chief Justice as a visiting judge on the Ohio Supreme Court. In each of the judicial roles, I have had the opportunity to rule on many constitutional issues. At the trial court level, I conducted over 7,000 hearings, at the court of appeals I have authored over 1,000 majority and administrative decisions, and cast over 2,900 appellate votes as a panel member with my colleagues.

2. According to your Senate Judiciary Questionnaire, you have been a member of the Federalist Society since 2017. And in April of that year, you first submitted an application to Ohio's bipartisan judicial advisory committee.

a. **What spurred your decision to join the Federalist Society in 2017?**

Recognizing that I have spent my career as a state court judicial officer and litigator, I joined the Federalist Society to expand my knowledge of federal law through their continuing education programs and for networking opportunities.

b. Were you encouraged to become a member of the organization in connection with your desire to apply for a federal judicial vacancy, or is there otherwise any connection between your decision to become a Federalist Society member and the judicial vacancy to which you applied?

No.

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

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

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

As a state court appellate court judge and if I am so fortunate to be confirmed as a district court judge, my foremost obligation is to binding precedent on the meaning of any statute. As such, I believe reviewing the text and structure of a statute is very important.

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

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

An independent federal judiciary is established by Article III of the Constitution and critical to the fair administration of justice. These protections are designed to enable judges to make decisions, supported in law, without respect to criticisms in the public that may follow.

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

Please see my response to Question 4(a).

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

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

The Supreme Court held in *Webster v. Doe*, 486 U.S. 592 (1988), that due to national security concerns, the plaintiff's case under the Administrative Procedure Act could not 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.).

6. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders.

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

As a sitting Ohio judge and federal district court nominee, I believe it is inappropriate to comment in the context of this question pursuant to Canon 3(A)(6) of the Code of Conduct for United States Judges. If I am so fortunate to be confirmed, I will faithfully follow my oath of office and relevant binding precedent.

7. 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?

Article I, Section 8, Clauses 1 to 18 of the Constitution, provide the enumerated powers of Congress, including the power of the purse and sword. In *Hamdi v. Rumsfeld*, 52 U.S. 507 (2004) , the Court stated "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 Constitution gives the powers of foreign and war affairs to Congress and the President. If I am so fortunate to be confirmed as a district court judge, I will follow my oath and faithfully apply all binding Supreme Court and Sixth Circuit precedent.

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

Please my response to Question 7(b).

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

It appears this question may implicate impending litigation. As a sitting Ohio Judge and nominee, I must respectfully refrain from responding to this question consistent with Canons 2, 3(A)(6), and 5 of the Code of Conduct for United States Judges.

9. 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?

I am not familiar with that remark. In *United States v. Virginia*, 518 U.S. 515, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits discrimination against women.

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

The Voting Rights Act is a landmark law of which I will faithfully follow if I am so fortunate to be confirmed as a district court judge.

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

Article I, Section 9, Clause 8, of the Constitution states: "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 whatever, from any King, Prince or foreign State."

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

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

    Generally, trial courts create the record and appellate courts review that record for error. Established standards of review provide the lens as guidance for the appellate review thereof. The holding of *Shelby County v. Holder*, 570 U.S. 529 (2013), is binding Supreme Court precedent and I will faithfully follow the same if I am confirmed.

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

The Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution demonstrate a defined commitment to counteract racial discrimination. Each provide that Congress has the power to enforce them by "appropriate legislation."

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

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

The case of *Lawrence v. Texas,* 539 U.S. 558 (2003), is binding Supreme Court precedent and if I am confirmed, I will faithfully apply it as well as all other binding precedent from the Sixth Circuit.

15. 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?

As a magistrate and appellate judge in the Ohio judiciary for the past 19 years I recognize the great importance that stare decisis plays in our legal system by providing stability and predictability. And presently, I am bound by the binding precedent of the Ohio Supreme, the Sixth Circuit Court of Appeals, and the U.S. Supreme Court. As such, if I am so fortunate to be confirmed, I will continue to follow all binding precedent on me as a district court judge. In determining if he U.S. Supreme Court can deviate from precedent, they may consider the unworkability of the prior decision, the antiquity of the precedent, the reliance at stake, and the quality of the prior reasoning. *Montejo v. Louisiana*, 556 U.S. 778 (2009).

16. 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.

If I am so fortunate to be confirmed, I will apply the conflict rules and ethical standards for district court judges so as to ensure fairness and impartiality. Specifically, I would recuse myself in any appeal I sat on for the Ohio 4th District Court of Appeal should it ever reach district court. I would also recuse myself involving any litigation involving Shawnee State University, where I work as an adjunct professor.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the

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

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

Courts play an important role in protecting constitutional rights by the fair application of the law and respect for the same. Pursuant to Canon 3(A)6 of the Code of Conduct of U.S. Judges, it would be inappropriate for me to comment on abstract legal concepts that may require consideration and application to future cases or controversies as a district court judge.

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

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

Yes, generally.

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

Under Canons 2 and 5, of the Code of Conduct for United States Judges, I believe it is not appropriate for me to opine on this issue.

20. **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 in Article I, Section 8, Clause 3, expressly allows Congress: "To regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes" along with the necessary and proper clause. And, the Supreme Court has discussed these powers in several cases. *See, Gonzales v. Raich*, 545 U.S. 1 (2005); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

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

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

In that case, 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." And, if I am so fortunate to be confirmed, I will follow my oath and faithfully apply all binding precedent of the U.S. Supreme Court and the Sixth Circuit in all respects.

22. **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, 2309 (2016), the Supreme Court held that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a women seeking an abortion impose an undue burden on the right." As a judicial nominee, it would not be appropriate for me to comment on specific examples that may arise in future cases or may already be in litigation, pursuant to Canon 3(A)6 or the Code of Conduct of U.S. Judges.

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

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

As a judicial nominee, and a sitting Ohio judge where these types of issues are frequently before us, it is not my place to grade or opine on the decisions of the Supreme Court in this context. If I am so fortunate to be confirmed, I will faithfully apply all binding precedent in this area of qualified immunity.

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

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

In that case, the Supreme Court has acknowledged that new technological developments can create serious concerns under the Fourth Amendment. As a judicial nominee, it would not be appropriate for me to comment on specific examples that may arise in future cases or may already be in litigation, pursuant to Canon 3(A)6 or the Code of Conduct of U.S. Judges.

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

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

I have not researched this area of the law and have not considered it. And, as a sitting Ohio judge and nominee, it would be inappropriate for me to comment on issues that may arise in future cases or are now in litigation.

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

Independent and impartial courts and judges therein must be free from political influence for justice to be served to all. Article III of the Constitution allows for the protection of that judicial independence. I strongly believe that an independent judiciary is a cornerstone pillar of our constitutional system and the promotion of the rule of law in our republic.

Nomination of Matthew Walden McFarland
to the United States District Court for the Southern District of Ohio
Questions for the Record
Submitted July 3, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Recent reporting in the Washington Post ("A conservative activist's behind-the-scenes campaign to remake the nation's courts," May 21, 2019) 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?

        In response to your request, yes.

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

        As a district court nominee, it is inappropriate for me to comment pursuant to Canons 2 and 5 of the Code of Conduct for United States Judges.

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

        Please see my response to Question 1.b.

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

        No.

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

        Please see my response to Question 1.b.

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?

        Yes. The role of an umpire and the role of the judge are very similar and I have done both. You must follow the established rules, be fair to all, and do your best.

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

        A lower court judge must follow precedent and should not consider the practical consequences unless directed by that precedent to do so.

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?

    The Supreme Court in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), has made clear that summary judgment determinations are objective, not subjective.

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?

        I have always tried to be a judge of compassion, conscience, and competence. With that said, I must follow the rule of law.

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

        Every judge has personal life experiences that they bring to the job that make them unique, but one's personal views have no place in judicial decision making.

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

        For me, I understand that the cases that come before me are not just a case number but about people. That litigants want their day in court to tell their side of the story and I want them to walk away feeling that they were treated fairly, kindly, and with professionalism.

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?

        It is critical to our constitutional system, in my view.

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

        This question could involve pending litigation in the current court that I serve and potentially in the district court I may serve, I must respectfully decline to answer pursuant to Canons 2, 3(A)(6) and 5 of the Code of Conduct for United States Judges.

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

        Please see my response to Question 6.b.

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

    I will faithfully follow all Supreme Court and Sixth Circuit precedent in this area of deference to congressional fact finding and recognize the importance of the doctrine of separation of powers.

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

        Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

            I will comply with the Code of Conduct for United States Judges and will consider any and all relevant advisory opinions relating to my attendance at education seminars I may be invited to attend.

        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

            Please see my response to Question 8(b)i.

        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to Question 8(b)i.

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to Question 8(b)i.

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.

Please see my response to Question 8(b)i.

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

Please see my response to Question 8(b)i.

Nomination of Matthew Walden McFarland, to be United States District Court Judge for the Southern District of Ohio
Questions for the Record
Submitted July 3, 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 Sixth Circuit for precedent beginning with *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 a district court judge I would follow all Supreme Court and Sixth Circuit precedent.

   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 to both questions.

   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*).

      If I am so fortunate to be confirmed as a district court judge, I will follow all binding Supreme Court and Sixth Circuit precedent.

   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 to gender-based classifications. See *United States v. Virginia*, 518 U.S. 515 (1996), *Palmore v. Sidoti*, 466 U.S. 429 (1984), *Frontiero v. Richardson*, 411 U.S. 677 (1973).

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

      The Supreme Court has addressed the manner for interpreting and applying the Fourteenth Amendment. As such, I would follow all binding precedent of the Supreme Court and Sixth Circuit.

   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 do not know why there was not an earlier challenge to the Virginia Military Institute's policies. The Supreme Court had previously struck down gender-based classifications on Equal Protection grounds—for example, *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982), was an earlier case striking down gender-based classifications relating to educational opportunities.

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

      The Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), held that same-sex couples must be afforded the right to marry "on the same terms as accorded to couples of the opposite sex."

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

      This question may involve pending litigation, as a sitting Ohio judge and district court nominee, I respectfully must refrain from responding. See Canon 3(A)(6) of the 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?

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that there is a right for married couples to use contraceptives, and I will faithfully apply all Supreme Court and Sixth Circuit precedent.

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

The Supreme Court has so held. *See Roe v. Wade*, 410 U.S. 113 (1979). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

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 statute based on the liberty interest protected by the Due Process Clause for "two consenting adults, who, with full mutual consent from each other engaged in sexual practices." *Id.* at 578. I will follow all relevant Supreme Court and Sixth Circuit precedent if I am so fortunate to be confirmed as a district court judge.

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 (b) above.

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

   If I am so fortunate to be confirmed as a district court judge, I will faithfully apply all binding precedent of the Supreme Court and the Sixth Circuit.

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

The *Daubert* case and Federal Rule of Evidence 702 outline the evidentiary process a trial court must follow for the admission of this type of 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 pending litigation in the court I now serve or the district court I may serve, I must respectfully refrain from responding to this question pursuant to Canon 3(A) of the Code of Conduct for United States Judges.

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

      Please see my response to Question 1.

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
   a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

      This has been a topic of debate within the academic community with legal scholars. I will follow all Supreme Court and Sixth Circuit precedent regarding *Brown* and its progeny.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited July 2, 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, please see the U.S. Constitution, Art. 1, Section 3, Clause 3, requiring Senators to be at least thirty years of age. And, I will faithfully follow all Supreme Court and Sixth 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 Questions 6.c.

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

I would review and apply all relevant Supreme Court and Sixth Circuit precedent that identifies the appropriate sources to use to determine the contours of a constitutional provision.

7. Your opinion in *Harter v. Chillicothe Long-Term Care, Inc.* held that the alleged sexual harassment at issue was not severe or pervasive enough to create a hostile work environment, despite a disturbing record of alleged sexist and anti-gay slurs and offensive sexually explicit comments.

a. What are the legal standards that you would apply in sex discrimination and hostile work environment cases?

The *Harter* opinion was a unanimous decision in the judgment by the three judges that comprised that panel. The opinion was based on the precedent from the Ohio Supreme Court *in Hampel v. Food Ingredients Specialists, Inc.,* 89 Ohio St.3d 169, 729 N.E. 726 (2000) and quoted from *Harris v. Forklift Sys., Inc.,* 510 U.S. 17 (1993). I would apply all legal standards in the context as set forth by the binding precedent of the Supreme Court and the Sixth Circuit and from Title VII of the Civil Rights Act of 1964.

b. What factors would you consider when deciding if sexual harassment amounts to sex discrimination under Title VII of the Civil Rights Act of 1964?

Please see my response to Question 7.a.

c. Do you agree that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), remains binding precedent with respect to the protections against sex discrimination provided by Title VII?

All current law from the Supreme Court and the Sixth Circuit is binding precedent and if I am so fortunate to be confirmed, I will faithfully follow my oath and apply any relevant cases and statutes that apply in this area.

d. What types of conduct would you consider sufficiently severe or pervasive to support an actionable claim of sexual harassment?

Because there maybe pending or future litigation in the court in which I now sit and the district court where I may sit if I am confirmed, I must respectfully decline to comment pursuant to the Ohio Code of Conduct and the Code of Conduct for U.S. Judges.

8. In *State v. Bradford* and *State v. Simmons*, you dissented and dissented in part, concurred in part, respectively, from majority opinions holding that the searches conducted without warrants violated the Fourth Amendment.
   a. What are the legal standards that you would apply in evaluating the legality of a warrantless search?

   I would apply all the legal standards as set forth by the binding precedent from the Supreme Court and the Sixth Circuit in this area of law. Including, but not limited to: *Mapp v. Ohio*, 367 U.S. 643 (1961); *Terry v. Ohio*, 392 U.S. 1 (1968); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Carpenter v. U.S.,* 138 S. Ct. 2206 (2018); *Illinois v., Caballas,* 543 U.S. 405 (2005); *Riley v. California*, 573 U.S. 373 (2014); *Chimel v. California*, 395 U.S. 752 (1969); *U.S. v. Leon*, 468 U.S. 897 (1984); *Katz v. United States*, 389 U.S. 347 (1967); *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Dunn*, 480 U.S. 294 (1987); and any other cases relevant to the factual setting in the case at hand.

   b. When should a court admit evidence obtained through a search conducted in violation of the Fourth Amendment?

   Please see my response to Question 8.a.

Questions for the Record from Senator Kamala D. Harris
Submitted July 3, 2019
For the Nomination of

Matthew Walden McFarland, to the U.S. District Court for the Southern District of Ohio

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?**

    Consistent with the oath of office of a district court judge, I would carefully and thoroughly review the facts and appropriate law applicable to each case. I would patiently listen to all litigants involved, including any victims of crime to arrive at the appropriate sentence that is consistent with the United States Sentencing Guidelines that is "sufficient, but not greater than necessary" to be consistent with 18 U.S.C. Section 3553(a).

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

    Please refer to my response in Question 1(a) above.

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

    After carefully and thoroughly reviewing all relevant information presented in each case, I would follow the factors pursuant to 18 U.S.C. Section 3353(a) to determine if a deviation is appropriate and justified.

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

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

        I am not familiar with Judge Reeves' views in this regard.

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

        It appears this question may cause me to opine on the policy matters regarding mandatory minimum sentences addressed by Congress. As such,

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

it would be inappropriate for me to comment pursuant to *Canons 2, 3(A), and 5 of the Code of Conduct for United States Judges.*

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

Please see my response to Question 1(d)ii.

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

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

I am not familiar with Judge Gleeson's opinion in this regard. If I am so fortunate to be confirmed, I will evaluate each case independently and act consistent with my ethical obligations, my oath of office previously mentioned and the rule of law.

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

The prosecution of cases is under the authority of the Department of Justice within the Executive Branch. As such, the doctrine of separation of powers requires respect in this regard. However, I would address any misconduct consistent with my ethical obligation under the Canons.

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

As stated above, the doctrine of separation of powers is very important and must be given the necessary respect in this context.

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

Yes.

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

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. It is core pillar of our judicial system. I believe my over 19 year record on the bench as an Ohio Magistrate and Appellate Judge so demonstrates my steadfast commitment to fairness to all.

    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 understand there is data that indicates higher rates of incarceration for African-American men that for white men. If I am so fortunate to be confirmed, I will treat all parties before me with equality, respect, and fairness. Consistent with my oath of office, I will administer justice without bias or prejudice.

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

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

    Yes.

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

    Yes.