Nomination of Steven Grasz to the U.S. Court of Appeals for the Eighth Circuit
Questions for the Record
Submitted November 8, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Mr. Grasz, as you are aware, the American Bar Association (ABA) Standing Committee on the Federal Judiciary rated you unanimously "Not Qualified" to be a judge on the U.S. Court of Appeals for the Eighth Circuit. No nominee has received this rating since 2006; and the previous two nominees rated by the ABA as unanimously Not Qualified were never confirmed by the Senate.

   Part of the ABA's process includes interviews with those who know you and your work, including judges and other attorneys. In your case, because the ABA conducted two different evaluations, over 200 individuals were interviewed. Based on these interviews and the evaluators' review of your record and materials, several concerns were raised in the ABA's statement issued on October 30, 2017 ("ABA Statement").

   One concern was that your "colleagues expressed the view, that, in terms of judicial temperament," you are "not 'free from bias.'" Additionally, "[m]any" interviewees were concerned whether "Mr. Grasz would be able to detach himself from his deeply-held social agenda and political loyalty to be able to judge effectively." (p. 5)

   a. Why do you believe your colleagues expressed a concern over your ability to be an impartial judge "free from bias"?

   Due to the nature of the process it is not possible to know the reasoning behind these anonymous comments. In my role as Chief Deputy Attorney General I represented the State of Nebraska in a number of high-profile cases involving controversial issues. However, as I testified at my hearing, I fully understand the fundamental difference between serving as an advocate and a judge. Advocates represent their clients' interests. Judges must be neutral officials who apply the law as it exists, and not according to any personal views or opinions. If I am so privileged to be confirmed, I will faithfully perform my duties as a judge to dispense justice fairly and impartially and without regard to the identity of the parties.

   b. Have any of your colleagues or members of the legal profession ever talked to you about their concerns about your ability to be impartial given your strong political views? If so, please describe the context and the concern.

   No. On the contrary, I have received overwhelming support from those who know me and are familiar with my work, including from those who do not share my political views.

The ABA Statement notes that you had "a certain amount of caginess, and at times, a lack of disclosure with respect to some of the issues which the evaluators unearthed." (p. 7) And the ABA concluded that "a number of lawyers were missing" from your lists provided as part of the "10 most significant litigated matters" in your Senate Questionnaire. (p. 5)

c. With regard to "issues the evaluators unearthed" that were undisclosed, please explain what those were and why you did not disclose them. In addition, please identify information missing from your Senate Questionnaire, if any, including any counsel required to be listed pursuant to Question 16.

The ABA's rules require evaluators to disclose adverse comments and afford nominees the opportunity to respond. I believe those issue that were "unearthed" are those referenced in the report.

Regarding Question 17 of the Senate Judiciary Questionnaire, the Question asks for the "individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties." My response to Question 17 contains the requested information for co-counsel for each case and also for the principal opposing counsel for each of the ten cases listed. To my knowledge, my response is accurate and responsive.

Another concern raised in the ABA Statement was an "unusual fear of adverse consequences expressed by those from whom interviews were solicited, of all political parties, based on the nominee's deep connection and allegiance to the most powerful politicians in his state." (p. 6)

d. Please explain your "deep connections and allegiance to the most powerful politicians in [your] state."

I have served as General Counsel to the Nebraska Republican Party. I have also served as legal counsel to the Mayor of Omaha's two campaigns and have held positions with the campaign committee of Nebraska's Governor. I formerly served as Nebraska's Chief Deputy Attorney General.

e. Have you ever retaliated against an opposing counsel, colleague, or any other individual in your professional work, including because such an individual criticized you or your work?

No. To do so would be unprofessional, unethical, and contrary to my deeply held personal beliefs.

f. What, if anything, do you believe gave rise to such fears on the part of the interviewees?

I do not know the source of these comments and cannot determine what the bases for these comments are. I have, in the course of my representation of a client, sought the

discipline of state government officials who violated the civil rights of my client. *See Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016). I do not know if this is related.

2. In a Nebraska Attorney General Opinion you authored published in 1996, you wrote "we would be remiss if we did not state the obvious: The legal question presented by the examination of the constitutionality of partial-birth abortion…necessarily exposes the moral bankruptcy which is the legacy of *Roe v. Wade*."

   a. What is the "moral bankruptcy" that you wrote "is the legacy of Roe v. Wade"?

   This comment was made in the context of an opinion request from a State Senator asking for advice in drafting legislation banning partial-birth abortion. The statement followed a graphic medical description of the partial-birth abortion procedure which the United States Congress later determined to be a "brutal and inhumane." *See Gonzales v. Carhart,* 550 U.S. at 157.

   b. The opinion you wrote was an official document issued on behalf of Nebraska's Attorney General's Office. **From whose perspective were you writing about "obvious" "moral bankruptcy"? Your own? The state's?**

   Attorney General's Opinions are official documents of the Office of the Attorney General and represent the opinion of the Nebraska Attorney General.

   c. What role does morality play in the legal analysis of matters involving constitutional law and constitutional rights?

   The statement about moral bankruptcy played no role in the legal analysis of the proposed ban on partial-birth abortion. The opinion expressly stated the proposed legislation must be carefully drafted to comply with requirements of Supreme Court precedent and specifically *Planned Parenthood v. Casey*.

3. In a 1999 article entitled, *If Standing Bear Could Talk…Why There is No Constitutional Right to Kill a Partially Born Human Being* ("*Standing Bear*"), you argued that *Roe* and *Casey* were inapplicable in evaluating the constitutionality of a ban on certain abortion procedures. The U.S. Supreme Court, however, held in both cases in which it has examined such bans (*Stenberg v. Carhart* and *Gonzales v. Carhart*) that *Casey* (preserving the core holding of *Roe*) does apply.

   The ABA Statement on your nomination notes that you "continue[] to adhere to views [] expressed in 'If Standing Bear Could Talk.'" (p. 6)

   a. Please explain which views you expressed in this article you continue to adhere to and which you no longer support.

   Respectfully, my personal views or opinions, including those related to an article I wrote

nearly twenty years ago, would not be relevant to my role as a circuit judge should I be so privileged as to be confirmed. In *Gonzales*, the Supreme Court upheld the federal ban on partial-birth abortion under the *Casey* test. In the Eighth Circuit, as in the Supreme Court, *stare decisis* applies where the question at issue has been squarely addressed in a prior decision. If I am confirmed to this position, I would be bound to follow and apply all Supreme Court and Eighth Circuit precedent, including *Planned Parenthood v. Casey*.

In *Standing Bear*, you wrote that "[l]ower federal courts…need not extend questionable jurisprudence into new areas of the law or apply it in areas outside of where there is clear precedent." (p. 28)

b. Please explain what you meant by the term "questionable jurisprudence" and what that encompasses.

This statement, written as a commentator nearly 20 years ago, immediately followed my statement that "lower court judges are obliged to follow clear legal precedent regardless of whether it may seem unwise or even morally repugnant to do so." Questionable jurisprudence, in the context of the article, could include that which had unclear application to the facts presented by the instant case. As a judge, should I be so privileged to be confirmed, I would be bound to follow and apply all Eighth Circuit and Supreme Court precedent.

c. Please list all of the U.S. Supreme Court cases that you consider to be "questionable jurisprudence."

As a judge, should I be so privileged to be confirmed, I would be bound to follow and apply all Eighth Circuit and Supreme Court precedent.

d. Specifically, is *Roe v. Wade* or *Planned Parenthood v. Casey* "questionable jurisprudence"?

See response to Questions 3(a) and 3(c).

e. Please explain what you consider constitutes "clear precedent."

Any precedent of the United States Supreme Court or the applicable Circuit, within the terms of the respective holdings.

In *Standing Bear*, you wrote that the Supreme Court "has arbitrarily chosen birth, not viability, as the thamaturgical moment when a child gains the constitutional status of personhood." (p. 30) You also wrote that "abortion jurisprudence is based on definitions and arbitrary distinctions." (p. 32)

f. In your view, what is the non-arbitrary moment that a fetus or fertilized egg "gains the constitutional status of personhood"?

See response to Questions 3(a) and 3(c).

g. What are the "arbitrary distinctions" in "abortion jurisprudence" you are referring to?

See response to Questions 3(a) and 3(c).

h. What did you mean in *Standing Bear* when you wrote that "[a]bortion jurisprudence is, to a significant extent, a word game"? (p. 30)

This statement, written as a commentator nearly 20 years ago, was in reference to a related statement in the same article that in the context of abortion law "terminology and definitions are of critical importance."

4. In 1999, you co-authored the petition for certiorari in *Stenberg v. Carhart* after the Eighth Circuit struck down Nebraska's ban on so-called "partial-birth" abortions. One of the questions you urged the Supreme Court to consider was whether "[i]n light of… the lack of any constitutional textual basis, the Court should now recognize that abortion is more properly a public policy legislative matter than a constitutional issue for judicial decision?" You went on to argue that the "fundamental public policy issue involved in abortion is one that defies judicial determination." In granting certiorari, the Supreme Court did not take up your question and decided the case – upholding the Eighth Circuit.

a. What did you mean by a "lack of any constitutional basis"? Does the text of the Constitution provide a basis for a woman's right to abortion?

The language in question was drafted personally by the Attorney General for the purpose of presenting an issue for the Supreme Court's consideration. The Court declined to take up the issue. The Supreme Court has held, and affirmed, that the right to abortion is protected by the Fourteenth Amendment.

b. Does the text of the Constitution provide a basis for a woman's right to contraception?

The Supreme Court has held, and affirmed, that the right to abortion comes from the liberty interest under the 14th Amendment.

c. Do you still hold the view that the issue of abortion is "one that defies judicial determination"?

See response to Question 4(a).

5. You have made strong public statements criticizing *Roe v. Wade* and expressing your fervent opposition to legalized abortion. **Given your record, and the ABA's finding regarding**

your colleagues' concern over your impartiality and ability to be "free from bias," if confirmed, why should litigants believe you will be impartial and they will get a fair hearing in a case involving abortion?

I believe in, and am deeply committed to, the rule of law. I would follow my solemn oath to dispense equal justice and perform my duties with impartiality.

6. In 1995, the Nebraska Attorney General's Office submitted an amicus brief at the U.S. Supreme Court in *Romer v. Evans,* in support of Colorado's constitutional amendment barring protections for the LGBT community. **Did you work on or contribute to that brief? If yes, please provide what you specifically worked on and what role you played.**

The brief in question was written by outside counsel on behalf of the seven amici states. It was not drafted by the Nebraska Attorney General's Office, and I have no recollection of any involvement.

7. At your hearing, Senator Durbin asked you whether "there have been instances when Americans have been discriminated against because of sexual orientation." You answered, "Senator, absolutely."

However, in 2013, during the City of Omaha's convention to review its charter, you introduced a charter amendment that appears to permit discrimination against LGBT people in employment and public accommodation, in conflict with a city ordinance. The transcript of the convention proceedings show that when you were asked at the convention if your proposed amendment created an "end run" around the anti-discrimination ordinance, you said: "If you want to call protecting religious freedom of individuals an end run and subjugate those individual religious liberties to someone else's employment rights, yes."

a. What did you intend for this amendment to accomplish?

Omaha is a home rule city. The City Charter of a home rule city is the equivalent of its constitution. I sought for the Omaha Charter to provide the same protections that the Nebraska Constitution and current federal law, 42 USC 2000bb, provide. The language I proposed was substantially identical to those documents for that reason.

Reports indicate you introduced the amendment because you said "many business owners live in fear of lawsuits over expressing their views or refusing to provide service to gay or transgender customers." ("Review of Omaha's Charter," *Omaha World- Herald*, Dec. 4, 2013)

b. Was that, in fact, one of the reasons for your introduction of the amendment?

The cited news article misquotes me. The transcript from the public hearing shows I actually said, "there are Christian ministries here in town who had to . . . violate their own religious beliefs because they don't want to stop providing services to people."

c. Would the text of your proposed amendment permit an employer to refuse to hire an LGBT person if they had a sincerely-held religious belief objecting to such persons?

Given that the amendment I proposed was based on existing state and federal law that could come before me as a circuit judge, if I am so privileged to be confirmed, it would not be appropriate for me to opine on this question.

d. Would the text of your proposed amendment permit a business owner to refuse to provide service to an LGBT person with a sincerely-held religious belief objecting to such persons?

See response to Question 7(c).

e. Would the text of your proposed amendment permit an employer to refuse to hire someone of color if they had a sincerely-held religious belief objecting to such persons?

See response to Question 7(c).

f. Would the text of your proposed amendment permit a business owner to refuse to provide service to someone of color if they had a sincerely-held religious belief objecting to such persons?

See response to Question 7(c).

g. When you agreed with Senator Durbin that there have been "instances when Americans have been discriminated against because of sexual orientation," in your mind, were any of those instances related to discrimination in employment or refusal of service to LGBT individuals?

When responding to Senator Durbin, I did not have any specific instances in mind. Rather, I was making a general observation regarding society.

8. At your hearing, Senator Durbin asked you about the ban on polygamy that the U.S. federal government conditioned the State of Utah's statehood upon in 1894. You said, "if that provision is not already the subject of litigation, I would anticipate that it would be in light of the *Obergefell* decision." When Senator Durbin clarified he was asking specifically about the 1894 enabling act from Congress, you said, "I was commenting, Senator, about the possibility of a challenge to anti-polygamy provisions."

In *Obergefell*, the U.S. Supreme Court held that two individuals in a "same-sex couple[] may exercise the fundamental right to marry." 135 S. Ct. 2584, 2605 (2015)

a. Why do you "anticipate" that a challenge to bans on polygamy would be the

subject of litigation after the Court in *Obergefell* held that same-sex couples have the same right to marry as any other two adult individuals?

Because bans on polygamy have already been the subject of litigation in the federal courts post-*Obergefell*, including a petition for certiorari to the United States Supreme Court. *See, e.g.*, *Brown v. Buhman*, No. 16-333(S.Ct.).

9. In your Senate Questionnaire, submitted to the Committee on August 24, 2017, you indicated that you were a Board Member of the Nebraska Family Alliance from "August 2015 to Present." At your hearing, you told Senator Blumenthal, "I am no longer a member of that board."

a. When did you end your board membership with the Nebraska Family Alliance?

Because of my judicial nomination, I decided to step aside from any positions that I believe it would not be appropriate for me to hold as a judge. I verbally resigned from this board on September 19, 2017. I followed this by a confirming letter on September 25, 2017.

b. Why did you end your board service after submitting your Senate Questionnaire?

See response to Question 9(a).

The Nebraska Family Alliance is opposed to state bans on conversion therapy for LGBT youth, arguing that these bans "trample on parental rights." (Nate Grasz, "Legislation Criminalizing Conversion Therapy," July 21, 2017) At your hearing, you told Senator Blumenthal that you "have never repudiated any of [the Nebraska Family Alliance's] views."

c. Did you ever express any concern as a Board Member when the organization took its position to oppose bans on conversion therapy? Do you stand by the organization's position today?

The NFA had no official position on this subject while I was on the Board. It was never discussed by the Board.

d. Have you ever expressed concern as a Board Member with a position taken by the Nebraska Family Alliance? If so, which positions?

It would not be appropriate for me to opine on political questions and/or provide personal views as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

10. In 2013, you criticized a speaker's remarks on voting rights which you said "were an extensive reiteration of the Democratic Party's current talking points aimed at convincing

voters that Republicans are engaged in 'voter suppression.' This nation-wide strategy is designed to help maintain high minority voter turnout in the next election."

Last year, the U.S. Court of Appeals for the Fourth Circuit struck down a sweeping North Carolina law instituting a strict voter identification requirement and making several other changes that decreased access to voting. The court found that "the new provisions target African Americans with almost surgical precision…Faced with this record, we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent." (*North Carolina NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).) This May, the U.S. Supreme Court denied North Carolina's petition for certiorari to appeal the ruling.

a. What evidence did you rely upon in making your contention that the Democratic Party has a "nation-wide strategy…to help maintain high minority voter turnout" that is based on arguments about partisan voter suppression?

The question calls for me to opine on a political question, which would not be appropriate for me to do as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

b. Do you believe that racial discrimination in voting still exists?

Discrimination in voting, on the basis of race, is a violation of federal and state law. Allegations of racial discrimination in voting continue to be litigated in the federal courts. If I am so privileged to be confirmed, I would faithfully follow the law and precedent in this area. It would not be appropriate, under the applicable ethical canons, for me to opine further.

c. Do you believe that 3-5 million people voted illegally in the 2016 Presidential election? If so, on what basis have you reached that conclusion? If not, do you believe it is appropriate for President Trump to make that claim?

This is a political question about which I cannot opine. *See* Canon 5, Code of Conduct for United States Judges. *Cf* Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

11. In 1999, Nebraska press reported that you sent the Nebraska Department of Education a letter that raised concerns with education standards that taught evolution as fact as an interference with students' religious rights. The Department of Education reacted to your letter by reportedly making "minor changes in the standards to make it clear that evolution is to be taught as theory rather than as fact." ("Evolution Debate Fuels State Review," *Omaha World-Herald*, May 8, 1999)

a. Did you in fact send such a letter? If so, what prompted you to get involved in this

issue as the Deputy Attorney General of Nebraska?

It is the job of the Attorney General's Office to review every proposed regulation from all state agencies, including the Board of Education's standards. The Attorney General looks for potential legal problems with all such proposed regulations. As Chief Deputy, I recommended approval of the State Board of Education's final standards for the teaching of evolution and the Attorney General approved the regulation. The initial concern that was identified in an earlier draft was that it could have been construed as demanding that all students accept the view that there is no creator (as accepted by various religions), which raised Establishment Clause concerns. *See, e.g., Edwards v.* Aguillard, 482 U.S. 578 (1987).

b. Do public education standards that include the teaching of evolution as fact interfere with a student's own free exercise of religion as protected by the First Amendment? If so, how?

See response to Question 11(a).

12. In 1999, the Nebraska Attorney General's Office challenged the U.S. Environmental Protection Agency's (EPA) 1991 regulations requiring water utilities to monitor levels of lead and copper in drinking water. With regard to this rule, the EPA's website notes that lead and copper exposure may harm health "ranging from stomach distress to brain damage."You wrote a letter to the editor calling these regulations "outrageous and unnecessary." ("A Cheap Shot," Lincoln Journal Star, Apr. 13, 2000) **Please describe why these water safety regulations were "outrageous and unnecessary."**

To the best of my recollection, these regulations affected more than sixty Nebraska towns that could not afford the unfunded mandates imposed by the regulations. The legal issue was whether the EPA had authority to regulate local water supplies not involving any aspect of interstate commerce. It was the position of the State of Nebraska, as well the affected towns, that the regulations were unnecessary and unlawful.

13. On your Senate Questionnaire, you indicated that you served from June 2015 to March 2017 as Assistant Secretary for both the Nebraskans for the Death Penalty, Inc. and Nebraskans for Capital Punishment, Inc.

a. Why did you join these organizations and take a leadership role within them?

I was retained as legal counsel to a ballot committee due to my experience litigating initiative and referendum cases in both trial and appellate courts. Nebraskans for the Death Penalty, Inc. was a ballot committee organized for the purpose of placing the legislature's repeal of capital punishment on the ballot for Nebraska voters to decide. Nebraskans for Capital Punishment, Inc. was another name reserved by my client, but was never used. My position as "Assistant Treasurer" was assumed purely to facilitate legal filings in the course of my legal work without the need to bother the organization's

officers.

b. Why did your membership in the organization end in March 2017?

The work of the ballot committee ended in 2016 and it was inactive after that time. However, formal action to have my name removed from corporate documents did not come until March 2017.

14. On your Senate Questionnaire, you listed your membership in the Federalist Society, including your service on the Nebraska Lawyers Chapter Steering Committee. You indicated that you joined the organization this year.

a. On what date did you join the Federalist Society in 2017?

On February 21, 2017, I received a call from a partner in a Lincoln, Nebraska law firm who is an old friend. He said he was trying to start a Nebraska Lawyers Chapter and wanted to know if I would help. He specifically asked if I would be willing to serve on the Chapter Steering Committee. On February 27, 2017, I completed and returned a form to him. I then paid my dues on line.

b. Why did you join the Federalist Society this year, including taking a leadership position in a local chapter?

See response to Question 14(a).

c. All but one of President Trump's circuit court nominees thus far have been members of the Federalist Society. Did you believe that you needed to join the organization in order to be considered for a circuit court judgeship?

I did not. I joined at the request of a local friend.

d. Did anyone suggest that joining the Federalist Society was important for your potential nomination?

No.

15. Would you describe your approach to constitutional interpretation to be "originalist"? If so, what does that mean to you? If not, how would you describe your approach?

I have never found it necessary to put a label on my approach to constitutional interpretation. My approach is to follow the standard rules of construction with regard to the Constitution. This means starting with the text and its plain meaning. It also means following any applicable precedent.

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

Statutory construction must start, and, if possible, end, with the words of the text. When the words of the text are ambiguous, judges look to the plain meaning of the words used in their most natural sense with the aid of historical context. This may include legislative history.

17. 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?

I am not aware of any situation in which it would be appropriate for a lower court to depart from Supreme Court precedent. It is the role of the Supreme Court to decide whether a prior decision should be reversed.

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?

Judges of inferior courts, including circuit courts, are bound to apply Supreme Court precedent, and if I am so privileged to be confirmed I will do so faithfully and to the best of my ability. There are circumstances where concurring circuit judges have questioned existing precedent in separate writings. However, they must still follow the precedent.

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

In the Eighth Circuit, a panel is bound by the decisions of prior panels. Only where the panel is compelled to overturn a circuit precedent by a Supreme Court decision or where the Eighth Circuit is sitting en banc are prior precedents overturned.

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

If I am so privileged to be confirmed I will be following Supreme Court precedent. It would not be appropriate for me opine on the role of the Supreme Court in this regard.

18. 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?"

Roe v. Wade, as affirmed in its main holding by *Planned Parenthood v. Casey*, is binding precedent of the Supreme Court. If I am so privileged to be confirmed, I will faithfully follow and apply it. For judges on lower courts, all Supreme Court precedent is "superprecedent."

b. Is it settled law?

See response to Question 18(a).

19. 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?**

Obergefell v. Hodges is binding precedent of the United States Supreme Court. If I am so privileged to be confirmed, I will faithfully follow and apply it.

20. 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?

I have not had occasion to consider *District of Columbia v. Heller* in detail. It is binding precedent of the United States Supreme Court. If I am so privileged to be confirmed, I will faithfully follow and apply it.

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

In *Heller*, the Supreme Court stated, "nothing in [its] 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 law imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

See response to Question 20(a).

21. According to your Senate Questionnaire, you joined the Federalist Society this year. You also sit on the Nebraska Lawyers Chapter Steering Committee for the organization. The Federalist Society's "About Us" webpage, states that, "[l]aw 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." The same page states 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. **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 had no role in authoring that statement, and I do not know precisely what the Federalist Society meant by it.

    b. **As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."**

    See response to Question 21(a).

    c. **As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.**

    See response to Question 21(a).

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

    I received the questions from the Office of Legal Policy at the Department of Justice on November 8, 2107. I reviewed the questions and drafted answers. I then shared the answers with the Office of Legal Policy. After conferring with lawyers there, I made revisions and authorized the Office to submit the responses to the Committee on my behalf.