Nomination of Daniel Mack Traynor to the United States District Court for the District of North Dakota
Questions for the Record
Submitted October 2, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. You have been active on Twitter. For example, during the 2016 election, you tweeted: "Hillary lies so much"—and you added several hashtags, such as: "#SheCantTellTheTruth" and "#Benghazi." (@DanielMTraynor, Sept. 26, 2016)

   a. Please provide the evidence underlying your assertion that "Hillary [Clinton] lies so much." For each alleged inaccurate statement by Secretary Clinton, please list the statement, the date it was made, and the evidence you have that the assertion was inaccurate.

   I do not recall tweeting that particular comment from three years ago. The comments appear to have occurred during a political campaign where I was supporting an opposing political candidate. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially, regardless of their political affiliation.

   b. Please explain what you meant by "#Benghazi."

   Please see my response to Question 1(a) above.

   c. Given your highly partisan tweets, will you commit to recusing yourself from any cases that involve elections or touch on partisan politics?

   The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

   d. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving elections or partisan politics?

If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially regardless of political affiliation or lack thereof.

2. You have also retweeted President Trump a number of times. For example, you retweeted a tweet by President Trump in which he criticized the "failing New York Times" and stated that "the media is TOTALLY dishonest!" (@DanielMTraynor, May 15, 2016)

   a. Please explain how "the media is totally dishonest"? Please provide specific examples to support this claim.

   The referenced tweet was not mine and therefore I cannot comment. It was made during a political campaign where I was supporting an opposing political candidate.

   b. Why did you retweet President Trump's statement that "the media is totally dishonest!"?

   Please see my response to Question 2(a).

   c. Will you commit to recusing yourself from any cases involving *The New York Times*, given that you have retweeted President Trump's attacks on the newspaper?

   Please see my response to Question 1(c).

   d. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving *The New York Times*.

   Please see my response to Question 1(c).

3. In one tweet, you mocked a lawsuit alleging that President Trump has violated the Emoluments Clause of the U.S. Constitution. You tweeted, "Where was the Emoluments Clause suit when the Lincoln bedroom was for rent?" (@DanielMTraynor, June 12, 2017)

   a. Given that you have expressed a view on this case, will you commit to recusing yourself from any case involving whether President Trump has violated the Emoluments Clause of the Constitution?

   Please see my response to Question 1(c).

   b. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving President Trump and the Emoluments Clause of the Constitution?

   Please see my response to Question 1(c).

4. Shortly after President Trump was elected, you tweeted, "It feels good to be deplorable."

    a. Given your public support for President Trump on Twitter, will you commit to recusing yourself from any case involving President Trump?

    Please see my response to Question 1(c).

    b. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving President Trump?

    Please see my response to Question 1(c).

5. You retweeted a tweet by the actor James Woods (@RealJamesWoods), which stated, among other things, "#ObamaCare #DeathPanels have arrived!" (@RealJamesWoods, Oct. 24, 2016)

    a. Please identify the "death panels" created by the Affordable Care Act.

    The referenced tweet was not mine and therefore I cannot comment. It was made during a political campaign where I was supporting an opposing political candidate.

    b. Will you commit to recusing yourself from any cases involving the Affordable Care Act, given that you have suggested that the law contained "death panels"?

    Please see my response to Question 1(c).

    c. If not, please indicate under what circumstances your impartiality would not reasonably be questioned in a case involving the Affordable Care Act?

    Please see my response to Question 1(c).

6. 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 lower courts 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?

    It is not proper for a district court judge to question Supreme Court precedent. A district court judge must fully and faithfully apply all Supreme Court precedent.

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

A district court decision is not binding. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). As such, a district court is not bound by another district court's ruling. In addition, Federal Rules of Civil Procedure 59(e) and 60 provide standards for a district court to set aside its prior rulings in a specific case. A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located.

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

Only the Supreme Court may overrule one of its own prior opinions. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). As a judicial nominee, I do not believe it appropriate to comment on a role unrelated to my nomination to the federal district court bench. *See* Code of Conduct for United States Judges, Canons 2 and 5. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

7. 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"?

Each and every Supreme Court decision is binding on all district courts. Every Supreme Court precedent is thus "super-stare decisis" or "superprecedent" with respect to the lower district courts. If confirmed, I will fully and faithfully apply *Roe v. Wade* and its successor cases.

b. Is it settled law?

Yes. Please see my answer to Question 7(a).

8. 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. If confirmed, I will fully and faithfully apply *Obergefell v. Hodges*.

9. 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?

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" a dissenting opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent.

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

In *District of Columbia v. Heller*, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626–27 (2008). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Heller*. As a judicial nominee, I do not believe it appropriate to comment further on abstract or hypothetical scenarios, which are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

The First Amendment states a fundamental guarantee to the people of the United States. As with the guarantees of each of the Bill of Rights, First Amendment rights

should always be of concern to judges considering cases and controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent concerning First Amendment rights and campaign finance law. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 10(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court provided some guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I will fully and faithfully follow all Supreme Court and Eighth Circuit precedent. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

11. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2016. 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 did not draft this statement and am unfamiliar with it. As such, I cannot comment on its meaning. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical topic of political and academic debate. *See* Code of Conduct for United States Judges, Canons 2(A) and 5(C).

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

the legal system"?

Please see my response to Question 11(a).

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

Please see my response to Question 11(a).

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

During the course of this nomination process, I have had general discussions with various members of the legal community about my nomination, some of whom are also members of the Federalist Society. I did not have any contact with anyone in the national office of the Federalist Society about my possible nomination.

e. Why did you decide to join the Federalist Society in 2016, nearly 20 years after you started practicing law?

A staffer from Senator Heidi Heitkamp's office suggested I join the organization. Also, the organization became more active in North Dakota, with a local chapter and started having events. I have attended those events.

12. On your Senate Questionnaire, you indicated that you have been a member of the Republican National Lawyers Association ("RNLA") since 1999. Additionally, you indicated that you have been the Chair of the North Dakota Chapter of RNLA since 2000. The RNLA's "About Us" webpage states that "[e]ach member . . . must ascribe to the accomplishment" of the organizations missions, which include: "Advancing Republican Ideals. The RNLA further builds the Republican Party goals and ideals through a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates."

a. Please detail the activities that your membership in this organization has entailed.

I have never attended an event. I been designated as the Chair of the North Dakota Chapter. I believe I am the only member in the State.

b. In what ways do you believe that you have "directly support[ed] Republican policy, agendas and candidates"?

Over the years I have given financial contributions and put up yard signs. From time to time I have been retained to assist with recounts or as local counsel for potential statewide recounts of federal races.

c. What did your role as Chair of the North Dakota Chapter entail?

Not much, really. Essentially, I was a point of contact for the national organization.

13. The RNLA's legal counsel recently wrote a blog post on the RNLA's website in which she wrote that "anti-Semitism has become mainstream in the Democratic Party." (Lisa Dixon, *Liberals' Anti-Semitic Attacks on Steven Menashi Latest Politics of Personal Destruction*, RNLA Blog (Aug. 16, 2019))

What evidence do you have that "anti-Semitism has become mainstream in the Democratic Party"?

I did not draft this statement and am unfamiliar with it. As such, I cannot comment on its meaning.

14. 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?

To the best of my recollection, 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?

To the best of my recollection, no.

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

To the extent I have considered the topic as a judicial nominee, it has been with the view that, if confirmed, I will fully and faithfully apply all statutes, regulations, and Supreme Court and Eighth Circuit precedent, including those concerning administrative law.

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

I have not studied the topic and do not believe it is appropriate to express an opinion.

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

The Supreme Court and the Eighth Circuit have stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

17. 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.

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

I received the questions on Wednesday, October 2, 2019. I reviewed my Senate Judiciary Questionnaire, conducted limited research and consulted other materials, and drafted my answers. I then shared my draft responses with the Office of Legal Policy at the Department of Justice, which offered suggestions and comments. In light of those comments, I then revised my responses as I thought appropriate. After finalizing my answers, I authorized the Department of Justice to file these responses. My answers are my own.

Written Questions for Daniel Mack Traynor
Submitted by Senator Patrick Leahy
October 2, 2019

1. I do not fault judicial nominees for simply having previously been involved in politics or supportive of their home-state politicians. You have been an active supporter of and donor to several Republican politicians and made contributions only months before you applied for a federal judgeship. You also serve as the Republican National Lawyer's Association's North Dakota Chair. The RNLA is committed to "Advancing Republic Ideals" and to building the Republican Party through "a network of supportive lawyers who understand and directly support Republican policy, agendas and candidates."

    (a) Are you concerned by the appearance of the close temporal proximity of your campaign donations and your application to be a judge? Can you assure the Committee that the timing is coincidental?

    My political involvement and contributions have been made for decades. They pre-existed my interest in this position.

    (b) What assurances can you give this Committee that you will be impartial and free from political influence while serving as a federal judge?

    If confirmed, I will ensure that all parties in my courtroom are treated fairly, equally, and impartially regardless of their political affiliation or lack thereof.

2. Over the last couple years, your social media accounts have perpetuated a number of overtly partisan and controversial assertions, including false statements and distortions. You retweeted claims that Christine Blasey Ford's allegations against then-Judge Kavanaugh were a case of mistaken identity; you tweeted about Hillary Clinton's emails, using the hashtags, #BathroomServer, #Benghazi, #PayToPlay; you retweeted exaggerated and uninformed comments about "issues like immigrants accepting welfare, taking jobs, killing Americans"; and you perpetuated the myth about the Affordable Care Act instituting "death panels." Judges must be guided by truth and facts. In fact it stirs doubt in the minds of litigants when their judges deal in false statements and distortions.

    (a) Do you stand by those tweets?

    In most of the instances describe above, the comments were not mine. Further, I believe the comments were made in the context of a political campaign where I was supporting a particular candidate.

(b) In a September 2018 tweet, you said of federal circuit court judges that the "bunch are all drunks." **Do you stand by that statement? Will that negative view of circuit court judges color your willingness to adhere to binding circuit court decisions?**

I have no recollection of the comments but I am certain the comment was made in jest. If confirmed, I will fully and faithfully follow all Supreme Court and Eighth Circuit precedent.

(c) Do you believe that kind of rhetoric is harmful to the federal judiciary?

In the context of a joke, no.

3. On your Questionnaire, you wrote that you served as a lobbyist for Ducks Unlimited during North Dakota's 2015 legislative session.

(a) **Please provide a detailed explanation of the nature of your work for Ducks Unlimited.**

In 2015 I served as a registered lobbyist for Ducks Unlimited, a sportsman and conservation group. DU sought to improve their relationship with policymakers in North Dakota. I recall that I reviewed testimony of the state director prior to one state legislative hearing. I also suggested several grassroots DU members who might assist with improving relationships with the state legislature.

4. North Dakota's lobby disclosure database shows that you were a registered lobbyist for the North Dakota Republican Party from July 1, 2002 to June 30, 2003. However, you did not disclose this registration on your Questionnaire.

(a) What was the nature of your work for the Republican Party during this period?

At the time I was the State Republican Chairman. I recall monitoring legislation concerning the creation of a state voter file and state campaign finance requirements. I do not recall appearing or testifying before any legislative committees.

(b) Why was this registration not included in your Questionnaire?

I did not recall registering as a lobbyist for the North Dakota Republican Party. I believe the registration was done out of an abundance of caution because the organization interacted with legislators in several ways during the legislative session.

(c) Are there any other lobbying engagements that you did not include in your Questionnaire?

Not that I can recall.

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

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

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

Determining the meaning of a statute requires examination of the text and structure of the statute, with consideration given as to how statutory provisions work together to form a consistent whole. The Supreme Court has instructed that in interpreting statutory text, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent concerning the methods for interpreting statutes.

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

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

The independence of the federal judiciary is a core feature of our constitutional design. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. These protections are designed to enable judges to make decisions that are grounded in law, without respect to criticisms in public debates and commentary. As a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, or on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

Please see my response to Question 6(a).

7. 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?

    Under Supreme Court precedent, courts can review decisions by the President, including during times of war or other armed conflict. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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

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

    Please see my responses to Questions 6(a), 7(a), and 10. If confirmed, and if such a scenario were to come before me, I will carefully examine the relevant authorities that may bear upon this question and fully and faithfully apply all applicable Supreme Court and Eighth Circuit precedent. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

    The Constitution assigns powers over war and foreign affairs to the President and Congress. Questions regarding the appropriate exercise of these powers continue to arise in litigation. In evaluating conflicts between the two branches in this area, the Supreme Court has sought guidance from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (citing Justice Jackson's concurrence). 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." If confirmed, I will fully and

faithfully apply Supreme Court and Eighth Circuit precedent, as well as any constitutional and statutory authority. As a judicial nominee, I do not believe it appropriate to comment further.

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

Please see my response to Question 9(a).

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

The Supreme Court made clear long ago that it is ultimately "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). In evaluating any challenge to Executive action, a court must consider the relevant precedents, together with applicable constitutional and statutory provisions, as set forth in my response to Question 9(a).

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

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

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an "exceedingly persuasive justification" for such gender-based classifications. *United States v. Virginia*, 518 U.S. 515, 531 (1996). If confirmed, I will fully and faithfully follow all Supreme Court precedent, including *United States v. Virginia*.

12. **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 historic and landmark law. Justice Scalia's comment was not part of a holding of the Supreme Court. If confirmed, I will fully and faithfully apply Supreme Court precedent interpreting the Voting Rights Act.

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

The Constitution provides in Article I, section 9 that "no Person holding any Office or 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." As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

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

    As a general matter, a district court relies on the parties to discover and place before the court the appropriate factual record under the rules of evidence, and an appellate court then considers the record that has been developed in the court below. Established standards of review govern an appellate court's review of factual findings made in the district court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Shelby County v. Holder*. As a judicial nominee, I do not believe it appropriate to comment further on a subject of possible litigation.

15. **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 reflect a constitutional commitment to counteracting racial discrimination in the aftermath of the Civil War. Each of these Amendments provides that Congress has the power to enforce them "by appropriate legislation." U.S. Const., art. XIII, § 2; U.S. Const., art. XIV, § 5; U.S. Const., art. XV, § 2.

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

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

The Supreme Court has addressed and established a fundamental right to personal autonomy as expressed in *Lawrence v. Texas* and other decisions. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Lawrence v. Texas*.

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

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

The Supreme Court has stated that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991) (citation omitted). It is never appropriate for lower courts to depart from Supreme Court precedent. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

With respect to circuit precedent, a panel of the Eighth Circuit is bound by a prior decision of the Eighth Circuit *en banc*, unless the *en banc* proceeding resulted in an affirmance by operation of law as a result of an equally divided court. *Loeffler v.* Tisch, 806 F.2d 817, 818 (8th Cir. 1986) (*en banc*), *rev'd on other grounds*, 486 U.S. 549 (1988). A panel of the Eighth Circuit generally is bound by a prior published decision of another Eighth Circuit panel, so long as the prior panel decision has not been vacated or overruled either by the Supreme Court or Eighth Circuit sitting *en banc*. *Brock v. Astrue*, 674 F.3d 1062, 1065 (8th Cir. 2012); *Sisney v. Reisch*, 674 F.3d 839, 843 (8th Cir. 2012); *S.D. v. U.S. Dep't of Interior*, 423 F.3d 790, 796 (8th Cir. 2005); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575 n.2 (8th Cir. 2002). If confirmed, I will fully and faithfully apply all precedent of the Supreme Court and the Eighth Circuit, including precedent with respect to application of stare decisis.

18. 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.

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

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

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

    I believe that courts play a central role in protecting constitutional rights under the rule of law through the impartial application of the law. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent considering and applying footnote 4 of *United States v. Carolene Products*.

20. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

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

    Yes.

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

I have not previously researched this question and do not presently have considered views on it. If confirmed, and were such a matter to come before me, I will discern and fully and faithfully apply all applicable Supreme Court and Eighth Circuit precedent regarding the presidential pardon power.

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

The Constitution confers on the federal government certain enumerated powers, including Article I, Section 8, Clause 3 (the Commerce Clause) and Section 5 of the Fourteenth Amendment. The reach of those powers with respect to such provisions has been the subject of litigation and debate, with the Supreme Court deciding a number of cases in these areas. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 of the Fourteenth Amendment). If confirmed, I will fully and faithfully apply Supreme Court and Eighth Circuit precedent concerning the scope of congressional powers, including those addressing the Commerce Clause and Section 5 of the Fourteenth Amendment.

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

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

    In *Trump v. Hawaii*, the Supreme Court held, among other things, that the challenged Proclamation was lawfully issued under 8 U.S.C. § 1182(f). The Court held that "even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained" because the Proclamation "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions." 138 S.Ct. 2392, 2409. The

Court also held that "plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id*. The decision in *Trump v. Hawaii* is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply it and all Supreme Court precedent.

24. **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.**

The Supreme Court has held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Fifth Circuit precedent, including *Planned Parenthood v. Casey* and *Whole Woman's Health v. Hellerstedt*.

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

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

The Supreme Court has held that "[t]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotations omitted). According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent applicable to qualified immunity. As a judicial nominee, I do not believe it appropriate

to comment on whether certain aspects of the law, as a policy matter, should be expanded or contracted.

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

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

The Fourth Amendment, as with each of the Bill of Rights, states a fundamental guarantee to the people of the United States. The Supreme Court has recognized that new technological developments can give rise to genuine Fourth Amendment concerns. The Supreme Court has explained that new technologies in the digital era can "risk[] Government encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (citation omitted); *see also, e.g.*, *Riley v. California*, 573 U.S. 373, 402 (2014) (examining Fourth Amendment concerns involving modern cell phones). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent applicable to data collection and the Fourth Amendment. Beyond this, I cannot comment.

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

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

I have not previously researched this question and do not presently have considered views on the matter.

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

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

    I firmly believe that an independent judiciary is a core feature of our constitutional system and that an independent judiciary is necessary to promotion and protection of the rule of law.

Senator Dick Durbin
Written Questions for Daniel Traynor
October 2, 2019

For questions with subparts, please answer each subpart separately.

Questions for Daniel Traynor

1. **Please list all clients for whom you performed work as a registered lobbyist and the work you performed for each client.**

   In 2009 I served as a registered lobbyist for Walmart Stores, Inc., which sought repeal of a state law that restricted the ownership of pharmacies in the state. Walmart sought to repeal a pharmacy ownership requirement in North Dakota that prevents it from operating pharmacies in the State of North Dakota.

   In 2015 I served as a registered lobbyist for Ducks Unlimited, a sportsman and conservation group. DU sought to improve their relationship with policymakers in North Dakota.

2. **Do you believe that your work as a registered lobbyist has helped prepare you to be a federal district court judge?**

   No. It helped me to realize I did not want to be a lobbyist.

3. In 2016, you co-wrote an op-ed in the *Bismarck Tribune* where you endorsed North Dakota Attorney General Wayne Stenehjem as a candidate for governor. In this op-ed, you wrote approvingly that Attorney General Stenehjem had "fought against Obamacare and federal government overreach at every turn."

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

      The comments were made in the context of a political campaign where I was supporting a candidate in a primary election.

   b. **What are examples of the federal government overreach to which you were referring?**

      Please see my response to Question 3(a).

4. You have been active on social media, including Twitter. For example, you tweeted on September 26, 2016, "Hillary lies so much." And on October 24, 2016, you retweeted actor James Woods who said, "Obamacare death panels have arrived."

   Certainly as a private citizen you have the right to tweet political commentary. **But do you believe your tweets have demonstrated the kind of temperament and judgment that a federal district court judge should have?**

I have no recollection of the comments, but note that they appear to have been made during a political campaign where I was supporting a particular candidate. If confirmed, I will ensure that all parties in my courtroom are treated fairly, equally, and impartially.

5. **Have you tweeted or retweeted anything that you regret? If so, please identify the tweets at issue.**

   None that I can think of.

Nomination of Daniel Mack Traynor
to the United States District Court for the District of North Dakota
Questions for the Record
Submitted October 2, 2019
QUESTIONS FROM SENATOR WHITEHOUSE

1. Your questionnaire indicates that you joined the Federalist Society in 2016.
    a. What was your primary motivation for joining the organization?

    A staffer from Senator Heidi Heitkamp's office suggested I join the organization. Also, the organization became more active in North Dakota, with a local chapter and started having events. I have attended those events.

    b. If confirmed, do you plan to remain an active participant in the Federalist Society?

    Insofar as they remain active in North Dakota, yes.

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

    Other than the annual membership fee, no.

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

    No.

2. You have actively maintained social media accounts and consistently tweet about political issues. On Facebook, you have "liked" the National Rifle Association. Please describe your level of involvement with the NRA.

    None.

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

    I do not recall reading the Washington Post story or listening to the recordings. I have done so, as requested. I have no basis upon which to know whether or the extent to which the facts and circumstances related in the Washington Post story are accurate.

    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.

I am unfamiliar with the facts and circumstances reported in the Washington Post story. I am aware that judicial nominations have generated significant controversy and debate, particularly since the 1980s. I firmly believe that an independent judiciary is a core feature of our constitutional system and that an independent judiciary is necessary to promotion and protection of the rule of law. An independent judiciary depends upon judges being free from political influence or bias. Article III of the Constitution sets forth certain protections to allow for judicial independence, including provisions regarding tenure and compensation in office. The Code of Conduct for United States Judges likewise reinforces the importance of judges operating independent of the political sphere by affirming that "[a]n independent and honorable judiciary is indispensable to justice in our society." *See* Code of Conduct for United States Judges, Canon 1. If confirmed, I will seek to model the independence inherent in these statements.

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?

I am not familiar with the facts and circumstances related to that statement. As such, I cannot comment on his meaning. Beyond this, please also see my response to question 3(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.

I have no such knowledge.

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?

I am not familiar with the facts and circumstances related to that statement. As such, I cannot comment on his meaning. Beyond this, please also see my response to question 3(b).

4. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
   a. Do you agree with Justice Roberts' metaphor? Why or why not?

   I agree with the metaphor to the extent it captures the idea that the role of a judge is to fairly and impartially adjudicate cases within the constitutional boundaries of the judicial branch. Simply stated, judges should fairly and neutrally apply predetermined rules without favor or preference to one side or the other, and without placing himself or herself in the role of an adversary.

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

A judge's duty is to follow and apply the law in a fair and neutral manner, and it is generally the duty of the political branches to consider and address the practical consequences. To the extent that Supreme Court and Eighth Circuit precedent and applicable rules and statutes permit a judge to consider the practical consequences in rendering a decision on a particular issue, a judge may do so.

5. 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?

   Whether a genuine dispute as to any material fact exists requires the court to consider the parties' factual assertions based on the evidentiary record, construed in a light most favorable to the nonmovant. Such a decision requires judgment and reason, and in that sense is objective. Regardless, it should not be subjective in the sense that judges should refrain from injecting their personal views or feelings into the determination.

6. 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?

      In execution of their duties, a judge must be fair, careful, and thorough. Empathy is an essential human attribute, and it should motivate a judge to conform his or her conduct to meet these characteristics. Ultimately, a judges' decisions must be based on applicable law and relevant facts, and not on personal feelings. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

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

      Every judge brings his or her varied life experiences to the bench with them. But a judges' personal views should not affect their duty to administer justice impartially and fairly to all. Ultimately, a judges' decisions must be based on applicable law and relevant facts, and not on personal experiences. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

7. 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.

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

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

The Seventh Amendment right to a jury trial in "suits at common law" is an important feature of the American justice system that protects the rights of civil litigants to have facts decided by a jury of one's peers. As such, the jury plays a fundamental and critical role in our constitutional system.

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

The Seventh Amendment states a fundamental guarantee to the people of the United States. As with the guarantees of each of the Bill of Rights, the right to a jury trial in "suits at common law" should always be of concern to judges considering cases or controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent with respect to the Seventh Amendment. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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 8(b).

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

The Supreme Court has issued several opinions analyzing the level of deference that should be given to the fact-findings by Congress in situations where they support expanding or limiting individual rights. If confirmed, I will fully and faithfully follow Supreme Court and Eighth Circuit precedent with respect to this issue.

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

    I had not previously read or reviewed this material. I have done so, as requested.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.
        ii. Determining whether the seminar is supported by private or otherwise anonymous sources.
        iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.
v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

Advisory Opinion #116 appears generally to summarize and emphasize particular aspects of the Code of Conduct for United States Judges and the Code of Conduct for Judicial Employees with respect to educational seminars. I commit to abide by and consider both Codes in the execution of my judicial duties, including with respect to participation in educational seminars.

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 10(b). In addition, I commit to being alert to the potential that sponsoring organizations of educational programs might attempt to gain influence with participating judges, and if I am aware of that fact, to taking appropriate action.

Nomination of Daniel Mack Traynor, to be United States District Judge for the District of North Dakota
Questions for the Record
Submitted October 2, 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?

   If confirmed, I will fully and faithfully apply the framework set forth in the many Supreme Court decisions assessing these questions, including, but not limited to *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

      Yes, as directed by Supreme Court and Eighth Circuit precedent.

   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, as directed by Supreme Court and Eighth Circuit precedent. The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), set for the analysis for whether a right is deeply rooted in the nation's history and tradition, stating that it involves "examining our Nation's history, legal traditions, and practices." The Court directed inquiry to historical practice under the common law, the practice in the American colonies, historical state statutes, judicial decisions, and long-established traditions.

   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. If confirmed, I will be bound by Supreme Court and Eighth Circuit precedent previously recognizing any such right. Absent binding precedent, I will look to decisions from other circuit courts as persuasive authority.

   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. If confirmed, and absent binding precedent, I will consider whether Supreme Court and circuit precedent previously recognizing any similar right constitutes persuasive authority.

   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*).

Both *Planned Parenthood v. Casey* and *Lawrence v. Texas* are binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including *Casey* and *Lawrence*.

f. What other factors would you consider?

If confirmed, I will consider any other facts deemed relevant under Supreme Court and Eighth Circuit precedent.

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 long held that the Equal Protection Clause of the Fourteenth Amendment applies to both race-based classifications and gender-based classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976).

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?

Any academic debate about the intent of the individuals who passed the Fourteenth Amendment does not affect the binding nature of Supreme Court precedent. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including the precedent cited above.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I am unaware why *United States v. Virginia* was filed at the time it was, instead of earlier. Regardless, please see my response to Question 2(a).

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

In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), the Supreme Court held that the Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including *Obergefell*.

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

Equality under the law is paramount in our legal system and to the rule of law. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent addressing this topic. However, as a judicial nominee, I do not believe it appropriate to comment further on a subject which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

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

   The Supreme Court has addressed and established a constitutional right to privacy protecting a woman's right to use contraceptives in a series of cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including *Griswold* and *Eisenstadt*.

   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 addressed and established a constitutional right to privacy protecting a woman's right to obtain an abortion in a series of cases, including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including these decisions.

   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?

      The Supreme Court has addressed and established a constitutional right to privacy protecting intimate relations between two consenting adults, regardless of their sexes or genders, in a series of cases, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including *Lawrence* and *Obergefell*.

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

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

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex

couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent finding it appropriate to consider such evidence.

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

The role of sociology, scientific evidence, and data depends on the nature of the particular issue within a particular case. If confirmed, I will fully and faithfully apply Supreme Court and Eighth Circuit precedent establishing what role these sources should play in a given case, including precedent with respect to judicial notice and admissibility of expert opinion.

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?

Obergefell is binding Supreme Court precedent. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court stated, "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." 138 S. Ct. 1719, 1727 (2018). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent.

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

Please see my response to Question 5(a).

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?

I am aware that several legal scholars have maintained that *Brown v. Board of Education* is consistent with originalism, including Robert Bork, Michael McConnell, and Ilan Wurman. Beyond any academic debate, however, the Supreme Court has made clear in numerous decisions that racial discrimination has no place under our Constitution. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including *Brown* and successor cases.

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 Sept. 30, 2019).

I am not familiar with this article or these authors' argument. I am aware that determining the original public meaning of a constitutional provision can be difficult. The quoted language appears to acknowledge this fact. Beyond this, if confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent regardless of the breadth of a term such precedents interpret.

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?

For a district judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If the Supreme Court or Eighth Circuit has decided that some other mode of interpretation is appropriate in interpreting a constitutional provision, that decision is dispositive. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, regardless of their methodology.

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

Please see my response to Question 6(c) above.

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

If confirmed, I will fully and faithfully apply all relevant Supreme Court and Eighth Circuit precedent that identifies the appropriate sources to use in discerning the contours of a constitutional provision.

7. On May 15, 2016, @DanielMTraynor retweeted the following tweet by then-candidate Donald Trump: "Why doesn't the failing @nytimes write the real story on the Clintons and women? The media is TOTALLY dishonest!"
   a. Did you retweet this? If so, why?

      The comments are not mine. They appear to be that of the President, when he was a candidate for the presidency in 2016.

   b. Do you believe that the media is "TOTALLY dishonest"?

      No.

   c. How do you evaluate the accuracy of a media report?

      I try to look at several sources of information to evaluate accuracy.

8. On September 26, 2016, @DanielMTraynor tweeted the following: "Hillary lies so much, #SheCantTellTheTruth. #BathroomServer #Benghazi #PayToPlay . . . ."
   a. Did you tweet this? If so, why?

      I do not recall tweeting that particular comment from three years ago. The comments appear to have occurred during a political campaign where I was supporting an opposing political candidate.

   b. What was your basis for asserting, "Hillary lies so much, #SheCantTellTheTruth"?

      Please see my response to Question 8(a).

   c. What did you mean by the references to "#BathroomServer," "#Benghazi," and "#PayToPlay"?

      Please see my response to Question 8(a).

9. On June 19, 2018, @DanielMTraynor retweeted the following tweet by Senator Cotton: "Dems' Keep Families Together Act is better called the Child Trafficking Encouragement Act. Show up at border with a minor & call him your child, then you get released into the US! Children will be abducted & sold to drug cartels & slave-traders as a free ticket into US."
   a. Did you retweet this? If so, why?

      The comments are not mine and were made in the context of a political campaign.

b. Do you agree with the assertion that if the Keep Families Together Act were passed, "Children will be abducted & sold to drug cartels & slave-traders as a free ticket into US"? If so, what is your basis for agreeing with this assertion?

Please see my response to Question 9(a).

10. A commitment to accuracy and judicial temperament are necessary attributes for lifetime appointments to the federal bench.
    a. Do you believe that your public statements on Twitter are a fair reflection of your commitment to accuracy?

    I cannot comment on a third party's perception of the above tweets, most of which were made by persons other than myself. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially.

    b. Do you believe that your public statements on Twitter are a fair reflection of your judicial temperament?

    Please see my answer to Question 10(a).

    c. Are there any tweets or retweets that you regret sending? If so, which ones, and why?

    Please see my answer to Question 10(a).

11. In your Senate Judiciary Committee Questionnaire, you stated: "If confirmed, I will recuse in cases where I have had a role in representing or providing counsel to any of the parties. Regarding my present firm, I will recuse myself in cases pending at the time of my appointment wherein current members of my firm are counsel of record."
    a. If confirmed, will you recuse yourself from cases where Traynor Law Firm, P.C. is currently involved though not serving as counsel of record?

    Yes.

    b. If confirmed, will you recuse yourself from cases where Traynor Law Firm, P.C. is retained after your confirmation?

    The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

c. If confirmed, will you recuse yourself from cases where a member of your family is retained as counsel after your confirmation?

Please see my response to Question 11(b).

Questions for Daniel Mack Traynor
From Senator Mazie K. Hirono

1. You are active on social media, and seem to specialize in hyper-partisan commentary on President Trump, Hillary Clinton, immigration, the Affordable Care Act, and other such topics. You are extremely active in Republican politics. And, since 2002, you have been the North Dakota Chair of the Republican National Lawyer's Association, an organization that lists "Advancing Republican Ideals" as one of its goals.

   a. Why do you want to become a federal judge on a district court where you are duty-bound to follow the law and Supreme Court precedent as it is, not as you wish it would be?

   Every judge brings his or her varied life experiences to the bench with them. But a judges' personal views should not affect their duty to administer justice impartially and fairly to all. Ultimately, a judges' decisions must be based on applicable law and relevant facts, and not on personal experiences. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

   b. When litigants come before you, they will see your hyper-partisan statements. What can you point to in your record to give litigants and the public the ability to have confidence that you will be fair and non-partisan, should you be confirmed as a federal judge?

   I believe that my broad personal and professional experiences have equipped me well to be a judge and to exercise a judicial role. I have a wide range of experiences in my life, with a diverse array of friends, colleagues, and acquaintances. As a lawyer and as a friend, I have counseled many persons without regard to partisan affiliation or interest. However, judicial decisions should be based on applicable law and relevant facts, and not on personal feelings, life experiences, or the identities of the parties appearing before them.

2. On your Senate Judiciary Questionnaire, you stated that, if you are confirmed, you will recuse yourself "in cases pending at the time of [your] appointment wherein current members of [your] firm are counsel of record." This is an extremely narrow approach to recusal. As an example, many other nominees have committed to recusing themselves "[f]or an appropriate period of time . . . from any cases where [their] current law firm . . . represents any party."

   a. Why have you decided that it is appropriate for you to recuse yourself only from cases pending at the time of your appointment wherein current members of your firm are counsel of record, if you are confirmed as a federal judge?

   The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and

the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

b. In your opinion, if you are confirmed as a federal judge, would it be appropriate for you to preside over a case in which a member of your firm was doing pre-litigation work for a client while you were still at the firm, simply because a complaint wasn't actually filed until the day after you are confirmed?

No.

3. Your practice has been highly focused in state court. In your Senate Judiciary Questionnaire, you estimated that only 10% of your work has been in federal court. You also noted that since 2005, your work has been "nearly entirely focused on civil litigation in personal injury matters."

Given your dearth of experience in federal court and a focus on a single type of case for the past 14 years, what qualifies you to be a federal district court judge?

I have handled several significant matters in federal court. However, as courts of general jurisdiction, state courts are where most legal disputes are heard. While my practice has been focused on civil litigation in personal injury matters, I have represented both injured plaintiffs and defendants accused of negligence. I have also represented children and vulnerable adults with regard to personal injury matters. Throughout my career I have represented Native people in asserting their rights in tribal, state and federal court. Moreover, as a general matter, I have had a long career as a litigator and a trial attorney, where I routinely handle evidentiary issues, both lay and expert witness testimony, discovery disputes, dispositions, and direct and cross examination of witnesses. I believe this lifetime of experience will serve me well on the federal trial bench if I am fortunate enough to be confirmed.

Nomination of Daniel Mack Traynor
United States District Court for the District of North Dakota
Questions for the Record
Submitted October 2, 2019

QUESTIONS FROM SENATOR BOOKER

1. According to your Senate Judiciary Questionnaire (SJQ), you registered as a lobbyist for Ducks Unlimited in 2015.[1] Please describe the nature of your work for Ducks Unlimited and what issues you work on.

   I reviewed testimony of the state director prior to one state legislative hearing. I also suggested several grassroots DU members who might assist with improving relationships with the state legislature.

2. According to your SJQ, you lobbied on behalf of the North Dakota Republican Party from 2002 to 2003. Please describe the nature of your work for the North Dakota Republican Party and what issues you worked on.

   At the time I was the State Republican Chairman. I recall monitoring legislation concerning the creation of a state voter file and state campaign finance requirements. I do not recall appearing or testifying before any legislative committees.

3. Impartiality is a fundamental part of a federal judge's duties. Impartiality is central to the rule of law and judicial independence. Canon 3 of the Code of Conduct for United States Judges instructs: "A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently." Canon 3(C), moreover, specifically provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Over the years, you have been very active on Twitter commenting on political issues.

   a. On September 26, 2016, you retweeted @AnnCoulter's tweet stating, "So great that Lester isn't wasting time on trivial issues like immigrants accepting welfare, taking jobs, killing Americans."[2]

      i. If you are confirmed, why should a litigant in your courtroom expect to get a fair hearing from an impartial judge in a case involving immigration issues, in light of statements like these?

         I have no recollection of the comments and they are not mine. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially, without regard to nationality.

ii. As noted, the Code of Conduct for United States Judges requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Given this comment on immigration issues, wouldn't your impartiality on this issue reasonably be questioned, such that your recusal would be warranted?

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

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[1] SJQ at pp. 37-38.

[2] Ann Coulter (@AnnCoulter), TWITTER (Sept. 26, 2016 , 10:06 P.M.), https://twitter.com/AnnCoulter/status/780589398215626752.

b. On October 24, 2016, you retweeted @RealJamesWoods's tweet stating, "Terminally ill mom denied treatment coverage—but gets suicide drug approved / #Obamacare #DeathPanels have arrived!"[3]

   i. If you are confirmed, why should a litigant in your courtroom expect to get a fair hearing from an impartial judge in a case involving the Affordable Care Act, in light of statements like these?

      I have no recollection of the comments and they are not mine. If confirmed, I will approach all issues from a position of neutrality, and decide all cases solely on their legal merits.

   ii. As noted, the Code of Conduct for United States Judges requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Given this comment on the Affordable Care Act, wouldn't your impartiality on this issue reasonably be questioned, such that your recusal would be warranted?

      The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

c. On September 21, 2018, you quote tweeted a tweet from @EdWhelanEPPC in which you said, "Boom! Read this." This tweet appears to now be deleted. However, it seems you were retweeting a conspiracy theory promoted by Ed Whelan that suggested that Christine Blasey Fords' allegations against Associate Justice Brett Kavanaugh was a case of mistaken identity.

   i. Why did you retweet this tweet?

      I have no recollection of the comments and they are not mine. As the tweet is deleted I am unable to confirm the information or consider its meaning.

   ii. Did you agree with Ed Whelan's theory that suggested that Christine Blasey Fords' allegations against Associate Justice Brett Kavanaugh was a

case of mistaken identity? If so, why?

I have no recollection of the comments and they are not mine. As the tweet is deleted I am unable to confirm the information or consider its meaning.

iii. Why did you delete this tweet?

From the little that I remember, I believe the information was debunked and abandoned by the author. So, I concluded the information must be unreliable.

4. In your article, "*In GOP Race for Governor, Former Democrat Finds Loyalty Questioned*" you stated that, "[p]eople make mistakes, and becoming a Democrat is a mistake."[4]

   a. Do you believe that registering as a Democrat is a mistake?

      No.

   b. If you are confirmed, why should a Democratic litigant in your courtroom expect to get a fair hearing from an impartial judge in light of statements like these?

      If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially, regardless of political affiliation.

5. The integrity of the judicial branch depends on the ability of judges to remain impartial. In order to remain impartial, other nominees have committed to recusing themselves from

[3] James Woods (RealJamesWoods), TWITTER (Oct. 24, 2016), https://twitter.com/RealJamesWoods/status/790717443937230849.
[4] *In GOP Race for Governor, Former Democrat Finds Loyalty Questioned*, AP NEWS (Jan. 8, 2000) (SJQ Attachment 12(e) at p. 516).

all cases where their former employer may represent a party. You only committed to recusing yourself "in cases pending at the time of my appointment wherein current members of my firm are counsel of record."[5]

a. Will you commit to recusing yourself in all cases where your firm represents a party?

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. If confirmed, I will carefully evaluate every case to determine whether recusal is warranted. In making these determinations, I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges, as well as any other applicable rules or guidance. As necessary and appropriate, I will also consult with colleagues and ethics officials within the court system. I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I have served as a lawyer or, for an appropriate period of time, cases in which my law firm is involved. In every case, I will carefully consider whether recusal is necessary.

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

I consider myself to be a lawyer. I do not categorize myself as exclusively an originalist or textualist, as all labels are themselves of debated meaning. I do believe that the original public meaning of constitutional and statutory texts must be considered when interpreting and applying any such text. The Supreme Court has looked to the original public meaning of texts and considered that meaning relevant when interpreting those texts in certain contexts. The Supreme Court has also repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

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

Please see my response to Question 6.

8. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

The Supreme Court has stated that consideration of legislative history may be appropriate when the text of a statute is ambiguous. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

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

Please see my response to Question 8(a).

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

Yes. I understand judicial restraint to mean decisions should be limited to resolving the case or controversy before the court.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[6] Was that decision guided by the principle of judicial restraint?

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" an opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[7] Was that decision guided by the principle of judicial restraint?

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" an opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent.

[5] SJQ at pp. 38-39.
[6] 554 U.S. 570 (2008).
[7] 558 U.S. 310 (2010).

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[8] Was that decision guided by the principle of judicial restraint?

As a judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" an opinion of the Supreme Court. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). If confirmed, I will fully and faithfully apply all Supreme Court precedent.

10. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.[9] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[10]

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

As a nominee for the district court, it would be inappropriate for me to comment on matters of public policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges.

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

As a nominee for the district court, it would be inappropriate for me to comment on matters of public policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges.

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

As a nominee for the district court, it would be inappropriate for me to comment on matters of public policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges.

11. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[11] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[12] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[13] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[14]

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

I have not studied the issue, but I am aware of studies that suggest the existence of such bias.

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

Again, I have not studied the issue and therefore cannot comment.

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[8] 570 U.S. 529 (2013).
[9] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org /analysis/debunking-voter-fraud-myth.
[10] *Id.*
[11] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[12] *Id.*
[13] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[14] *Id.*

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

I have not studied this issue specifically. I moderated a panel discussion on implicit bias at the North Dakota State Bar Annual Meeting. I recall that panelists suggested bias existed and as members of the bench and bar, we should guard against such bias. I also recall raising the issue concern where individuals are targeted because of tribal license plates. The panelists described the targeting as racial profiling.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[15] Why do you think that is the case?

I have not studied this issue closely enough to form an opinion on this question. Ours is a nation committed to the equality of all people without regard to race, and as such, racial bias should play no role in our criminal justice system. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[16] Why do you think that is the case?

Please see my response to Question 11(d).

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

All judges should be mindful of the potential for bias—implicit and explicit—in their courthouses and in the cases before them, and should endeavor to run their courtrooms and chambers in a manner that is free from bias of any sort, including racial bias. In this respect, I find the judicial oath of office particularly informative. *See* 28 U.S.C. § 453. If confirmed, I will uphold my judicial oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

12. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[17] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[18]

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

I have not studied the issue closely enough to form an opinion on this question.

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

I have not studied the issue closely enough to form an opinion on this question.

13. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

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

Yes.

15. Do you believe that *Brown v. Board of Education*[19] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. In *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson* and struck down the doctrine of "separate but equal," noting that it "has no place" in American law, thus correcting an erroneous decision shortly after ratification of the Fourteenth Amendment. *Brown*, 347 U.S. 483, 494–95 (1955). As a judicial nominee, it would typically be inappropriate to comment on the correctness of prior Supreme Court decisions or matters that are or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C). However, I am not aware of any such litigation to challenge or call into question the core holding in *Brown*, and in any event, I have previously indicated in public presentations my belief that *Brown* corrected the error of *Plessy*.

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

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

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

[18] *Id.*

[19] 347 U.S. 483 (1954).

16. Do you believe that *Plessy v. Ferguson*[20] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Please see my response to Question 15.

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

No. I believe it would be improper for me to do so as a judicial nominee. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

18. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[21] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. *See* Code of Conduct for United States Judges, Canons 2 and 3. The Code of Conduct for United States Judges sets recusal standards, along with statutory guidance such as 28 U.S.C. § 455 and other applicable rules. The independence of the federal judiciary is likewise a core feature of our constitutional design. Article III of the Constitution sets forth certain protections designed to enable judges to make decisions that are grounded in law, without respect to criticisms in public debates and commentary. As a judicial nominee, I do not believe it appropriate to comment further on a subject of current political debate, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

19. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[22] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including *Zadvydas*. As a judicial nominee, I do not believe it appropriate to comment further on an abstract and hypothetical scenario, which is or may be the subject of pending or impending litigation. *See* Code of Conduct for United States Judges, Canons 2(A), 3(A)(6), and 5(C).

[20] 163 U.S. 537 (1896).
[21] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,' WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[22] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted October 2, 2019
For the Nomination of

Daniel Mack Traynor, to the U.S. District Court for the District of North Dakota

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

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

    I would follow all of the procedures and practices set forth in the Sentencing Guidelines, the Federal Rules of Criminal Procedure, and other relevant statutes, plus any relevant and binding case law. I would review pre-sentencing memoranda, any investigatory reports, and the factors enunciated in 18 U.S.C. § 3553(a), and I would consider the arguments of counsel, statements from the defendant, the victim, and/or victim's family to evaluate each case thoroughly and independently.

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

    I would look to federal sentencing guidelines, review the sentences that have been imposed within my district and approved by the Eighth Circuit and Supreme Court, and incorporate the factors discussed in 1(a) to reach a fair and proportional sentence.

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

    Federal sentencing guidelines are not mandatory, and careful consideration of all relevant factors in a particular case may require departure from the sentence recommended by the Sentencing Guidelines.

    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's work in this area.

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

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

The merits of mandatory minimum sentencing is a political question within the purview of Congress; it is not a question for the judiciary. As a district court judicial nominee; it would not be appropriate for me to comment on this public policy question.

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?**

   My judicial opinions regarding sentencing would include a detailed description of the underlying facts and all applicable considerations, but I would impose any mandatory minimum sentence required by law, as per Congress's mandate.

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

   The decision whether or not to charge a crime, and which crime to charge, rests solely within the purview of the Executive Branch.

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

   Considerations of clemency are for the Executive Branch.

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?**

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[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

If confirmed, I will consider the provisions of 28 U.S.C. § 994(j).

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. If confirmed, I will take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me … under the Constitution and laws of the United States." 28 U.S.C. § 453. If I am a judge, I will treat all litigants, attorneys, and witnesses who appear before me with dignity and courtesy, and to render my judicial decisions without bias or prejudice.

    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.**

    While I have not studied the issue of racial disparity in the criminal justice system, I am aware of studies that express this view. Indeed, I have moderated a panel on implicit bias where racial disparities in our criminal justice system, particularly with regard to Native people, were discussed. It is an issue that should be a focus of research and discussion by the legislative and executive branches of government and, perhaps, by the bench and bar.

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?**

    If confirmed, I will consider all qualified applicants, without regard to their race or sex, for positions within my chambers.