

**Nomination of John Campbell Barker to the
U.S. District Court for the Eastern District of Texas
Questions for the Record
May 16, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.
 - a. **When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

It is not appropriate. Lower courts do not have the authority to depart from Supreme Court precedent.
 - b. **Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

Circuit judges have the authority to write concurring or dissenting opinions concerning any number of topics, including the possibility that the U.S. Supreme Court might someday revisit one of its precedents. But lower courts do not have the authority to depart from Supreme Court precedent.
 - c. **When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

As a lower-court nominee, it would be unfitting for me to advise when it is appropriate for the Supreme Court to overturn its own precedent. The Court itself determines when that is appropriate. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating that only the Supreme Court has “the prerogative of overruling its own decisions”).
 - d. **When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

Please see my response to Question 1(c) above.
2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))
 - a. **Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?**

All Supreme Court precedent is settled law from the perspective of a district

judge, entitled to controlling precedential weight and dispositive stare decisis effect. That includes *Roe*. If confirmed to serve as a district judge, I would follow all Supreme Court precedent fully, fairly, and faithfully.

b. Is it settled law?

Yes, please see my response to Question 2(a) above.

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

Yes, all Supreme Court precedent is settled law from the perspective of a district judge, entitled to controlling precedential weight and dispositive stare decisis effect. That includes *Obergefell*. If confirmed to serve as a district judge, I would follow all Supreme Court precedent fully, fairly, and faithfully.

4. In 2016, as Deputy Solicitor General of Texas, you signed two nearly identical amicus briefs before the United States Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and *Arlene's Flowers, Inc. v. Washington*. In both cases, the briefs you signed argued that state laws in Colorado and Washington, which prohibit discrimination on the basis of sexual orientation, could not be used to require individuals with religious objections to provide services for same-sex weddings. (*Amici Curiae* Brief for Texas, et. al., in Support of Petitioners, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 137 S. Ct.

2290), 2017 WL 4023111; *Amici Curiae* Brief for Texas, et. al., in Support of Petitioners, *Arlene's Flowers v. Washington* (Case No. 91615-2).)

a. What role did you play in selecting which arguments would be included in these briefs?

Along with other attorneys in the Texas Attorney General's Office, I contributed to the preparation of these briefs advancing the position of my clients in the cited litigation. The specific ways in which those attorneys contributed to the amici states' shared litigation position are protected by several privileges, including the attorney-client privilege.

b. In *Obergefell*, the Supreme Court held that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). How are the briefs you signed in *Masterpiece Cakeshop* and *Arlene's Flowers* consistent with the Supreme Court's decision in *Obergefell*?

Because this question relates to the merits of pending litigation, I am precluded from commenting by Canon 3(A)(6) of the Code of Conduct for United States Judges.

c. Both briefs concluded that there was no "tangible harm" to same-sex couples who were denied services for their weddings on the basis of their sexual orientation. What evidence supports your assertion that same-sex couples suffered no "tangible harm" as a result of the discrimination they suffered due to their sexual orientation?

Please see my response to Question 4(b) above.

5. 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 federal judicial nominee, it would be unfitting for me to provide personal opinions about particular Supreme Court decisions or dissents from those decisions. If confirmed, I would faithfully apply all Supreme Court precedent.

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

The Supreme Court in *Heller* stated that “the right secured by the Second Amendment is not unlimited,” adding, “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.” *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court “also recognize[d] another important limitation on the right to keep and carry arms,” namely, “that the sorts of weapons protected were those in common use at the time.” *Id.* at 627 (internal quotation marks omitted).

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

Please see my response to Question 5(a) above.

6. While serving in the Texas Solicitor General’s office, did you ever conceive of, recommend, or advocate for a particular litigation position or a specific legal argument that the state ultimately adopted? If so, please explain.

Yes. In my role as litigator, analyzing potential legal arguments in support of my clients’ objectives, some potential legal arguments may ultimately be advanced while others are not. To the extent that this question calls for the specifics of my legal work for a client, I cannot divulge those details because they are protected by several privileges, including the attorney-client privilege.

7. While serving in the Texas Solicitor General’s office, did you ever recommend that the state should not take a particular litigation position or should not make a specific legal argument that the state nevertheless adopted? If so, please explain.

Yes. In my role as litigator, analyzing potential legal arguments in support of my clients’ objectives, some potential legal arguments may ultimately be advanced while others are not. To the extent that this question calls for the specifics of my legal work for a client, I cannot divulge those details because they are protected by several privileges, including the attorney-client privilege.

8. In 2017, as Deputy Solicitor General of Texas, you signed two nearly identical amicus briefs in support of President Trump’s decision to rescind the Deferred Action for Childhood Arrivals (DACA) program. The briefs argued that DACA is unlawful and that it “creates a massive bureaucracy to grant applications a host of benefits—including lawful presence,

related benefits eligibility, and work authorization.” (*Amici Curiae* Brief for Texas, et. al., in Support of Petitioners, *Dep't of Homeland Sec. v. Regents of Univ. of California*, 138 S. Ct. 942 (2018), 2018 WL 620459; *Amici Curiae* Brief for Texas, in Support of Petitioners, *In re U.S.*, 138 S. Ct. 371 (2017), 2017 WL 6492865).

a. What role did you play in selecting which arguments would be included in these briefs?

Along with other attorneys in the Texas Attorney General’s Office, I contributed to the preparation of these briefs advancing the position of my clients in the cited litigation. The specific ways in which those attorneys contributed to the amici states’ shared litigation position are protected by several privileges, including the attorney-client privilege.

b. These briefs argued that there is “no legal basis” for DACA. Do you agree?

Because this question references the merits of litigation that is currently pending, Canon 3(A)(6) of the Code of Conduct for United States Judges precludes public comment.

9. In 2016, you helped defend Texas before the Supreme Court on Texas’s motion for a preliminary injunction to prevent the implementation of the Deferred Action for Parental Accountability (DAPA) program. The brief with which you assisted argued that a preliminary injunction was needed in part because the implementation of DAPA and expansion of DACA would both cause “irreparable injuries” to Texas and other states, in part by “legaliz[ing] the presence of 4 million people.” (Brief of the State Respondents, *U.S. v. Texas*, 136 S. Ct. 2271 (2016), 2016 WL 1213267).

a. What role did you play in selecting which arguments would be included in this brief?

Along with other attorneys in the Texas Attorney General’s Office, I contributed to the preparation of these briefs advancing the position of my clients in the cited litigation. The specific ways in which those attorneys contributed to the plaintiff states’ shared litigation position are protected by several privileges, including the attorney-client privilege.

b. Please identify the “irreparable injuries” to the State of Texas if parents of U.S.-citizen children are able to be legally present in this country.

The plaintiff states’ arguments in support of the second prong of the preliminary-injunction standard and the plaintiffs’ standing under Article III of the United States Constitution appear on pages 18-36 of the cited brief, which contain the citations in support of the plaintiff states’ arguments.

10. In 2016, as Deputy Solicitor General of Texas, you helped defend HB2, a Texas law that severely restricted women’s access to reproductive healthcare. (Brief of Respondents John

Hellerstedt, Commissioner, Texas Department of State Health Services, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 579 U.S. ____ (2016), 2016 WL 344496). This same law was struck down as unconstitutional by the Supreme Court. The Court's opinion held in part that HB2's surgical-center and admitting privileges requirements "provide[] few, if any, health benefits for women, pose[] a substantial obstacle to women seeking abortions, and constitute[] an 'undue burden' on their constitutional right to do so."

a. What role did you play in selecting which arguments would be included in this brief?

Along with other attorneys in the Texas Attorney General's Office, I contributed to the preparation of that brief advancing the position of my clients in the cited litigation. The specific ways in which those attorneys contributed to our clients' litigation position are protected by several privileges, including the attorney-client privilege.

b. At the time you defended HB2, were you aware of any evidence indicating that the imposition of surgical-center and admitting privileges requirements on health centers resulted in better outcomes for women's health?

The respondents' arguments about the health justification for the challenged legal provisions appear at pages 14 and 32-41 of the cited brief, which contain the citations in support of the respondents' argument. The Supreme Court held the challenged statute unconstitutional, and that decision is final, settled, and authoritative. If confirmed, I apply this Supreme Court precedent fully, fairly, and faithfully, as I would all binding precedent.

11. In 2016, as Deputy Solicitor General of Texas, you helped defend SB14, a Texas law requiring voters to present one of six forms of identification at the polls be eligible to vote. You signed a petition for a writ of certiorari before the Supreme Court, which argued in part that there was no proof that SB14 caused a disproportionate impact in minority political participation. (Reply Brief for Petitioners, *Abbott v. Veasey*, 137 S. Ct. 612 (2017), 2016 WL 7229221).

a. Can voter-identification laws impose a significant burden on voting for minorities?

Any law that regulates how individuals vote can impose burdens. The question in any particular lawsuit is whether the challenged voting regulation is lawful. On April 27, 2018, the Fifth Circuit upheld Texas's voter-identification requirements. *See Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018). That litigation is still ongoing, however, and therefore I cannot comment on legal propositions implicated by that litigation, or the evidence presented in it. *See Code of Conduct for United States Judges*, Canon 3(A)(6).

b. Are you aware of any evidence showing that voter ID requirements can suppress voter turnout?

Please see my response to Question 11(a) above.

12. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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?

As indicated in response to Question 26(a) on my Senate Judiciary Questionnaire, I interviewed with officials from the White House and Department of Justice on July 28, 2017. I do not recall everything discussed in that interview. I do recall providing a general description of the Supreme Court's governing framework for deference to administrative interpretations, including the Supreme Court's controlling decisions in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

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?

I do not recall ever being asked by the Federalist Society or Heritage Foundation about my views on administrative law.

Providing legal advice for my clients calls on me to express views on potential legal arguments, of course, and that confidential legal advice sometimes involves matters of administrative law. I do not understand my legal advice for my clients to be within the scope of this question, and I could not ethically disclose privileged and confidential legal advice in any event.

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

The Supreme Court has on various occasions made clear that courts may consider legislative history when the statutory language is ambiguous.

14. 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 at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received Questions for the Record from eight Senators and drafted responses to each question. After drafting my responses, I reviewed my employer's policies on privilege and statements regarding office litigation and sought feedback from the Texas Attorney General's Office to ensure that my responses were compliant with those policies, which they were. After that review, I solicited feedback on my responses from members of the Office of Legal Policy at the United States Department of Justice. I then made edits that I believed appropriate, and I authorized the submission of my responses.

Senator Dick Durbin
Written Questions for Ryan Bounds, J. Campbell Barker, and Maureen Ohlhausen
May 16, 2018

For questions with subparts, please answer each subpart separately.

Questions for J. Campbell Barker

1. You say in your questionnaire that after you joined the Texas Attorney General's Office in 2015, you represented the state of Texas in litigation over the DAPA and DACA programs.

On June 29, 2017, Texas Attorney General Ken Paxton wrote Attorney General Jeff Sessions and threatened to challenge the Administration in court unless the Administration rescinded DACA. Attorney General Sessions cited this "potentially imminent litigation" as a justification when he announced on September 5, 2017 that the Administration was shutting down DACA. According to an October 5, 2017 *Politico* article, when he was asked "were you in touch with the Trump administration about ending DACA before you sent the letter?" Attorney General Paxton responded "yeah, we had some back and forth conversations."

- a. **Did you communicate or coordinate with the Department of Justice or Department of Homeland Security regarding DACA prior to the June 29, 2017 Paxton letter? If so, please describe those communications, including who in the Administration you communicated with, when you communicated, and what was said.**

No, not that I recall. For clarity, I did represent the State of Texas in the above-cited litigation, *see Texas v. United States*, No. 1:14-cv-00254 (S.D. Tex.); *Brewer v. Arizona Dream Act Coalition* (U.S. No. 16-1180), and my name appears on the State of Texas's public filings in that litigation. Those public filings were served on and thus communicated to the Department of Justice.

- b. **Are you aware of any communications between anyone in the Office of the Texas Attorney General and the Department of Justice or Department of Homeland Security regarding DACA in advance of the June 29, 2017 Paxton letter? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

No, except for the public filings discussed above and the public oral argument in *Texas v. United States* litigation, which was attended by Department of Justice attorneys and which referenced DACA. *See* Oral Arg. Recording at 1:15:53-1:16:10, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238).

- c. **Are you aware of any communications between anyone in the Office of the Texas Governor and the Department of Justice or Department of Homeland Security regarding DACA in advance of the June 29, 2017 Paxton letter? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

No, except for public filings served on and thus communicated to the Department of Justice in the *Texas v. United States* litigation cited in response to Question 1(a) above.

- d. **Did you communicate or coordinate with the Department of Justice or Department of Homeland Security regarding DACA in advance of the Justice Department's September 5, 2017 announcement that the Administration was rescinding DACA? If so, please describe those communications, including who in the Administration you communicated with, when you communicated, and what was said.**

No, not that I recall. As discussed in response to Question 1(a) above, I do appear on public court filings that were served on the Department of Justice.

- e. **Are you aware of any communications between anyone in the Office of the Texas Attorney General and the Department of Justice or Department of Homeland Security regarding DACA in advance of the Justice Department's September 5, 2017 announcement that the Administration was rescinding DACA? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

No, with the exception of the June 29, 2017 letter referenced in Question 1(b) above and the public filings and oral argument referenced in response to that Question 1(b).

- f. **Are you aware of any communications between anyone in the Office of the Texas Governor and the Department of Justice or Department of Homeland Security regarding DACA in advance of the Justice Department's September 5, 2017 announcement that the Administration was rescinding DACA? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

No, with the exception of the public filings referenced in response to Question 1(c) above.

- g. **Did you communicate or coordinate with the Department of Justice or Department of Homeland Security regarding DACA in advance of the April 30, 2018 lawsuit filed by Attorney General Paxton challenging DACA? If so, please describe those communications, including who in the Administration you communicated with, when you communicated, and what was said.**

No, not that I recall. As discussed in response to Question 1(a) above and Question 1(h) below, I do appear on public court filings that were served on the Department of Justice.

For clarity, I understand that the lawsuit referenced in this Question 1(g) and in Questions 1(h), 1(i), 1(m), and 1(n) below is *Texas v. United States*, No. 1:18-cv-00068 (S.D. Tex.), which was filed on May 1, 2018, as opposed to April 30, 2018.

- h. **Are you aware of any communications between anyone in the Office of the Texas Attorney General and the Department of Justice or Department of Homeland Security regarding DACA in advance of the April 30, 2018 lawsuit filed by Attorney General Paxton challenging DACA? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

No, with the exception of the June 29, 2017 letter referenced in Question 1(b) above, the public filings and oral argument referenced in response to that Question 1(b), and the amicus curiae briefs publicly filed by the Texas Attorney General's Office on behalf of the State of Texas in the litigation challenging the September 5, 2017 DACA rescission.

- i. **Are you aware of any communications between anyone in the Office of the Texas Governor and the Department of Justice or Department of Homeland Security regarding DACA in advance of the April 30, 2018 lawsuit filed by Attorney General Paxton challenging DACA? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

No, with the exception of the public filings referenced in response to Question 1(c) above.

- j. **Did you communicate with Andrew Oldham, who is currently working in the Texas Governor's Office, about the June 29, 2017 Paxton letter before the letter was sent? If so, please list the dates of these communications and what was said.**

No, not that I recall.

- k. **Are you aware if anyone else in the Office of the Texas Attorney General communicated with Andrew Oldham about the June 29, 2017 Paxton letter before the letter was sent? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

I am not aware of any such communication.

- l. **When Mr. Oldham left the Texas Attorney General's Office to join the Office of the Governor, did he continue to work on the *U.S. v. Texas* matter to your knowledge?**

When Mr. Oldham withdrew from the DAPA litigation upon joining the Office of the Governor of Texas, he no longer represented the State of Texas or any of the other plaintiffs in that litigation. As is a matter of public record, Mr. Oldham subsequently represented several Governors as amici curiae in that litigation.

- m. **Did you communicate or coordinate with Mr. Oldham while he was in the Governor's Office regarding DACA in advance of the April 30, 2018 lawsuit filed by Attorney General Paxton challenging DACA? If so, please list the dates of these communications and what was said.**

No, not that I recall.

- n. **Are you aware if anyone else in the Office of the Texas Attorney General communicated with Andrew Oldham regarding DACA in advance of the April 30, 2018 lawsuit filed by Attorney General Paxton challenging DACA? If so, please describe those communications, including who was involved, when the communications occurred, and what was said.**

I am not aware of any such communication.

- o. **Please inform the Committee of anything else you know about the “back and forth conversations” that Attorney General Paxton said he engaged in with the Trump Administration about ending DACA before he sent the June 29, 2017 letter.**

I am not aware of any such back and forth conversations.

**Nomination of John Campbell (“Cam”) Barker
United States District Court
For the Eastern District of Texas
Questions for the Record
Submitted May 16, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. 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 in the sense that the role of a judge is to fairly apply the law to the facts of each case, with no allegiance to either party to a dispute.

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

Generally, a judge should not take into consideration the perceived consequences of a ruling. Of course, in some circumstances, the law itself provides for a judge to account for the consequences of a ruling. For example, judges must consider whether a movant for a preliminary injunction has shown that irreparable harm will occur without a preliminary injunction. As another example, judges have discretion to consider the practical consequences of case-management decisions.

2. 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?

A judge’s role is to fairly apply the law, regardless of the judge’s personal views. Of course, a judge may attempt to understand the emotions of others while still fairly applying the law. For example, judges may consider the experiences of the offender and any victims of the offense in the sentencing context.

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

All people are affected by their personal life experience. A judge’s role, however, is to apply the law faithfully and impartially, setting aside any personal preference of the judge. That principle of impartiality is central to the rule of law.

3. 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.

4. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

I deeply respect the duty of every federal judge to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. Over the course of my career, I have represented both plaintiffs and defendants, both large corporations and small businesses, both governments and parties adverse to the government. These experiences make me keenly aware of the need for all litigants to receive a fair hearing and equal treatment under the law.

- a. In civil litigation, well-resourced parties commonly employ “paper blizzard” tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

I believe that such tactics are problematic. The Federal Rules of Civil Procedure provide judges with the ability to “secure the just, speedy, and inexpensive determination of every action and proceeding,” Fed. R. Civ. P. 1, including by consideration of whether discovery is “proportional to the needs of the case,” Fed. R. Civ. P. 26(b)(1). If confirmed, I would work to use these and other rules to limit the effect of such problematic tactics.

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

Discrimination against minorities does still exist today, unfortunately. If confirmed, I certainly will not be indifferent to the possibility of discrimination in any given context and will strive to ensure that no invidious bias of any form exists in the courtroom.

6. Do you believe that a party’s past actions or statements (e.g. a state’s history of racial discrimination or a legislature or candidate’s stated discriminatory intent for a policy) are ever relevant inquiries in determining whether that party’s policy or legislation is facially neutral in regard to racial or religious animus?

The extent to which the various subjects of inquiry discussed by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), are relevant or persuasive in any particular legal and factual context is frequently a disputed matter, including in pending litigation. As such, I cannot comment further. See Code of Conduct for United States Judges, Canon 3(A)(6).

7. During oral argument in *Trump v. Hawaii*, Justice Sotomayor described the “unitary executive theory,” in which the President is the sole helm of the executive branch and has unlimited removal and directive power over executive branch officials. Do you believe in this theory?

Specifically, what do you believe are the limits and scope to unilateral Presidential authority on issues concerning national security?

The *Trump v. Hawaii* case referenced in this question is pending litigation, and therefore I cannot comment on legal propositions implicated by that matter. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

8. When, if ever, do you believe that cities and municipalities have the power to allocate resources or take action inconsistent with a State's directive?

This question implicates arguments made by the parties in pending litigation. *See City of El Cenizo v. State of Texas*, No. 5:17-cv-00404 (W.D. Tex.). Accordingly, I cannot comment further. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

**Nomination of J. Campbell Barker, to be United States District Judge for the
Eastern District of Texas
Questions for the Record
Submitted May 15, 2018**

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 would consider the factors that the Supreme Court and Fifth Circuit have made clear that courts should consider in determining the proper scope and extent of the Fourteenth Amendment. *See, e.g., Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). I would be bound to follow Supreme Court and Fifth Circuit precedent interpreting the Fourteenth Amendment, just as I would be bound to follow such precedents interpreting any other constitutional provision.

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

Yes.

- 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. Under *Glucksberg*, the inquiry focuses on historical practice under the common law, practice in the American colonies, the history of state statutes and judicial decisions, and long-established traditions. *See* 521 U.S. at 710-36.

- 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 outside your circuit?

Yes. I would look first to Supreme Court precedent, then to Fifth Circuit precedent, and then to precedent of other courts of appeals. The first two sources would be binding authority; the final source would be 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.

- 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*).

Yes, both *Casey* and *Lawrence* are binding Supreme Court precedents. I would apply those precedents, and all Supreme Court precedents, fully, fairly, and faithfully.

f. What other factors would you consider?

I would consider any other factor deemed relevant for consideration under applicable Supreme Court or Fifth 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 gender as well as race.

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?

My response would be to apply all Supreme Court precedent regarding gender discrimination fully, fairly, and faithfully, no matter what critiques academics may make about its reasoning.

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

I do not know why the question in *United States v. Virginia* was not decided by the Supreme Court before 1996.

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

The Supreme Court has made clear that the Fourteenth Amendment protects same-sex couples, as well as heterosexual couples.

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

It is my understanding that this issue is currently pending in the federal courts. Therefore, as a judicial nominee, I am precluded from commenting on this issue by Canon 3(A)(6) of the Code of Conduct for United States Judges.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.
 - a. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court has held that there is such a right. If confirmed, I would apply this holding, and all other binding precedent, fully, fairly, and faithfully.

- b. 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 held that there is such a right. If confirmed, I would apply this holding, and all other binding precedent, fully, fairly, and faithfully.

- c. 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 held that there is such a right. If confirmed, I would apply this holding, and all other binding precedent, fully, fairly, and faithfully.

- d. 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 the subparts above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher 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 to serve as a district judge, I would follow the laws enacted by Congress and the precedents of the Supreme Court on all such questions regarding the proper role of various categories of evidence in the adjudication of legal disputes that may come before me.

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

Rule 702 of the Federal Rules of Evidence provides that an expert may testify if "the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue" and the testimony meets tests for factual grounding and reliability. Under this rule, there are numerous circumstances in which science, data, and expert testimony can affect judicial analysis. Those circumstances are addressed in numerous decisions of the Supreme Court and courts of appeals governing the admissibility of such evidence.

5. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the

adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

- a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I understand that some scholars have studied this issue and concluded that it is. If confirmed, I would view the question as purely academic given the Supreme Court’s long-settled holding, which is binding precedent that I would apply fully, fairly, and faithfully.

- 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-pages/democratic-constitutionalism> (last visited May 15, 2018).

In all cases—whether arising under the constitutional provisions identified in this question or under some other source of law—the judge’s job is to identify the most relevant legal authorities and to apply them faithfully to the case at hand. If confirmed to serve as a district judge, I would apply all binding Supreme Court precedent, regardless of the interpretive approach used by the Court.

- 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?

From the perspective of a lower-court judge, the original public meaning of a constitutional provision is dispositive when binding precedent from the Supreme Court says that the original public meaning is dispositive. I would apply all binding precedent interpreting constitutional provisions, regardless of the particular methodology used in making any decision.

- 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 5(c) above.

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

If confirmed to serve as a district judge, I would apply all binding precedent, including precedent governing which sources to employ to discern the contours of a constitutional provision. The sources that precedent would direct me to employ might differ depending on the particular constitutional provision at issue.

6. You represented Texas in *Whole Woman's Health v. Hellerstedt* before the Supreme Court. You argued that Texas's law did not pose an undue burden, noting that 85 percent of reproductive-age Texas women would still live within 150 miles of an operating abortion clinic. Do you believe that traveling 150 miles to receive a constitutionally protected service does not constitute an undue burden?

Because attorneys owe a duty of loyalty to their clients, it would be unfitting for me to state personal views regarding my clients' litigation positions. The positions advocated in that brief were the positions of my clients, as opposed to my personal views. The Supreme Court held the statute at issue there unconstitutional, and that decision is final, settled, and authoritative. If confirmed to serve as a district judge, I would apply all binding Supreme Court precedent fully, fairly, and faithfully, including that decision.

7. President Trump has issued a series of Executive Orders that ban individuals from certain Muslim-majority countries from traveling to the United States. Congresswoman Lofgren and I have led the congressional amici briefs opposing this ban.
 - a. You have filed amicus briefs on behalf of Texas in support of the ban, which argue that the Executive Order is facially neutral. Do you agree that an Executive Order could discriminate against Muslims without explicitly referring to Muslims on its face?

Because this issue relates to the pending litigation in *Trump v. Hawaii*, I am precluded from commenting by Canon 3(A)(6) of the Code of Conduct for United States Judges.

- b. Then-candidate Trump promised a ban on all Muslims entering the country when he was running for president. Do you agree that a court should consider these campaign statements, among other evidence, when evaluating claims of religious discrimination? If not, please explain why you believe that this evidence is not relevant evidence.

Please see my response to Question 7(a) above.

8. You represented Texas in *Abbott v. Veasey*, a challenge to SB 14, Texas's voter ID law. Among the arguments you advanced, you criticized some of the plaintiffs' evidence because it demonstrated that "SB 14 substantially burdened the right to vote as applied to a small subset of voters." Do you believe it is acceptable for Texas to substantially burden the right of any subset of minority voters?

On April 27, 2018, the Fifth Circuit upheld Texas's voter-identification requirements. *See Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018). Because that litigation is still ongoing, however, I am precluded from commenting further under Canon 3(A)(6) of the Code of Conduct for United States Judges.

9. You represented Texas in challenging the Affordable Care Act. You argued that contraceptive mandate substantially burdened the petitioners' free exercise of religion because the contraceptive mandates forces petitioners to "choose between violating their faith or incurring severe financial penalties." When does the law require deference to an employer's religious beliefs that conflict with generally applicable laws protecting others' fundamental rights?

Canon 3(A)(6) of the Code of Conduct for United States Judges precludes me from “mak[ing] public comment on the merits of a matter pending or impending in any court.” Because this issue has been and continues to be the subject the litigation, I am precluded from public comment on it.

**Nomination of John Campbell Barker to be
United States District Judge for the Eastern District of Texas
Question for the Record
May 16, 2018**

QUESTION FROM SENATOR BLUMENTHAL

As a Texas Deputy Solicitor General, you argued in *Whole Women's Health v. Hellerstedt* that hospital admitting privileges for abortion providers did not unduly burden women, and the Supreme Court disagreed. You also defended President Trump's travel ban, argued against DACA and DAPA, defended a racially discriminatory state voter ID law, attacked the ACA, and defended discrimination against LGBT individuals by private businesses.

- 1. You were representing a client, the State of Texas, but you were also responsible for shaping policy as Deputy Solicitor General. Did you ever object to any of these positions?**

Because attorneys owe a duty of confidentiality and loyalty to their clients, I cannot disclose any privileged legal advice given or personal views regarding my clients' positions. The positions advocated in those cases were the positions of my clients, as opposed to my personal views. Under the Rules of Professional Conduct, "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." Tex. Disciplinary Rules Prof'l Conduct R. 6.01 cmt. 4; Model Rules of Prof'l Conduct R. 1.2(b) (Am. Bar Ass'n 1983).

Questions for the Record for John Campbell Barker
Senator Mazie K. Hirono
May 16, 2018

Questions for John Campbell Barker, nominee for the Eastern District of Texas

1. Chief Justice John Roberts has recognized that “the judicial branch is not immune” from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer two questions.
 - a. **Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

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

No.
2. You signed an *amicus brief* filed by the State of Texas before the Supreme Court in *Trump v. Hawaii*, in support of President Trump’s Muslim travel ban. Among the arguments you made in your brief were that President Trump’s derogatory comments about Muslims during his Presidential campaign were insufficient to demonstrate a “clear showing” of religious pretext.

I recently attended oral arguments in the Supreme Court in this case and the question of whether and how the Court should assess President Trump’s anti-Muslim statements during the campaign is a significant one. Solicitor General Noel Francisco argued that the travel ban had been “cured” of any potentially unconstitutional religious animus because the President made “crystal clear” that he disavowed those statements. Solicitor General Francisco has now taken the unusual step of correcting an error in his argument by claiming the statement disavowing the Muslim ban occurred January 25, not September 25 as he had claimed in Court, but I think he is wrong about what the President has said. And, well after the date of the supposed disavowal, the President re-tweeted anti-Muslim videos from a far right extremist and his deputy press secretary pointed to the proposed travel ban as the way to address the threat.

- a. **Do you believe that it is relevant to the Court in reviewing the travel ban whether or not the President has anti-Muslim animus in instituting it?**

Because this question concerns the merits of the pending litigation in *Trump v. Hawaii*, I am precluded from commenting on this issue by Canon 3(A)(6) of the Code of Conduct for United States Judges.

- b. **Will you recuse yourself if any cases regarding the travel ban or President Trump’s Executive Order should come before you?**

28 U.S.C. § 455(a) requires a federal judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(b) lists additional grounds for recusal, including a specific provision that applies to government attorneys. If confirmed, I would of course recuse myself from any case that I have worked on, and I would scrupulously apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics.

3. You were counsel on behalf of Texas on *amicus* briefs in four cases before the Supreme Court regarding the constitutionality of the DACA and DAPA programs. You argued in support of President Trump’s Executive Order rescinding DACA, claiming that DACA

was substantively unlawful and that the mere threats of litigation against the U.S. government regarding the DACA program made by the party you represented, Texas, provided a sufficient basis for President Trump to wind down the program. In *Brewer v. Arizona Dream Act Coalition*, you represented Texas in an *amicus brief* in support of Arizona's decision to withhold driver's licenses from DACA recipients, arguing that because DACA did not have the force of federal law it could not preempt a state's police powers to decide whether to issue a driver's license.

Will you recuse yourself if any cases regarding DACA or President Trump's Executive Order should come before you?

28 U.S.C. § 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(b) lists additional grounds for recusal, including a specific provision that applies to government attorneys. If confirmed, I would of course recuse myself from any case that I have worked on, and I would scrupulously apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics.

4. You have spent the last several years advocating for various controversial positions that frequently come up in litigation in federal court. You have taken a job that involves you arguing positions in cases about voting rights, abortion, religious freedom and lgbtq rights, workers' rights, immigration and more. You have been a very powerful voice for your side, which has consistently been the more extreme conservative position.

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

My interest in joining the federal judiciary arises because of my commitment to public service and because the rule of law under an independent judiciary plays such a critical role in our society. If confirmed, it would be an honor to follow the example set by the jurists for whom I clerked, Judges Bryson and Walker, and ensure that the law is applied fairly and impartially to all parties, without respect to persons.

5. Two weeks ago, the Judiciary Committee held a markup to debate and report a bipartisan bill to protect Special Counsel Mueller's investigation. The opponents of the bill called its constitutionality into question by not only citing Justice Scalia's dissent in *Morrison v. Olson*, but by predicting that his dissent would not be the position of the majority of the Supreme Court, even though the Court has recently affirmatively cited the Morrison majority. In other words, they believe the fact that that the law might move and the Supreme Court's precedent might change raised enough of a constitutional concern to oppose a bill.

- a. **Do you recognize that courts' interpretation of the law and constitution can change over time and that even previously settled precedent may not always stay good law?**

Yes.

- b. **Are you seeking this position as a district court judge so that in interpreting the law and the constitution you might move how the courts apply precedent and even change precedent so that it comes closer to your extreme**

conservative position on legal issues in cases that come before you?

No. And, with respect, I believe this question may be confusing the positions of my clients with my personal views. I currently represent clients in cases handled by the Texas Attorney General's Office. I have also represented clients suing the State of Texas—in litigation from which I am screened off at the Texas Attorney General's Office. I have represented the federal government, under both President Bush and President Obama. And I have represented parties adverse to the federal government. In all of those cases, the positions that I advocated in litigation were those of my clients, as opposed to my personal positions. Under the Rules of Professional Conduct, “[a] lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Tex. Disciplinary Rules Prof’l Conduct R. 6.01 cmt. 4; Model Rules of Prof’l Conduct R. 1.2(b) (Am. Bar Ass’n 1983).

**Nomination of J. Campbell Barker to the
United States District Court for the Eastern District of Texas
Questions for the Record
Submitted May 16, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute 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.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² 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.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

I have not researched the issue of implicit racial bias in the criminal justice system. Racism does still exist in America, unfortunately, despite efforts to eliminate it from our society. If confirmed to serve as a district judge, I will strive to ensure that no racial bias or any other invidious bias exists in the courtroom.

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

Yes, that is my understanding.

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

I have not studied the issue, and I do not recall any articles that I may have reviewed on it.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at

saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

- a. Do you believe there is a direct link between increases of 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 am not familiar with the Pew Charitable Trusts fact sheet and have not studied this particular issue. My understanding is that crime rates are influenced by many factors.

- b. Do you believe there is a direct link between decreases of 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.

Please see my response to Question 2(a) above.

3. 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.

4. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.⁷ One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.⁸ Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

- a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

⁷ JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

⁸ Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca.

The factual question of the extent of voter fraud is an issue implicated by pending or impending litigation. *See, e.g., Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex.). As a result, I am precluded from commenting on this issue by Canon 3(A)(6) of the Code of Conduct for United States Judges.

- b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see my response to Question 4(a) above.

- c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

Please see my response to Question 4(a) above. Please also see my response to Question 8 from Senator Coons.

Questions for the Record from Senator Kamala D. Harris
Submitted May 16, 2018
For the Nominations of

J. Campbell Barker to be U.S. District Judge on the Eastern District of Texas

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?

If confirmed to serve as a district judge, I would devote careful thought to every sentencing proceeding, working to ensure that the sentence imposed is “sufficient, but not greater than necessary, to comply with the purposes” of federal sentencing set forth by Congress. 18 U.S.C. § 3553(a). To achieve that goal, I would consult the governing statutes and applicable precedent, the presentence report of the probation officer, *see* 18 U.S.C. § 3552, the advisory Sentencing Guidelines and other factors set forth in § 3553(a), the arguments of the parties, and the statements of victims or witnesses. I fully appreciate the weighty nature of sentencing and the care it requires, and I would faithfully follow the law and my judicial oath in carrying out this responsibility.

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

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

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

Supreme Court precedent and the advisory Sentencing Guidelines explain the circumstances and considerations that can justify a departure or variance from the Guidelines. Part K of Section 5 of the Guidelines lists specific circumstances that can justify a departure from the advisory Guidelines range. Under Supreme Court precedent, the factors listed in 18 U.S.C. § 3553(a) may also call for varying from the advisory Guidelines range.

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?

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

I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a pending judicial nominee, it would be unfitting for me to comment on this matter. *See* Code of Conduct for United States Judges, Canons 2, 3(A)(6), 5. If confirmed, I would be required to follow the law of mandatory minimums regardless of my personal view on the deterrent effect of such minimum sentences.

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

Please see my response to Question 1(d)(i) above.

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)(i) above.

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

1. Describing the injustice in your opinions?

I am aware that mandatory minimum sentences have generated significant controversy and debate. I am also aware that judges have faced criticism over using judicial opinions as opposed to other channels to publicize their disagreement with a law. If I am confirmed, I would evaluate each case individually and would carefully consider the law and my ethical obligations if confronted with the circumstances hypothesized in this question.

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

The power to charge individuals with crimes lies exclusively with the Executive Branch. As a judge, I would be bound to respect the separation of powers built into the constitutional framework.

² *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>

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

The clemency power is reserved to the Executive Branch. As a judge, I would be bound to respect the separation of powers built into the constitutional framework.

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

Yes.

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

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

Yes.

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

Yes, that is my understanding. In 2011, while working at the United States Department of Justice, I presented the federal government’s argument that the Fair Sentencing Act of 2010 applies to all sentencings occurring after that Act’s effective date, regardless of when the crime was committed, as opposed to only sentencings for crimes committed after the Act’s effective date. *See, e.g.*, Pet. for Initial Hearing En Banc, *United States v. Blake*, No. 10-3971 (7th Cir. filed Aug. 16, 2011); *see also Dorsey v. United States*, 567 U.S. 260 (2012) (later adopting that position). The government’s briefing describing the background of the Fair Sentencing Act of 2010 cited the United States Sentencing Commission’s 2002 report on federal cocaine sentencing policy, which described concerns over racial disparities in the criminal justice system.

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

- a. **Do you believe that 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 would ensure that qualified minorities and women are given serious consideration for all positions that I am in a position to fill.