Nomination of Kevin C. Newsom
to be Judge on the United States Court of Appeals for the Eleventh Circuit Questions for the Record
Submitted June 21, 2017

<u>QUESTIONS FROM SENATOR WHITEHOUSE</u>

1. You represented Alabama in an amicus brief in *Caperton v. Massey Coal Co.*, an important case recognizing the corrupting impact of money in politics, including independent expenditures. You argued that a litigant's constitutional rights were not violated even when the judge hearing his case likely owed his position to the other party's multimillion dollar campaign spending on his behalf. In your amicus brief in *Caperton*, you warned that if the Court found a constitutional violation, "*Caperton* motions [for judicial recusal based on Due Process] would fly fast and furious."
    a. In your experience as a litigator, how many *Caperton* motions have you filed?

To my recollection, none.

    b. How may have been filed by the opposing party in a case you were litigating?

To my knowledge, none. Happily, so far as I am aware, the brief's prediction that the decision would lead to numerous recusal motions seems to have been incorrect.

2. You have opposed the Supreme Court's 2005 decision in *Roper v. Simmons* that held it is unconstitutionally cruel and unusual to execute juveniles. You authored an amicus brief in the Supreme Court case on behalf of Alabama and other states defending capital punishment for minor offenders. After the ruling, NPR reported on *All Things Considered* that you "regret[ed]" the decision, and quoted you saying: "there's no real magic in the number 18. Some of the court's reasoning would apply equally to 19-year-olds and some 25-year-olds, that at the same time won't apply to some 17-year-olds, you know, on the other side."
    a. Do you continue to believe that *Roper* was wrongly decided and that states ought to be permitted to execute juveniles?

As with any brief I have filed as an attorney, the arguments made in the *Roper* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). Moreover, it appears that the word "regret" is NPR's. In any event, as I sought to explain at my hearing, my personal opinions and views about any Supreme Court decision will not be relevant to my role (should I be fortunate enough to be confirmed) as a circuit-court judge. *Roper* is binding precedent, and if I am confirmed, I will apply it—like all other Supreme Court precedents—faithfully and to the best of my ability.

3. Large corporations routinely include arbitration agreements with class action waivers in the fine print of their consumer agreements. The proceedings are typically secret, there is virtually no right to appeal, and the arbitrators are often picked and paid for by the

company being sued—creating a clear incentive for arbitrators to rule in companies' favor.

a. Do you believe it is a concern that arbitrators sometimes have a financial incentive to rule against individual consumers or employees?

To my knowledge, I have not experienced a situation in which an arbitrator had a financial incentive to rule for or against either party.

b. Does the existence of repeat players among corporate litigants create a bias against consumers?

To my knowledge, I have not experienced a situation in which a corporate defendant's "repeat player" status seemed to create a bias either in favor of or against consumers.

c. Do you agree that individual plaintiffs also benefit from the right to appeal trial court decisions? The Seventh Circuit has held that an arbitrator's decision will be upheld if it is "incorrect or even wacky," a standard that does not exist in federal appellate review. Is it fair to say that "arbitration lacks the safeguards and judicial oversight that are indispensable" to any litigation?

Unsuccessful plaintiffs and defendants alike benefit from the right to appeal adverse trial-court decisions. In *AT&T v. Concepcion,* I filed an amicus brief on behalf of DRI – The Voice of the Defense Bar, arguing (as you say) that "arbitration lacks the safeguards and judicial oversight that are indispensable to class litigation." In its decision, the Supreme Court similarly commented that "[a]rbitration is poorly suited to the higher stakes of class litigation," in part because of the limited judicial review available in the arbitration context. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

4. In 2010, you were counsel of record on an amicus brief in *AT&T v. Concepcion*. Your brief argued that the Ninth Circuit's opinion conflicted with the FAA's pro-arbitration policy and that California's requirement for consumer arbitration agreements to permit class arbitration "is an attack on arbitration itself."

a. The Court's decision in *Concepcion* placed significant weight on the generosity of the AT&T arbitration provisions at issue in that case. What do you understand the Supreme Court's precedent to be for lower courts in cases where such generosity is not present in an arbitration provision?

I have not had occasion to study the post-*Concepcion* class-arbitration precedent carefully. I am reluctant to express any views on that subject because a similar issue might come before me as a judge, should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such a case were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. The Discover Bank rule at issue in that case protected consumers who had been bound to arbitration by an adhesion contract. Do you consider arbitration by adhesion contract to be a fair way for consumers to agree to arbitrate disputes with a business?

Please see the response to No. 4(a) above.

c. Under the subsequent *American Express Co. v. Italian Colors Restaurant* case, do you understand there to be any circumstances in which an arbitration agreement would be found to prevent the effective vindication of a federal right of action?

Please see the response to No. 4(a) above.

5. You co-authored a Supreme Court amicus brief filed on behalf of several states in *McCreary County v. ACLU of Kentucky*. Your brief argued that the Ten Commandments are a common feature of public life in the U.S. and that "public displays of the Ten Commandments should be upheld as a permissible 'acknowledgment . . . of the role of religion in American life.'

   a. Do you continue to view it as permissible to display the Ten Commandments in public buildings?

As with any brief I have filed as an attorney, the arguments made in the *McCreary* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model Rules of Professional Responsibility 1.2(b). I have not had occasion to study the post-*McCreary* Establishment Clause precedent carefully, and I am reluctant to express any views on that subject because a similar issue might come before me as a judge should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. Does your reading of Justice Souter's opinion in that case make it possible for any public displays of religious symbols? If so, under what circumstances?

Please see the response to No. 5(a) above.

6. In 2004, as Alabama Solicitor General, you co-authored an amicus brief filed on behalf of Alabama and other states in *Rasul v. Bush*. Your brief argued that the courts should defer to the Executive and Legislative Branches in the conduct of military operations, and also argued that foreign nationals detained abroad have no rights to habeas corpus and that the Geneva Conventions did not apply to Guantanamo detainees. The Supreme Court ultimately rejected all of these arguments.

   a. What rights do you currently understand Guantanamo detainees to have under the Supreme Court's jurisprudence?

As with any brief I have filed as an attorney, the arguments made in the *Rasul* brief reflected the views of my client—the State of Alabama—and the other States who chose to join Alabama on that brief. Such views should not be imputed to the lawyer who argues them. *See* ABA Model

Rules of Professional Responsibility 1.2(b). Moreover, although my name (along with the name of the Acting Attorney General) was on the signature block of the brief filed in the *Rasul* case, I was not counsel of record, and while I am certain that I reviewed the brief, I do not recall playing an active role in its drafting. I have not had occasion to study the post-*Rasul* precedent carefully, and I am reluctant to express any views on that subject because a similar issue might come before me as a judge should I be fortunate enough to be confirmed. *See* Canons 2 and 3, Code of Conduct for United States Judges; *cf. also* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."). If such a case were to come before me, I would carefully review the briefs and the applicable precedent to determine the proper outcome.

b. As a judge, what role would you see for the judiciary in the context of military operations being conducted by the Executive Branch?

Please see the response to No. 6a above.