Senator Dick Durbin
Written Questions for Judge Amul R. Thapar
May 3, 2017

1. Judge Thapar, your name was included on the list of 21 nominees that President Trump announced he would choose from in selecting Supreme Court nominees. President Trump publicly thanked the Federalist Society and the Heritage Foundation for assembling this list.[1] He said he would only choose from that list in naming nominees for the Supreme Court.

    a. Do you believe it was appropriate for the President to announce the involvement of the Federalist Society and the Heritage Foundation in the selection of candidates for the Supreme Court?

Response: This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

    b. Are you concerned that this creates an incentive for judges not to issue rulings that contravene the views of these two organizations, if those judges want to someday have a chance at being nominated by President Trump for a Supreme Court seat?

Response: As judges, it is our job to apply the law faithfully, without regard to political interests or pressures. Indeed, our lifetime tenure protects us from any such pressures. Moreover, under Canon 3(A)(1) of the Code of Conduct for United States Judges, judges "should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism."

    c. Are you concerned that the announced involvement of the Federalist Society and Heritage Foundation in selecting Supreme Court candidates undermines confidence in the independence and integrity of the federal judiciary?

Response: Please see the response to Question 1(b) and the response to Question 6 from Senator Leahy.

2. You have been a member of the Federalist Society and you have been a regular speaker at Federalist Society events. According to your Senate questionnaire, you have spoken at least 17 times at Federalist Society events since becoming a judge. At your hearing you said you joined the Federalist Society because it was an "open debate society."

    a. Why did you join the Federalist Society but not the American Constitution Society, which you also described at your hearing as an open debate society?

[1] In an interview with Breitbart News' Steve Bannon on June 13, 2016, President Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society" and also thanked Heritage Foundation President Jim DeMint for being "very much involved in this group."

Response: I have great respect for the American Constitution Society and have spoken at events co-sponsored by both organizations.

b. The Federalist Society website lists the organization's statement of purpose. That statement begins with the following: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." **Do you agree or disagree with this statement? Please explain your answer.**

Response: Please see the response to Question 7(a) from Senator Feinstein.

c. Please list all years in which you attended the Federalist Society's annual national convention.

Response: I have never attended the Federalist Society's annual national convention. I did attend the annual student symposium as a moderator in 2016.

3. During the confirmation process of Justice Gorsuch, special interests contributed millions of dollars in undisclosed dark money to a front organization called the Judicial Crisis Network that ran a comprehensive campaign in support of the nomination. It is likely that many of these secret contributors have an interest in cases before the Supreme Court. I fear this flood of dark money undermines faith in the impartiality of our judiciary.

a. Judge Thapar, do you want outside groups or special interests to make undisclosed donations to front organizations in support of <u>your</u> nomination?

b. Would you discourage donors from making such undisclosed donations?

c. If any such donations are made, will you call for the donors to make their donations public so that you can have full information when you make subsequent decisions about recusal in cases that these donors may have an interest in?

Response: As a judge, I have never solicited and would never solicit political contributions. Indeed, the ethical rules prohibit judges from doing so. *See* Canon 5 of the Code of Conduct for United States Judges. I am not aware of any such donations made in support of my nomination. As I said in my hearing, I am my own judge, and I will faithfully uphold my duty to rule independently, fairly, and impartially on the cases and controversies before me.

4. During the campaign and his presidency, President Trump has repeatedly disparaged federal judges when they have ruled against him. This is a real threat to the judiciary as an independent branch of government.

Consider the impact. If courts rule in a way that President Trump does not like, his supporters might believe that the courts are biased. And if courts rule the way President Trump wants, it will look like the President's bullying has worked.

Last year then-candidate Trump disparaged Judge Gonzalo Curiel for his rulings in the Trump University case. He said Judge Curiel had an "absolute conflict" because he was "of Mexican heritage" and said "this judge has treated me very unfairly." Speaker Paul Ryan described this as the "textbook definition of a racist comment."

According to your questionnaire, you interviewed with President Trump on January 26, 2017 about the Supreme Court vacancy. **In this interview, did you tell President Trump that you were concerned about the President's attacks on Judge Curiel or on the integrity of the federal judiciary?**

Response: That subject never came up during my interview with President Trump.

5. The White House has said they no longer want the American Bar Association to conduct evaluations of President Trump's judicial nominees prior to their nomination. After your nomination, the ABA reviewed your qualifications and gave you a rating of unanimously well-qualified for the circuit court.

   a. Do you think that the ABA's evaluation is an important tool for the Senate to use to determine whether a nominee is qualified for the judicial position to which he or she has been nominated?

Response: I appreciate the ABA's rating, but I respect the Senate's prerogative to give it whatever weight the Senate believes it deserves.

   b. In your view, is it concerning if the American Bar Association finds a nominee to be "not qualified?"

Response: Other than speaking with ABA representatives in connection with my evaluation (or answering questions about other nominees), I have never participated in the ABA evaluation process. As such, I do not know enough about the rating system to offer an informed view.

6. Last year, in *Winter v. Wolnitzek*, you enjoined several parts of the Kentucky Code of Judicial Conduct canons. You held that these portions of the canons--which limit how judicial candidates in Kentucky can campaign for office and restrict the political activity of Kentucky judges--violate the First Amendment.

   The canons in question are designed to insulate the state judiciary from partisan politics. You found that this justification could not survive a strict scrutiny analysis of several of the canons. For example, in ruling that the canon forbidding judges from making contributions to political candidates was unconstitutional, you stated the following:

   > [U]nder the Supreme Court's precedents, direct speech and monetary speech are functional equivalents.... Thus, there is simply no difference between "saying" that one supports an organization by using words and 'saying' that one supports an organization by donating money.... Thus... this Canon does not

advance Kentucky's proffered interest [in "diminishing reliance on political parties in the election of judges"] in a narrowly tailored way.

The Sixth Circuit disagreed with your assessment and reversed this part of your ruling. A three-judge panel unanimously found that "[w]hile 'judicial candidates have a First Amendment right to speak in support of their campaigns,' they do not have an unlimited right to contribute money to someone else's campaign." The court also pointed out that under your analysis, the Code of Conduct for United States Judges, which also bans judges from making political contributions, would be unconstitutional.

a. What is your response to the Sixth Circuit's reversal of your holding on this issue?

Response: The Sixth Circuit's decision on this issue is binding precedent, and I will follow it faithfully.

b. Do you think that the Code of Conduct for United States Judges may be unconstitutional?

Response: I have not studied the issue and, respectfully, cannot answer hypothetical questions.

7.

a. Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election? If you are unfamiliar with this claim, please review http://www.factcheck.org/2017/01/trumps-bogus-voter-fraud-claims-revisited/.

Response: This is a political question about which ethically I cannot opine. *See* Canon 5 of the Code of Conduct for United States Judges.

b. Are you aware of any evidence that supports the President's claim?

Response: Please see the response to Question 7(a).

8. In 1886, the Supreme Court noted that the right to vote "is regarded as a fundamental political right, because [it is] preservative of all rights," a quote which Chief Justice Roberts paraphrased at his confirmation hearing. References to the right to vote appear five times in the Constitution.

a. Do you believe that the right to vote is fundamental?

Response: The Supreme Court has recognized on numerous occasions that voting is a fundamental right, including in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966), and *Goosby v. Osser*, 409 U.S. 512, 519-20 (1973).

b. Do you believe that laws that make it more difficult for Americans to exercise this right must be scrutinized very closely by the courts?

Response: I will apply the level of scrutiny dictated by the Supreme Court. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *Burdick v. Takushi*, 504 U.S. 428 (1992).

c. Is it preferable for this judicial scrutiny to take place before the law goes into effect so that, if the law is unconstitutional, it will not have done irreparable harm by preventing someone from voting?

Response: Whether the court has authority to consider the constitutionality of a law before it goes into effect will depend on how the issue is presented and whether the case involves a live case or controversy. If such a case were to come before me, I would look at the briefs and apply the precedent of the Supreme Court and the Sixth Circuit.

9. In 2013, a divided Supreme Court voted 5-4 in *Shelby County v. Holder* to gut the Voting Rights Act. The Court struck down a provision of the Act that required certain jurisdictions to "preclear" any changes to their voting laws with the Department of Justice.

   The result was shocking, given the amount of evidence Congress had compiled demonstrating the need for a robust Voting Rights Act with preclearance. In 2006, Congress voted overwhelmingly to reauthorize the Voting Rights Act after holding 21 hearings, hearing testimony from more than 90 witnesses, and receiving 15,000 pages of evidence. As Congressman John Lewis said in an op-ed about the ongoing need for a strong Voting Rights Act:

   > Congress came to a near-unanimous conclusion: While some change has occurred, the places with a legacy of long-standing, entrenched and state-sponsored voting discrimination still have the most persistent, flagrant, contemporary records of discrimination in this country. While the 16 jurisdictions affected by Section 5 represent only 25 percent of the nation's population, they still represent more than 80 percent of the lawsuits proving cases of voting discrimination.

a. Do you agree with the Court's holding in *Shelby County*?

Response: It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Please see the response to Question 13(a) from Senator Feinstein. *Shelby County* is a binding precedent of the Supreme Court, and I will follow it faithfully as a district judge and, if confirmed, as a circuit judge.

b. In your view, was the Court correct in dismissing the reams of evidence demonstrating the need for preclearance?

Response: Please see the response to Question 9(a).

c. In *Shelby County*, the Court did not find that preclearance was unconstitutional, but rather that the formula for determining which jurisdictions were subject to preclearance was unconstitutional. **What is your understanding of preclearance?**

Response: While I have not had an opportunity to study the issue in a case, my understanding is that under the Voting Rights Act changes to the voting qualifications, standards, practices, or procedures of covered jurisdictions could not take effect until either a three-judge district court or the Attorney General approved the changes. 52 U.S.C. § 10304. To obtain such approval, the jurisdiction had to prove "that the change had neither 'the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.'" *Shelby County v. Holder*, 133 S. Ct. 2612, 2620 (2013) (quoting 79 Stat. 438, 439).

d. Since the *Shelby County* decision, several states have put in place restrictive state voting laws which have a disproportionate impact on lower-income and minority voters. For example, last year in Wisconsin, a newly-implemented voter photo identification law led to challenges and confusion in the April primary.

Consider the case of Eddie Lee Holloway, Jr. He moved from my home state of Illinois to Wisconsin in 2008 and was able to vote without any problems before the voter ID law went into effect.

After the law was passed, Mr. Holloway went to a DMV in Milwaukee with an expired Illinois photo ID, his birth certificate, and his Social Security card to obtain a Wisconsin photo ID for voting. However, his application was rejected due to a clerical error on his birth certificate, which read "Eddie Junior Holloway."

Mr. Holloway spent hundreds of dollars traveling to Illinois to try to fix this problem. In addition to the Milwaukee DMV, he visited the Vital Records System in Milwaukee, the Illinois Vital Records Division in Springfield, an Illinois DMV, and his high school in Decatur, Illinois—all in an attempt to obtain sufficient records for a Wisconsin voter ID.

Despite all of these efforts, Mr. Holloway was unable to vote in the April primary.

And he is not alone. Last year, researchers analyzed data from the annual Cooperative Congressional Election Study and found: "The patterns are stark. Where strict identification laws are instituted, racial and ethnic minority turnout significantly declines." For example, among Latino voters, "turnout is 7.1 percentage points lower in general elections and 5.3 percentage points lower in primaries in strict ID states than it is in other states."

What is your view of laws that prevent people like Mr. Holloway from exercising their fundamental right to vote?

Response: My personal views are not relevant to my role as a judge. Expressing a personal view risks giving litigants the impression that I could not be open-minded and impartial should this type of case come before me in the future. Moreover, under Canon 3(A)(6) of the Code of

Conduct for United States Judges, I cannot make public comment on "the merits of a matter pending or impending in any court." If a case concerning such a law comes before me, I will study the briefs, review the applicable laws, and read the relevant Supreme Court and Sixth Circuit precedent to determine the correct legal outcome.

e. Do you agree that voting restrictions that are created with racially discriminatory intent are both unconstitutional and violations of the Voting Rights Act?

Response: I have not presided over a case involving voting restrictions. If such a claim comes before me, I will study the briefs and the relevant Supreme Court and Sixth Circuit precedent and apply the law to the case at hand.

f. Do you agree that voting restrictions that have a racially discriminatory effect violate the Voting Rights Act?

Response: Please see the response to Question 9(e).

10. **Do you believe that systemic racial discrimination still exists in America today?**

Response: I am not sure what "systemic" means in this context, but racial discrimination still exists in the United States today.

11. Chief Justice Roberts wrote in the case *Parents Involved in Community Schools v. Seattle School District No. 1* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." He used this rationale to rule against school districts that took race into account in trying to integrate public school systems.

In her dissent in *Schuette v. Coalition to Defend Affirmative Action* Justice Sotomayor wrote:

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.

Do you agree with Justice Sotomayor's statement, or are your views closer to Chief Justice Roberts' statement in *Parents Involved*?

Response: It would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Please see the response to Question 13(a) from Senator Feinstein. If faced with such a case, I will faithfully apply the precedents of the Supreme Court and the Sixth Circuit.

12. The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution provides that:

> …no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

a. What do you believe the Founding Fathers intended this clause to mean?

b. Do you believe that this original public meaning of the Foreign Emoluments Clause should be adhered to by courts in interpreting and applying the Clause today?

Response: Please see the response to Question 14 from Senator Leahy.

13. The late Chief Justice Rehnquist once noted that corporations are granted the advantages of perpetual life, property ownership, and limited liability "to enhance [their] efficiency as an economic entity." But he went on to say that "those properties, so beneficial in the economic sphere, pose special dangers in the political sphere." **Do you agree or disagree with Justice Rehnquist's statement?**

Response: I am not familiar with the quoted statement or its context, so I cannot comment on what was meant by it. Moreover, it would be improper for me to state my personal views because doing so would mistakenly suggest that I might decide a case based on something other than the relevant law and facts. Please see the response to Question 13(a) from Senator Feinstein.

14. Seven years ago, the Supreme Court issued its far-reaching opinion in *Citizens United v. Federal Election Commission*. In a divided 5-4 vote, the Court struck down years of precedent and held that the First Amendment permits corporations to spend freely from their treasuries to influence elections.

As a result of *Citizens United* and the series of decisions that followed in its wake, special interests and wealthy, well-connected campaign donors have poured billions of dollars into recent federal elections.

The impact of this incredible spending hasn't just touched races for the White House and Congress—it has also stretched to governors' mansions, state capitols, and city halls throughout the country. As in federal campaigns, *Citizens United* has led to an explosion of outside spending at the state and local levels, with corporations and wealthy single spenders looking to play kingmaker, pouring cash into races for positions ranging from district attorney to school board.

This is particularly concerning in light of a growing body of research demonstrating that government policy is more responsive to the preferences of wealthy Americans, and that the preferences of wealthy Americans are very different than those of most citizens.

Dr. Martin Gilens of Princeton has explained that "under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on what policies the government does or doesn't adopt." He went on to note that "patterns of responsiveness… often correspond more closely to a plutocracy than a democracy."

Through *Citizens United* and related case law, the Supreme Court has created a system in which our government is responsive to wealthy donors—rather than the full spectrum of constituents we are sent here to represent.

In light of these growing concerns, should courts be troubled by the special dangers of giving political rights to corporations that Chief Justice Rehnquist warned us about?

Response: Lower courts should follow the laws of the United States and the precedent of the Supreme Court, and I will faithfully apply both to any cases that come before me.

15. In 2014, Justice John Paul Stevens discussed his support for a Constitutional amendment to overturn *Citizens United* in testimony before the Senate Rules Committee. He said:

> Unlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who provided them with money than to the interests of the voters who elected them. That risk is unacceptable.

Do you agree or disagree with Justice Stevens' statement?

Response: Article V of the Constitution provides the process for amending the Constitution. Whether to amend the Constitution is a political question and ethically it would be improper for me to comment. *See* Canon 5 of the Code of Conduct for United States Judges. As a judge, I will faithfully follow the Constitution, including any of its amendments.