

Nomination of Greg Katsas to the U.S. Court of Appeals for the D.C. Circuit
Questions for the Record
Submitted October 24, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. 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?

As a judge, my approach to constitutional interpretation would be to follow binding precedent of the Supreme Court and the D.C. Circuit. Thus, to the extent that the Supreme Court has interpreted specific constitutional provisions by attempting to discern their original public meaning, *see, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to keep and bear arms); *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment right to confront adverse witnesses), I would faithfully apply those precedents.

2. During your nomination hearing before this Committee, you said that you had not been interviewed by the Special Counsel, nor had you been asked to be interviewed.
- a. While your nomination is pending, would you commit to cooperating with Special Counsel Mueller’s investigation if you are contacted by anyone on his team?**

Yes.

- b. If you were confirmed, would any aspect of your service on the bench prevent you from cooperating fully with Special Counsel Mueller’s investigation or with any congressional investigation?**

No.

3. During your nomination hearing before this Committee, Senator Lee asked you “about what judicial independence means to you,” citing the “long and distinguished line of judges who have, on occasion, ruled against the administration of the Presidents who appointed them.” You responded that judicial independence is “central to our Constitutional structure.” You additionally stated that “I have worked for the government, and I have spent substantial parts of my career litigating against the government. I understand different roles, and I understand the role of the judge to apply the law neutrally and fairly without regard for whatever President happened to nominate the judge.”
- a. With regard to your statement “I have worked for the government, and I have spent substantial portions of my career litigating against the**

government”—have you ever worked *for* a Democratic presidential administration, or litigated *against* a Republican presidential administration? Please describe.

I have not worked in a Democratic presidential administration. However, I have represented prominent Democrats while serving at the Justice Department. For example, while in the Civil Division, I successfully defended Janet Reno and Eric Holder against constitutional claims arising out of the forcible removal of Elian Gonzalez from the home of his Miami relatives. *See Dalrymple v. Reno*, 334 F.3d 991(11th Cir. 2003); *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003). I have had only limited opportunities to litigate against Republican presidential administrations, given the length of my service in the administrations of George W. Bush and Donald Trump. However, between the inauguration of President Bush in January 2001 and the beginning of my service in the Justice Department in June 2001, I litigated at least one significant matter against the Republican administration of President Bush.

b. The D.C. Circuit regularly hears claims regarding executive power. What evidence can you offer the committee that your view of the legality of any particular executive action is not correlated with the political party of the President who undertakes the action?

As a litigator both for and against the Executive Branch, I have vigorously defended my clients’ interests without regard to narrow political considerations. As noted above, I have personally represented prominent Democrats and have personally litigated against Republican presidential administrations. Likewise, I have sued the government in many cases where my clients had no political or ideological alignment with the Republican party—for example, in seeking greater First Amendment protections for broadcasters charged with alleged indecency, *Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995); in seeking release of historical records withheld under the deliberative-process privilege, *Nat’l Sec. Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014); in seeking asylum for a woman abused by the Ethiopian government for her political views, *Powlos v. INS*, No. 98-2670 (4th Cir. 1999); and in seeking reduced sentences for federal criminal defendants, *Sablan v. United States*, 522 U.S. 1075 (1998) (denial of certiorari); *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996). In addition, the nine recommendations submitted to this Committee on my behalf—including three letters from five career DOJ attorneys who have worked with me on a daily basis over the course of several years—attest to my fairness and impartiality.

4. During your nomination hearing before this Committee, I asked if you had worked or advised on the President’s Executive Order creating the Commission on Election Integrity. You responded that you did work on that Executive Order. There are currently a number of lawsuits pending in the District of Columbia federal courts, including suits filed by the Lawyers’ Committee for Civil Rights Under Law and the

Electronic Privacy Information Center.

- a. In light of your work on the President’s Executive Order creating the Commission on Election Integrity, if confirmed, will you recuse yourself from any case that comes before the D.C. Circuit that arises from or in any way relates to the Commission on Election Integrity?**

If confirmed, I would recuse myself from any case challenging the lawfulness of the Executive Order creating the Commission on Election Integrity and from any of the currently pending cases challenging implementation of that Order. With regard to hypothetical future cases that may “in any way relat[e] to” the Commission, I would evaluate my recusal obligations under the legal standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges.

5. On January 26, 2017, President Trump said in an interview with Fox News’s Sean Hannity that “waterboarding was just short of torture.” (*The Hill*, “Trump: Waterboarding isn’t torture,” Jan. 26, 2017) And during his presidential campaign, then-candidate Trump said during a rally in Gaffney, South Carolina: “You know they haven’t been able to define waterboarding. They don’t know if it’s torture. If it is, it might be a little too tough, we can’t be nice.” (*CNN*, “Trump on waterboarding: ‘Nobody knows if it’s torture,’” Feb. 18, 2016)

- a. Since joining the White House Counsel’s Office in January, have you worked or advised on any matters relating to the interrogation of detainees or the use of enhanced interrogation techniques (EITs)?**

No.

- b. Since joining the White House Counsel’s Office in January, have you worked or advised on any matters related to the definition of torture under U.S. or international law, or on whether certain interrogation techniques fall under that definition?**

No.

- c. In your work on behalf of the Trump-Pence Transition, did you ever work or advise then-candidate Trump or anyone else on his campaign on any matters relating to the interrogation of detainees or the use of EITs? On the definition of torture under U.S. international law, or on whether certain interrogation techniques fall under that definition?**

No.

- d. If so — and relating only to your work on the Transition — what advice did**

you provide?

Not applicable.

6. You have spoken frequently on the topic of interrogation and the use of EITs. In notes for a July 2007 speech you delivered to the Federalist Society, you wrote of the Supreme Court’s opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the Court had put U.S. interrogators in a “tough” position.

a. How did *Hamdan* put U.S. interrogators in a “tough” position?

Hamdan held that Common Article 3 of the Geneva Conventions covered the armed conflict between the United States and Al Qaeda. See 548 U.S. at 630-31. As a result, U.S. interrogators faced criminal prosecution for war crimes—and a maximum sentence of life imprisonment—if they did anything later found to constitute “outrages upon personal dignity.” Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3(1)(c), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see 18 U.S.C. § 2441 (2005). Congress responded to this concern by enacting the Military Commissions Act of 2006, which specified what particular kinds of conduct would support the imposition of criminal liability for war crimes. See Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632-35 (2006).

7. In notes for an April 2009 speech you delivered at Amherst College, you wrote that it was “absurd to give [a] full measure of [constitutional] protect[ion]” to detainees. Immediately underneath that note, you also wrote “judges can’t sensibly balance against military/intel objectives.” This appears to suggest that you were referring to the inability of the judiciary to balance constitutional rights and protections with the objectives of our military and intelligence professionals.

a. Do you stand by your statement that judges cannot balance these competing interests?

The notes that you reference summarize arguments that I had made, on behalf of the Executive Branch and in defense of two congressional statutes (the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006), that the Suspension Clause of the Constitution does not apply to aliens held as enemy combatants at Guantanamo Bay, Cuba. The Supreme Court rejected those arguments in *Boumediene v. Bush*, 553 U.S. 723 (2008). After *Boumediene* was decided, I testified before the House Committee on Armed Services: “Now that the Supreme Court has spoken, the task is to move forward consistent with the principles set forth in the Court’s decision.” *Implications of the Supreme Court’s Boumediene Decision for Detainees at Guantanamo Bay, Cuba: Administration Perspectives: Hearing Before the H. Comm. on Armed Servs.*, 110th Cong. 49 (2008) (statement of Gregory G. Katsas, Assistant Att’y Gen.); see also *id.* at 20 (oral testimony) (“You can’t eliminate the right to habeas corpus.”).

- b. Should the Committee understand your statement to mean that, if confirmed, and if confronted with a case where a President claimed that national security required him or her to undertake a particular action—you would automatically rule in the President’s favor?**

No. If confirmed, I would decide cases implicating national security like all other cases—by faithfully applying all applicable precedent and by carefully considering the arguments of both sides.

- c. Considering that judges, especially on the D.C. Circuit, are regularly called upon to balance constitutional rights with the Executive’s claims of military prerogatives — what can you say to assure the Committee that you will be able to fulfill your responsibilities and oath of office?**

My reaction to *Boumediene* illustrates my ability to faithfully implement the law and to fulfill my responsibilities and oath of office. Despite strongly arguing on behalf of the government against extending habeas corpus to aliens held as enemy combatants at Guantanamo Bay, I forcefully sought to implement *Boumediene* after it was decided: I gave congressional testimony about how to “move forward consistent with the principles set forth in the Court’s decision,” secured from throughout the Justice Department a detail of fifty lawyers in order to ensure the expeditious handling of the habeas actions authorized by *Boumediene*, and worked closely with two Chief Judges of the District Court for the District of Columbia in order to develop efficient case-management protocols for these cases.

8. In the same speech notes for that April 2009 speech, you wrote that the prohibition on torture had a “high bar,” as “a lot of coercive interrog[ation]” did not equal “torture.”

- a. What forms of coercive interrogation do not equal torture?**

As reflected in my notes, the interrogation methods that I had in mind when I gave that speech were ones that had been disclosed as previously used by the Department of Defense at Guantanamo Bay—change of diet to “MRE” (meals ready to eat, which are served to U.S. servicemembers); creation of “moderate” environmental discomfort such as cold, but only if the interrogator was present with the detainee; and sleep “adjustment” that did not amount to “deprivation.”

9. In speech notes for an April 2010 speech to the Federalist Society, you stated that in your view Guantanamo was an “ideal venue” to house detainees, as it was “safe, remote, [and] world class.”

- a. Do you continue to believe that Guantanamo is an “ideal venue” to detain enemy combatants?**

Your question addresses views that I expressed as a commentator more than seven years ago. As a judicial nominee, however, I cannot properly express such views on what remains a contentious political issue. *See* Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

10. In notes for the same April 2010 speech mentioned above, you cited the “greater risk” that would come from trying detainees in federal courts, rather than at Guantanamo, including the detainee’s rights to *Miranda* warnings and exclusions under the Fourth Amendment.

a. Given your stated opposition to trying enemy combatants in Article III courts, how can you assure this Committee and the American public that, if confirmed, you will approach any detainee-related cases without bias, prejudice, or prejudgment?

In the passage that you refer to, I was summarizing policy arguments made by the Bush Administration in support of the Military Commissions Act of 2006 and by the Obama Administration in support of the Military Commissions Act of 2009, both of which sought to expand the use of military commissions beyond what had been permitted under *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). My service in the Bush Administration would in no way impair my ability to enforce legal limits on the use of military commissions, just as my service in the Bush Administration in no way impaired my ability to faithfully apply and implement *Boumediene*.

11. During your hearing, I asked you whether you had advised on Interim Final Rules from the Departments of Health and Human Service, Treasury, and Labor allowing employers to stop providing women employees with health insurance coverage for contraception based on religious or moral objections. You said you had, although you were recused from “certain cases within that area.”

a. If confirmed, would you commit to recuse yourself from any litigation involving a challenge to these rules?

Yes.

12. Last week, a lawsuit was filed in federal court in D.C. against the Acting Secretary of Health and Human Services (HHS) in the case of a 17-year-old young woman detained in Texas whom federal officials have blocked from accessing an abortion she seeks. (*Garza v. Hargan*) It appears federal officials’ actions in this young woman’s case and others similar to hers constitute a change in policy from the last Administration within HHS’s Office of Refugee Resettlement (ORR).

In your Senate Questionnaire, you disclosed that your duties as Deputy Counsel and Deputy Assistant in the White House Counsel's Office include "managing legal issues involving executive-branch agencies."

- a. Did you work or advise on any issues or legal questions that arose in relation to the *Garza v. Hargan* case, including the current Administration's appeal of a federal judge's order halting officials' interference in the young woman's personal medical decisions?**

No.

- b. Did you work or advise on any issues related to ORR's policy or actions with respect to providing Unaccompanied Alien Children access to medical care, including abortion?**

No.

- c. Did you work or advise on any issues related to ORR's compliance with the 2014 interim final rule on "Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children?"**

No.

- d. Did you work or advise on any issues regarding ORR's compliance with the *Flores v. Reno* settlement agreement, including the agency's obligation to provide access to family planning services?**

No.

13. In July, the Justice Department intervened in *Zarda v. Altitude Express*, a private employment lawsuit, in order to argue that the ban on sex discrimination in the Civil Rights Act of 1964 does not protect workers on the basis of their sexual orientation. Sarah Isgur Flores, a Justice Department spokeswoman, said, "The White House Counsel's Office has known about this for a long time."

- a. Did you work or advise on any issues related to the Justice Department's decision to file a brief in this case?**

Yes.

14. In August, the Justice Department filed an amicus brief in support of the petitioner in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, arguing that First Amendment guarantees of freedom of expression preclude the application of Colorado's general antidiscrimination law to a boutique bakery that produces custom-

made wedding cakes.

- a. Did you work or advise on any issues related to the Justice Department’s decision to file a brief in this case?**

Yes.

15. Did you work or advise on any issues related to the transgender military ban, including President Trump’s initial tweets, any subsequent policy documents or memoranda, and the final directive reinstating a ban on transgender individuals from serving in the military?

Yes.

16. Did you work or advise on the decision to withdraw the March 2016 joint guidance issued by the Departments of Justice and Education regarding schools’ obligations to comply with federal law with respect to transgender students?

Yes.

17. In 2012, as an attorney at Jones Day, you represented the National Federation of Independent Business (NFIB) in *NFIB v. Sebelius*, a challenge to the Affordable Care Act’s (ACA) individual mandate to obtain health insurance. In one brief in that case, you argued that the individual mandate “exemplifie[d] the threat to individual liberty that occurs when Congress exceeds its limited and enumerated powers.”

- a. In what way is the ACA’s individual mandate a “threat to individual liberty”?**

On behalf of NFIB, I argued that Congress could not use its powers under the Commerce Clause and the Necessary and Proper Clause to force citizens to buy unwanted goods and services—including health insurance. A majority of the Supreme Court agreed. *See NFIB v. Sebelius*, 567 U.S. 519, 547-63 (2012) (opinion of Roberts, C.J.).

- b. In speeches in 2012 and 2013, you also criticized the Supreme Court’s *NFIB* decision upholding the constitutionality of the ACA. Given your past public statements, how can you assure litigants in ACA-related cases that may come before you that you could impartially consider their claims?**

I have repeatedly proven myself able to implement and apply decisions that I had argued against as an advocate. For example, in private practice, I represented large corporate defendants in False Claims Act litigation, and I filed briefs

unsuccessfully arguing that the qui tam provisions of the FCA were unconstitutional. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Yet, as head of the Civil Division, I vigorously enforced the FCA, sued many large corporations under it, frequently worked with relators and their counsel, and generated recoveries for the government on the order of \$1 billion per year. Likewise, in private practice, I argued that the Coal Industry Retiree Health Benefit Act was unconstitutional in its entirety. After the Supreme Court invalidated the Coal Act only in part, *see Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), I vigorously enforced the remainder of the statute as head of the Civil Division. Finally, as noted above, I took extraordinary measures to ensure the prompt and faithful implementation of *Boumediene*, despite my prior role as a vigorous advocate against that decision.

18. In a 2015 speech you gave to the Rochester Lawyers Chapter of the Federalist Society, you criticized Justice Kennedy's majority opinion in *Obergefell v. Hodges*, by stating that "As is typical for Justice Kennedy's decisions in this area, this one is long on rhetoric and short on what one might think of as traditional legal reasoning. There's not a lot of discussion of constitutional text and there's not a lot of discussion about history and tradition, except for Justice Kennedy to make the point that history and tradition are not controlling in his view."

a. As a judicial nominee, do you regret criticizing Justice Kennedy?

I have no regret for having expressed candid views of many Supreme Court decisions as a private commentator—*before* I became a judicial nominee. If confirmed as a judge, I would faithfully apply all precedents of the Supreme Court and the D.C. Circuit, including *Obergefell*.

b. If confirmed, would you have any problem applying the Supreme Court's decisions in *Obergefell*, *United States v. Windsor*, *Romer v. Evans*, or *Lawrence v. Texas*?

No.

19. You provided the Committee with speech notes for an October 2016 speech at the Federalist Society. Although those notes are somewhat difficult to decipher, you appeared to write the following with respect to *Zubik v. Burwell*: "equiv of AMK concur," with an arrow pointing to the word "equiv" and then a notation "hostil to tradit xt morality in pop culture." Later in the same notes, you write: "gay M. not only accept but compel objectors to support."

a. In writing "equiv of AMK concur," were you referring to Justice Kennedy's concurrence in *Hobby Lobby*?

Yes.

b. Please explain what you told the Federalist Society regarding “hostil to tradit xt morality in pop culture” and the relationship to “equiv of AMK concur.”

To the best of my recollection, I argued that the Court was likely to limit its *Hobby Lobby* decision in the future, given the reasoning in Justice Kennedy’s concurring opinion in that case. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785-87 (2014) (Kennedy, J., concurring). I also predicted that recent cultural changes would produce an increasing number of religious-liberty claims brought by traditional Christians opposed to practices such as abortion, contraception, and same-sex marriage.

c. What did you mean when you wrote about gay marriage “not only accept but compel objectors to support”?

I had in mind cases in which the government, by application of antidiscrimination or public-accommodation laws, would seek to compel individuals opposed to same-sex marriage on religious grounds to provide some degree of affirmative support to the practice.

20. In a June 2016 Federalist Society podcast, you stated: “the right of abortion, which isn’t in the Constitution, which has all these made-up protections.”

a. What are the “made-up protections” for abortion to which you were referring?

I was referring to the standards used in abortion cases to determine (1) the applicability of claim preclusion and (2) whether to strike a challenged provision in its entirety or only as applied in particular cases. Compare *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2304-09 (2016) (claim preclusion); and *id.* at 2318-19 (facial invalidation) with *id.* at 2331-42 (Alito, J., dissenting) (claim preclusion), and *id.* at 2350-53 (facial invalidation). I was not commenting on the substance of the constitutional right to abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

b. Do you believe that the Constitution can protect rights not enumerated in its text? If so, do you believe the Fourteenth Amendment protects a woman’s right to choose to have an abortion?

Since at least *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court has held that the liberty component of the Due Process Clause of the Fourteenth Amendment protects various rights not further enumerated in the constitutional text. In *Roe* and *Casey*, the Court extended this line of cases to a woman’s right to choose to have an abortion. If confirmed, I would have no difficulty fully and fairly applying these

and all other binding precedents.

c. Is the right to abortion under *Roe v. Wade* and its line of cases made conditional upon a woman's immigration status?

I have not had occasion to study this specific question.

21. In an August 2011 panel discussion at the Federalist Society, you said “[i]t seems to me pretty self-evident, but at least a debatable point that other things [being] equal, the best arrangement for a child is to be raised by both of the child's biological parents.”

a. On what basis have you reached the conclusion that “the best arrangement for a child is to be raised by both of the child's biological parents”?

The thesis of my speech was that the Solicitor General should have defended the Defense of Marriage Act, a congressional statute, because there were reasonable arguments that DOMA was constitutional. In reaching that conclusion, I relied on the many lower-court decisions at the time holding that the traditional, opposite-sex definition of marriage was rationally related to a legitimate government interest in encouraging optimal family arrangements for having and rearing children. *See, e.g., Standhardt v. Superior Court*, 77 P.3d 451, 462-63 (Ariz. App. 2003); *Smelt v. Cty. of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *In re Kandu*, 315 B.R. 123, 146-48 (Bankr. W.D. Wash. 2004). After my speech, the Supreme Court invalidated Section 3 of DOMA, *see United States v. Windsor*, 570 U.S. 12 (2013), and its state-law analogues, *see Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

b. If confirmed, how can you assure same-sex litigants that you will approach their case(s) without bias, prejudice, or prejudgment?

If confirmed, I would have no trouble faithfully applying *Windsor*, *Obergefell*, and all other binding precedent. As explained above, my record shows that I have repeatedly enforced judicial decisions that I had previously argued against as an advocate, and the many recommendations submitted on my behalf attest to my honesty, integrity, and lack of bias.

22. During your nomination hearing before this Committee, Senator Klobuchar asked you a number of questions about the propriety of the Department of Justice changing its litigation position in pending cases. You testified that you had not worked or advised on the decision to change positions in either the Texas voter ID case (*Veasey v. Abbott*) or the Ohio voter purge case (*Husted v. Randolph Institute*).

a. Have you worked or advised on a decision by the Justice Department or any

other federal agency to change its litigation position in any pending case? If so, which case(s)?

Yes. To the best of my recollection, the cases responsive to your question are *NLRB v. Murphy Oil USA, Inc.*, S. Ct. No. 16-307; *PHH Corporation v. CFPB*, D.C. Cir. No. 15-1177; and *United States v. Wheeler*, 4th Cir. No. 16-6073.

23. In your Senate Questionnaire, you indicated that your responsibilities in the White House Counsel's Office include "interviewing and recommending candidates for various executive and judicial appointments." When Judge Brett Kavanaugh came before this Committee in 2006, he disclosed whether he had worked on a particular judicial nomination. (For example, Judge Kavanaugh testified that during his tenure at the White House, he did not work on the nomination of William Haynes to the Fourth Circuit, or Jay Bybee's nomination to the Ninth Circuit.) **Please tell the Committee whether you worked on the following nominations:**

a. John Bush to the United States Court of Appeals for the Sixth Circuit

Yes.

b. Damien Schiff to the Court of Federal Claims

No.

c. Stephen Schwartz to the Court of Federal Claims

No.

d. Jeff Mateer to the Eastern District of Texas

No.

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

The Supreme Court has held that it is appropriate for judges to consider legislative history when, but only when, the text of the statute is ambiguous. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017).

25. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

It is never appropriate for lower courts—which the Constitution describes as

“Tribunals inferior to the supreme Court” (Art. I, § 8, cl. 9)—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?

A circuit court must always apply Supreme Court precedent that “directly controls,” even if that precedent “appears to rest on reasons rejected in some other line of [Supreme Court] decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In cases involving that kind of doctrinal instability, it may be proper for a circuit judge to flag for the Supreme Court the question whether a particular precedent should have continuing vitality in light of other decisions, so long as the judge faithfully applies the directly-controlling precedent. Similar considerations might apply in the context of a dissent, though a circuit judge should never decline to apply directly-controlling precedent.

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

It is never appropriate for one circuit panel to overturn prior circuit precedent. *See, e.g., Dep’t of Treasury v. FLRA*, 862 F.2d 880, 882 (D.C. Cir. 1988). A circuit may consider overruling its own precedent when sitting en banc, which is generally limited to cases involving intra-circuit conflicts or questions of exceptional importance. *See Fed. R. App. P. 35(b)*.

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

In deciding whether to overturn one of its own prior precedents, the Supreme Court generally considers whether it thinks the precedent at issue was rightly decided, whether the question at issue is statutory or constitutional, whether the precedent has given rise to significant reliance interests, whether the precedent has been consistently applied, and whether the precedent has been eroded by other related decisions. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 233-36 (2009); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

26. 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 precedents are binding on the lower courts. I agree that *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*, has withstood many attempted overrulings and that it binds all lower courts.

b. Is it settled law?

Please see my answer to question 26(a).

27. 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 is binding on the lower courts, as are all other Supreme Court precedents.

28. 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 nominee for a federal court of appeals, I cannot properly comment on whether I personally agree with particular Supreme Court majority opinions or dissents, particularly in recent decisions that are themselves the subject of ongoing litigation.

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” and that “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 laws 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?

When *Heller* was decided, there was only limited Supreme Court precedent bearing on the question whether the Second Amendment confers an individual right to keep and bear arms. The majority and the dissenters disagreed about the import of that precedent. *Compare* 554 U.S. at 618-26 *with id.* at 673-79 (Stevens, J., dissenting).

29. According to your Senate Questionnaire, you have been a member of the Federalist Society since 1989. 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 graduated from law school in 1989 and, since then, have only occasionally given lectures or other presentations at law schools. Accordingly, I do not feel qualified to comment on the extent to which one or another kind of ideology currently dominates law schools.

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

I am unaware of any attempt by the Federalist Society to "reorder priorities within the legal system." To my knowledge, the Society is a group of some 70,000 lawyers, professors, and students interested in major legal issues of the day. While the Society consists primarily of members who identify themselves as conservatives or libertarians, it is open to anyone regardless of political or jurisprudential orientation, and it strives, in the various speeches, debates, and panels that it sponsors, to present a healthy diversity of views.

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

In my experience, there is vigorous debate among Society members about the role of “traditional values” within the legal system. Moreover, the Society itself does not take positions on specific legal or policy issues.

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

I drafted answers to all of the questions presented to me, solicited comments from members of the White House Counsel’s Office and the DOJ Office of Legal Policy working on my nomination, and revised my draft answers as I thought appropriate in light of those comments. All of these answers are my own.

Senator Dick Durbin
Written Questions for Gregory Katsas
October 24, 2017

For questions with subparts, please answer each subpart separately.

Questions for Gregory Katsas

1. You say in your questionnaire that while you were working as a member of the Trump-Pence Transition Department of Justice Landing Team, your “assigned components included Civil Division, Office of the Solicitor General, and Office of Legal Counsel.”

a. **What specific matters involving the Civil Division did you work on while you were on the Landing Team?**

My assignment was to gather as much information as possible about the Civil Division, for the benefit of new appointees immediately after the Inauguration. The outgoing leadership of the Division briefed me on various issues, including structure of the Division, available positions for political appointees, an overview of each branch within the Division, and budget, management, and operations issues. I did not, and could not, work on any government cases prior to my assuming federal office after the Inauguration.

b. **What specific matters involving the Office of the Solicitor General did you work on while you were on the Landing Team?**

My assignment was to gather as much information as possible about the Office of the Solicitor General, for the benefit of new appointees immediately after the Inauguration. The outgoing leadership of OSG briefed me on various issues, including structure of the Office, available positions for political appointees, and budget, management, and operations issues. On my own, I also reviewed the docket of all cases then pending in the Supreme Court. However, as noted above, I did not and could not work on any government cases until after assuming my current position in the White House Counsel’s Office.

c. **What specific matters involving the Office of Legal Counsel did you work on while you were on the Landing Team?**

My assignment was to gather as much information as possible about the Office of Legal Counsel, for the benefit of new appointees immediately after the Inauguration. The outgoing leadership of OLC briefed me on various issues, including structure of the Office, available positions for political appointees, and budget, management, and operations issues. I also reviewed various OLC opinions potentially of interest to the incoming Administration.

- d. **Did you play any role in crafting or reviewing the travel ban executive order while you were on the Landing Team? If so, please describe the work you performed.**

I provided legal advice on Executive Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, prior to its issuance on January 27, 2017. I do not recall whether I first reviewed drafts of that Order while on the Landing Team or after joining the White House Counsel's Office.

- e. **Did you play any role in crafting or reviewing immigration policy while you were on the Landing Team? If so, please describe the work you performed.**

No.

- f. **Did you work on or advise on any matters regarding or relating to Russian interference in the 2016 election while you were a member of the Landing Team? If so, please describe the work you performed.**

No.

- g. **Did you work on or advise on any matters regarding or relating to Lt. General Michael Flynn while you were a member of the Trump Justice Department Landing Team? If so, please describe the work you performed.**

No.

- h. **Did you work on or advise on any matters regarding or relating to the President's or his family's financial conflicts of interests or emoluments while you were a member of the Landing Team? If so, please describe the work you performed.**

I provided legal advice regarding whether, or the extent to which, the Emoluments Clauses of the Constitution might apply to the President's business arrangements.

2. Former Acting Attorney General Sally Yates testified to this Committee earlier this year that the Office of Legal Counsel was advised not to tell her about its review of the Administration's travel ban. She said she was not aware of any other instance in Justice Department history where OLC was advised to keep the Attorney General in the dark about its work. **Were you aware of, or did you play any role in, the decision to not inform the Acting Attorney General about the travel ban or the decision to have OLC review the ban without her knowledge?**

No.

3. Earlier this year I asked Francis Cissna, the nominee to head U.S. Citizenship and Immigration Services, to discuss the work he did for the Trump Transition Team on

immigration policy. Mr. Cissna declined to answer my question, saying he did not think it was appropriate to discuss the internal policy deliberations of the Transition Office. I asked if Mr. Cissna had consulted with others when he made the decision not to provide information to the Committee about what policies he worked on with the Transition, and he said “I did consult with the Office of the White House Counsel regarding whether legal counsel had been previously provided on similar questions.”

a. **Did Mr. Cissna consult with you about this matter?**

No.

b. **In your view, are there any legal grounds for denying this Committee access to information about what issues nominees may have worked on while working for the Trump Transition? If so, please explain the specific legal grounds.**

In preparing for my own confirmation hearing, I determined that I could answer the questions posed to me by Senator Feinstein about whether or not I had worked on or provided legal advice on particular matters since joining the White House Counsel’s Office. I also determined that I could not answer further questions about the substance of my advice or any other internal deliberations on those matters. This was based on an assessment of the specific circumstances presented by my own nomination, as well as the answers provided under similar circumstances while the Committee was considering the judicial nominations of Justice Kagan and Judge Kavanaugh. I have not had occasion to consider how in other contexts to strike an appropriate balance between the Committee’s need for information and the Executive’s need to preserve the confidentiality of its internal deliberations.

4. You stated in your questionnaire that “In the White House Counsel’s Office, since January 2017, I supervise litigation occasionally.”

a. **What specific litigation matters have you supervised?**

I am primarily involved in litigation matters involving challenges to executive orders or other forms of presidential action, as well as matters otherwise implicating White House equities.

b. **Have you supervised any litigation involving the Administration’s immigration policies or executive orders? If so, please discuss the relevant litigation, policies and/or executive orders.**

To the best of my recollection, I have advised on litigation involving Executive Order 13769, Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017); Executive Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States (March 6, 2017); Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States (Sept. 24, 2017); and Executive Order 13815, Resuming the United States Refugee

Admissions Program With Enhanced Vetting Capabilities (Oct. 24, 2017). Relevant litigation has included *Trump v. International Refugee Assistance Project*, S. Ct. No. 16-1436, and *Trump v. Hawaii*, S. Ct. No. 16-1540.

- c. **Have you supervised litigation involving the Administration's efforts to cut off federal public safety funding to cities because of those cities' unwillingness to have their police officers commandeered to support the Trump Administration's deportation agenda?**

I have advised on litigation challenging Section 9(a) of Executive Order 13768, which instructs the Attorney General and the Secretary of Homeland Security, to the extent permitted by law, not to award certain law-enforcement grants to jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373.

5. In 2010, while you were at Jones Day, you testified before the U.S. Commission on Civil Rights about the Justice Department's decision to drop its claim against three defendants in the case *U.S. v. New Black Panther Party*. This was an alleged voter intimidation case brought in the final weeks of the Bush Administration. You said in your testimony that this:

[A]mounted to nothing less than a decision by DOJ, following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare – and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations.

As you know, the Trump Justice Department has reversed legal positions in a number of pending cases, such as a lawsuit against Texas's strict voter suppression law and a case before the Supreme Court involving Ohio's attempt to purge voter rolls. In fact, you provided to the Committee notes for a speech you gave before the Federalist Society on March 2, 2017 about your job in the White House Counsel's Office, and in your notes you say that you are "extremely busy" on a range of matters including what appears to be a shorthand reference to "litigation- abandon positions".

- a. **In your view, have the Trump Administration's changes in position in pending litigation helped to "undermine DOJ's credibility with the courts"?**

During my testimony before the Civil Rights Commission, I acknowledged that changing legal positions in pending cases could be appropriate, so long as the changes were "fully justified on fair, neutral grounds" beyond simply the fact of a change in presidential Administrations. See *Hearing on the Department of Justice's Actions Related to the New Black Panther Party Litigation and Its Enforcement of Section 11(b) of the Voting Rights Act Before the U.S. Comm'n on Civil Rights* 165 (Apr. 23, 2010). In matters that I worked on where DOJ changed positions in pending cases, DOJ filed briefs explaining at length the legal basis for its new positions.

- b. **In your view, have the Trump Administration’s changes in position in pending litigation helped to “raise suspicion that DOJ’s litigating positions may be influenced by political considerations”?**

Please see my answer to your Question 5(a).

- c. **What changes in litigation positions have you been involved with while you’ve been in the White House Counsel’s Office? Please describe each such litigation matter and any work you performed in monitoring, discussing or overseeing any changes in position in these litigation matters.**

Please see my answer to Senator Feinstein’s Question 22(a). It would be inappropriate for me to disclose either the substance of my advice on these matters or the details of internal deliberations on them within the Executive Branch.

- d. **What changes in litigation positions were you involved with while were working on the Trump Department of Justice Landing Team? Please describe each such litigation matter and any work you performed in monitoring, discussing or overseeing any changes in position in these litigation matters.**

As a member of the DOJ Landing Team, I did not and could not become involved in changing any litigating position of the United States or any of its agencies.

6. On July 2, 2016, you wrote a column entitled “Justice Clarence Thomas: 25 Years Later.” In the column, you praise Justice Thomas, for whom you clerked, as “principled, careful, courageous, and consequential,” and say that Justice Thomas “favors text over policy, original meaning over evolving standards, history over legislative history, rules over standards, and getting it right over following precedent.”

- a. **When in your view is it appropriate for a Supreme Court Justice not to follow precedent for the sake of “getting it right”?**

Please see my answer to Senator Feinstein’s Question 25(d).

- b. **Do you think it is appropriate for all Supreme Court justices to try to “get it right over following precedent,” or just originalist justices?**

All Supreme Court justices should follow the same law, including the law of precedent. While some justices may be more willing to reconsider precedent than others, no justice, to my knowledge, favors “getting it right” in the sense of reconsidering all precedent de novo.

- c. **If you are confirmed, when would you try to get it right over following precedent?**

If confirmed, I would be obligated to fully and faithfully apply all Supreme Court precedent—including precedent that I believed the Supreme Court itself would likely

overrule. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Moreover, except when sitting en banc, I would be obligated to fully and faithfully apply all D.C. Circuit precedent. *See, e.g., Dep't of Treasury v. FLRA*, 862 F.2d 880, 992 (D.C. Cir. 1988). I would have no trouble applying these binding rules of precedent.

7. In your questionnaire you say that you would “recuse myself in any matter in which, during my time in private practice, either I or a lawyer with whom I was then practicing had participated.” You were one of the attorneys representing the NFIB in the landmark 2012 Supreme Court case *NFIB v. Sebelius* in which the Supreme Court upheld the constitutionality of the Affordable Care Act. After the case was decided, you criticized the Court’s decision to uphold the individual mandate under Congress’s power to tax, and you also said you were “gratified that the court made some new law significantly limiting federal power in two different respects with the Commerce Clause holding and Medicaid.” **If confirmed, will you commit to recuse yourself from handling cases involving challenges to the Affordable Care Act, given your work on the *NFIB* case and your public comments about the Act and the Supreme Court’s *NFIB* decision?**

Under governing law, my work on and public comments about *NFIB v. Sebelius* would not necessarily disqualify me from hearing other challenges to the Affordable Care Act. If confirmed, I would address recusal in cases involving the ACA as I would in all other cases, by faithfully applying the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges.

8. **Since you have been at the White House Counsel’s Office, have you worked on or advised on any matters relating to the President’s pardon power or any individual pardon cases? If so, please discuss the relevant matters and please state whether you discussed any such matters with the President’s private attorneys.**

I have not worked on any matters implicating the legal scope of the President’s pardon power. I briefly did some preliminary factual investigation into one individual pardon case, but handed the matter off to another lawyer in the Office. I did not discuss the matter with the President’s private attorneys.

9. **In your view, is there any role for empathy when a judge is considering a criminal case – empathy either for the victims of the alleged crime, for the defendant, or for their loved ones?**

As a general matter, judges must interpret and apply the law neutrally in all criminal and civil cases. In fact, Congress has required all federal judges to swear that they “will administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. Understanding a defendant’s background may have some relevance in the adjudication of specific issues such as insanity or duress. Moreover, at sentencing, a judge must consider “the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1).

10.

- a. **Do you believe that the role of a judge on the federal court of appeals is to apply Supreme Court and Circuit precedent in all cases?**

Yes.

- b. **Do you believe there are cases that come before the Circuit Courts that are of first impression or that are not directly covered by precedent?**

Rarely if ever do circuit courts consider cases of “first impression” in the sense that there is no Supreme Court or circuit precedent that bears on the question presented. In many instances, circuit courts consider cases where the applicability of existing precedents is subject to reasonable debate.

- c. **If you answered yes to question 10(b), in such cases, what would be your approach to reaching a decision if you are confirmed?**

In cases where the applicability of existing precedents is subject to reasonable debate, I would strive to reach the most plausible reading of those precedents. In cases truly of first impression, I would attempt to discern the original public meaning of the legal provision at issue—as elucidated by legal context, statutory or constitutional structure, historical practices, and applicable canons of construction—and to apply that meaning to the specific facts in the case or controversy before the Court.

11.

- a. You say in your questionnaire that you have been a member of the Federalist Society since 1989. **Are you aware that President Trump publicly thanked the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News’ Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

I am generally aware that the President has made comments to that effect.

- b. **Prior to your nomination, did you ever discuss the possibility of a judicial nomination with Federalist Society Executive Vice President Leonard Leo or any other Federalist Society board members or staff? If so, please discuss the dates and contents of such discussions.**

I had no discussions with Leonard Leo or any other Federalist Society personnel about the possibility of my judicial nomination before July 12, 2017, when the Counsel to the President informed me that the President intended to nominate me to the D.C. Circuit subject to my clearing the necessary background checks and vetting procedures. Shortly after July 12, I conveyed this news to Mr. Leo, and he congratulated me.

- c. **Please list each year that you attended the Federalist Society’s annual conference and describe any other engagement you’ve had with the Federalist Society.**

Since 1992, I have attended the Federalist Society’s annual conference to the extent permitted by my work schedule. In most years, I have been able to attend at least small portions of the conference. Rarely have I been able to attend the entire conference. I do not have calendar records regarding the extent of my attendance in individual years. My participation in speeches, debates, and panels sponsored by the Federalist Society is set forth in my answer to Question 12(d) of the Senate Judiciary Questionnaire.

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

The Judicial Crisis Network has also spent money on advertisements supporting President Trump’s Circuit Court nominees, including Justice Joan Larsen.

- a. **Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?**

I am aware that the Judicial Crisis Network has expressed public support for my nomination, but I did not solicit that support, and I have no knowledge regarding any donations to the Network. I appreciate the wide range of support that my nomination has received from across the political spectrum.

- b. **Will you condemn any attempt to make undisclosed donations on behalf of your nomination?**

As a nominee for judicial office, I cannot comment on the political aspects of the confirmation process. *See* Canon 5, Code of Conduct for United States Judges (“A judge should refrain from political activity”); *id.* Canon 1 commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

- c. **Will you call for any such undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?**

Please see my answer to your Question 12(b).

13.

- a. **Can a president pardon himself?**

I have not had occasion to study this question.

- b. **Can an originalist view of the Constitution provide the answer to this question? If yes, please provide this answer.**

I have not had occasion to study this question.

- c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

A lower-court judge should always begin with any applicable Supreme Court or circuit precedent. If precedent resolves the question, then the judge must apply it. If precedent does not resolve the question, then the judge should consider other interpretive guides which, in the case of a presidential pardon, would include the original public meaning of the phrase “Reprieves and Pardons for Offenses against the United States” (U.S. Const. Art. II, § 2, cl. 1); any structural considerations regarding use of that phrase in context (for example, the fact of an enumerated exception for “Cases of Impeachment”); historical practices at the time of the Founding; and any further traditions developed over time.

14. **Do you agree, as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election?**

I have no basis on which to agree or disagree with that statement.

**Nomination of Greg Katsas to the
United States Court of Appeals
For the D.C. Circuit
Submitted October 24, 2017**

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 do agree with the metaphor—like an umpire, a judge should neutrally apply rules written by others in order to ensure the fair outcome of a particular contest.

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

For the most part, consideration of practical consequences is a task for lawmakers as opposed to judges. On occasion, however, substantive law requires judges to consider practical consequences—for example, in deciding whether or not to grant a preliminary injunction. *See, e.g., Winter v. Nat’l Res. Defense Council*, 555 U.S. 7 (2008). Moreover, judges may consider practical consequences in applying the absurdity doctrine. *See, e.g., United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989).

- c. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a judge to make a subjective determination?

In determining whether there is a “genuine dispute as to any material fact,” the judge must decide whether any reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986). That can be a difficult determination, but it is nonetheless an objective one. Among other things, the judge should be guided by subsidiary rules informing the inquiry (*e.g.*, the rule that a court on summary judgment should not weigh the credibility of witnesses), as well as by summary-judgment dispositions in other cases involving comparable legal questions and factual records.

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?
- b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?
- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

On these questions, I cannot improve upon the testimony given by Justice Kagan at her confirmation hearing: “I think it’s law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it’s true of statutory law—the question is what the law requires.” *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010).

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. In light of your public criticism of Supreme Court precedent concerning reproductive rights (including *Roe*, *Casey*, and *Whole Women’s Health*), how can you assure the American public that you will uphold and enforce *Roe* as the Court has done for the past 44 years, as recently as *Whole Women’s Health*?

If confirmed, I would faithfully apply all binding Supreme Court and D.C. Circuit precedents, including *Roe*, *Casey*, and *Whole Woman’s Health*. Throughout my career, I have repeatedly shown myself able to apply and enforce decisions that were contrary to positions I had previously taken as an advocate or commentator. For examples, please see my answers to Senator Feinstein’s Questions 7(c) and 17(b).

5. A draft executive order titled “Establishing a Government-Wide Initiative to Respect Religious Freedom,” which was leaked in February, sought to create wholesale exemptions for people and organizations who claim religious or moral objections to same-sex marriage, premarital sex, abortion, and transgender identity, and it sought to curtail women’s access to contraception and abortion through the Affordable Care Act. Did you have any role in deliberating or preparing the draft executive order?

I have worked or advised on various issues regarding religious liberty. It would be inappropriate for me to discuss any internal deliberative matters.

6. In response to Senator Feinstein’s question of whether or not you worked on the “interim

final rules by the Departments of Health and Human Services, Treasury, and Labor allowing any company or employer to stop providing workers with health coverage for contraception for religious or moral objections” you responded: “I worked on discrete pieces of that issue, but there were certain cases in that area in which I was recused.” Why were you recused from working on parts of this Executive Order?

I recused myself from individual cases in which my former law firm was representing employers.

7. The Justice Department intervened in a private employment lawsuit in July, arguing that the ban on sex discrimination in the Civil Rights Act of 1964 does not protect workers on the basis of their sexual orientation. Sarah Isgur Flores, a Justice Department spokeswoman, said, “The White House Counsel’s Office has known about this for a long time.”

- a. Were you aware of or involved in any way with the Justice Department’s decision to intervene in this case or adopt the specific position against protecting workers from discrimination based on their sexual orientation?

I provided legal advice regarding the Justice Department’s amicus brief in the *Zarda* appeal.

- b. Do you agree with the Justice Department’s position?

As a lawyer for the President, it would be improper for me to express my personal views on this or any other pending client matter.

- c. Under federal law, may an employer discriminate against an employee on the basis of sexual orientation? What about gender identity?

Title VII of the Civil Rights Act of 1964 generally prohibits employment discrimination against any individual “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2. The question whether this provision reaches discrimination because of sexual orientation or gender identity is unsettled. I have not had occasion to study the question whether other laws might prohibit such discrimination.

8. The Trump administration in February revoked federal guidelines specifying that transgender students have the right to use public school restrooms that match their gender identity. In what ways were you involved in considering this issue?

I provided legal advice regarding the decision by the Attorney General and the Secretary of Education to withdraw prior agency guidance on that issue pending further study.

9. The White House Counsel’s office appeared to play a central role in the ban on transgender individuals serving openly in the U.S. military. It was reported that the White House

Counsel's office signed off on a "guidance" for implementation of President Trump's tweets announcing the ban. Additionally, it was reported that the guidance on the transgender service ban went back to the White House Counsel's office for "adjustments" in response to public statements by organizations after the news broke that the 2 ½ page memo was on its way to Defense Secretary Mattis. Were you involved in any deliberations or drafting concerning the transgender military ban, including President Trump's initial tweets, any subsequent policy documents or memos, or the final directive reinstating a ban on transgender individuals from serving in the military?

I provided legal advice on many of these issues.

10. In describing the 2014 Supreme Court term as "grim" and "a very bad year for conservatives," you specifically highlighted the Court's decision in *Obergefell v. Hodges*, which recognized marriage equality as the law of the land.

- a. Can you please explain why "grim is a pretty good word" to describe a landmark Supreme Court decision vindicating the rights of same-sex couples and their families?

In the speech at issue, I said that "grim is a pretty good word" to describe "[t]he October 2014 Term for conservatives." I based that assessment on my review of the leading and closely-divided decisions from that Term. My assessment was widely shared by other commentators. See, e.g., Alicia Parlapiano et al., *The Roberts Court's Surprising Move Leftward*, N.Y. Times (June 29, 2015), <https://www.nytimes.com/interactive/2015/06/23/upshot/the-roberts-courts-surprising-move-leftward.html>.

- b. Do you believe that, after *Obergefell v. Hodges* and *Pavan v. Smith*, states have the right to deny married same-sex couples certain benefits or protections offered to married different-sex couples?

These decisions squarely held that states cannot "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

11. In response to Senator Feinstein's question regarding what types of legal advice you provided at OLC, you testified that you could not answer because "the executive branch needs confidentiality in order for the President to receive confidential advice [and] in order for lawyers to provide confidential advice." You further explained: "I am treading carefully for obvious reasons, to the extent that any matters that I may have advised on would impede the work of the Special Counsel. I want to be very careful not to say anything here that could undermine that work." Can you please explain further what information you could possibly provide that could undermine the Special Counsel's investigation?

I have never worked at OLC. In court filings, the Special Counsel has opposed public

disclosure of any materials that could “reveal the course, nature, scope, or strategy of [his] ongoing investigation.” FBI Memorandum of Law in Support of its Motion for Summary Judgment at 8, *New York Times Co. v. FBI*, No. 17-CIV-04558 (S.D.N.Y. Oct. 13, 2017), ECF No. 14. It would be inappropriate for me to publically disclose any such information in order to advance my own personal interests as a judicial nominee.

12. In your time at the White House Counsel’s office, did you ever do any work, in any context, on the issue of executive privilege?

Yes.

**Nomination of Gregory G. Katsas, to be United States Circuit Judge for the District of
Columbia Circuit
Questions for the Record
Submitted October 24,
2017**

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?

Many Supreme Court decisions, from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), set forth the governing legal framework for assessing this question. I would apply that framework.

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

Yes, as required by Supreme Court precedent regarding the incorporation doctrine. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010).

- b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes, as required by Supreme Court precedent in this area. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997).

- c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of another court of appeals?

I would be bound to consider and apply all relevant Supreme Court and D.C. Circuit precedent. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Dep't of Treasury v. FLRA*, 862 F.2d 880, 992 (D.C. Cir. 1988). I would respectfully consider precedent from other circuits for whatever persuasive force it might have.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

Yes, consistent with my obligation to follow not only the specific holdings, but also the essential reasoning, of all relevant Supreme Court and D.C. Circuit precedent. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 66-67 (1996).

- 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*).

Casey and *Lawrence* are binding precedents, so I would apply the holding and rationale of those cases as well as those of all other relevant precedents.

f. What other factors would you consider?

I would consider any other factors that appear relevant under Supreme Court and D.C. 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 mandates heightened scrutiny for gender-based classifications as well as for race-based classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 170 (1976).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

Any question about the original public meaning of the Fourteenth Amendment, or the intent of its framers and ratifiers, would be purely academic in light of the long line of binding Supreme Court precedent on this point.

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?

Judicial decisions interpreting the Fourteenth Amendment establish what that Amendment has meant from the date of its enactment. *See, e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994). I am unaware why the *Virginia* litigation was not filed until 1990.

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 held that the Fourteenth Amendment prohibits states from "bar[ring] same-sex couples from marriage on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). The extent to which the Fourteenth Amendment prohibits discrimination based on sexual orientation in other contexts is an unsettled question that could come before me as a judge. Accordingly, I cannot express an opinion on that question as a judicial nominee. *See* Canon 3A(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

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

The extent to which the Fourteenth Amendment prohibits discrimination based on transgender status is an unsettled question that could come before me as a judge. Accordingly, I cannot express an opinion on that question as a judicial nominee.

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

The Supreme Court recognized such a constitutional privacy right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

- a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court recognized such a constitutional privacy right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

- b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court recognized such a constitutional privacy right in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

Please see my answers to the previous subparts of this question.

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 (2013), 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?

In some cases, such as *United States v. Virginia* and *Obergefell*, the Supreme Court has looked to changed understandings of society. In other cases, the Court has focused more on understandings prevailing at the time

of the Founding. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004). I have not had occasion to study this question exhaustively.

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

A trier of fact may consider such evidence when it is relevant to a disputed issue and based on a reliable methodology. See Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). In addition, judges sometimes consider such evidence through filings loosely described as “Brandeis briefs.”

5. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not had occasion to study the question whether *Brown* is consistent with originalism, which I understand legal scholars continue to dispute. In any event, the question is purely academic in light of the Supreme Court’s holding.

- 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 October 23, 2017).

As the criticism suggests, the determination of a provision’s original public meaning can sometimes be difficult. Moreover, that determination does not end the constitutional analysis, for the provision must nonetheless be applied to the specific factual context at issue, which may involve circumstances unforeseen by the Framers of the Constitution. See, e.g., *United States v. Jones*, 565 U.S. 400 (2012) (Fourth Amendment covers GPS tracking devices attached to cars).

6. During your hearing, I asked you whether it is problematic that President Trump pardoned former Sheriff Joe Arpaio for his contempt of court conviction. You indicated that you do not know whether the pardon power is qualified in the context of contempt.
- a. Are there separation-of-powers concerns associated with the President pardoning a

defendant before a court can fully adjudicate charges based on the defendant's refusal to comply with an order of that same court?

Separation-of-powers considerations are present any time the exercise of a power by one branch of the government impacts the functioning of another.

- b. If confirmed, would the presence of a defendant who you had reason to believe may receive a pardon influence your approach to adjudicating the case?

No.

- c. Normally a pardon involves multiple layers of review and recommendations from the Department of Justice and White House Counsel's Office. Did you or any other member of the White House Counsel's office provide the President any recommendation on whether to pardon Arpaio?

I did not work or provide advice on the Arpaio pardon. I do not know what other advice was or was not provided.

7. In notes for a March 2017 speech to the Federalist Society, you wrote a section titled "extremely busy." One of the entries was "litig—abandon posits," apparently shorthand for abandoning current positions in ongoing litigation. In 2010, you testified before the U.S. Commission on Civil Rights that reversals in position "are extremely rare—and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations." At your nomination hearing, you shared with the Committee that the reason for the Department's change in positions in *Veasey v. Abbott* was that Texas passed a new statute.

- a. Your response appears to relate to why the government argued that no additional remedy was necessary, i.e., because the legislature's subsequent bill "fully remedie[d] any discriminatory effect." I would like to know why the government dropped its intentional discrimination claim, which the court found had merit.

I did not work on *Veasey* and thus do not know the answer to your question.

- b. Please explain the administration's decision to change sides in *National Labor Relations Board v. Murphy Oil USA, Inc.* The government originally argued that class action waivers unlawfully "deprive employees of their statutory right" to engage in certain activities. In June, however, the government filed an amicus brief to the Supreme Court indicating that after review, the government had "reached the opposite conclusion."

The Administration's position—and its legal justification—are fully set forth in the amicus brief filed by the Solicitor General in *Murphy Oil*. I cannot properly disclose internal executive-branch deliberations on specific matters.

- c. Please explain the government's decision to change sides in *Husted v. A. Philip Randolph Institute*, where the government abandoned its earlier position that an Ohio law that removed registered but non-voting citizens from voter rolls violates the

National Voter Registration Act.

I did not work on *Husted* and thus do not know the answer to your question.

- d. Did you participate in any way in the decision to change positions in these cases?

As previously noted, I provided legal advice with respect to *Murphy Oil*, but not with respect to *Veasey* or *Husted*.

- e. Do these changes in positions “raise suspicion that DOJ’s litigating positions may be influenced by political considerations”?

No. Please see my answer to Senator Durbin’s Question 5(a).

8. In notes for a 2015 “Supreme Court Round Up” speech that you gave to the Federalist Society, you stated that *Obergefell v. Hodges* was “long on rhetoric” and “short on tradit[ional] legal reas[oning].” *Obergefell* acknowledged that there is a constitutional right to marriage equality for same-sex couples.

- a. Do you disagree with the decision in *Obergefell v. Hodges*?

As a judicial nominee, it would be inappropriate for me to express my personal views on individual Supreme Court decisions. Prior to my judicial nomination, I defended the Defense of Marriage Act in court, and I criticized *Obergefell* as a commentator. However, neither my prior defense of DOMA in court nor my prior criticism of *Obergefell* would prevent me from faithfully applying that binding precedent, just as my defense of the Military Commissions Act and my criticism of *Boumediene* did not prevent me from faithfully applying and enforcing that binding precedent when I was head of the Civil Division of the Justice Department.

- b. Why did you say the decision was short on traditional legal reasoning, when the case relies on the Due Process and Equal Protection Clauses?

At the time of that speech, I found persuasive the criticisms made by the four dissenting opinions.

- c. After *Obergefell*, can states continue to enforce laws that deny to same-sex couples the benefits available to all opposite-sex couples?

The States are bound by *Obergefell*’s holding that they cannot “bar same-sex couples from marriage on the same terms accorded to couples of the opposite sex.” 135 S. Ct. 2584, 2607 (2015).

9. In a 2011 speech to the Federalist Society, you stated, “[I]t seems to me pretty self-evident, but at least a debatable point that other things being equal, the best arrangement for a child is to be raised by both of the child’s biological parents.”

- a. Can same-sex or non-traditional couples be good parents?

Yes. For the context and import of my 2011 speech criticizing the Solicitor General's refusal to defend DOMA, please see my answer to Senator Feinstein's Question 21.

- b. Do you understand why LGBT parents may be concerned that they will not get a fair hearing in your courtroom?

I do not believe that any such concerns would be warranted. In 2011, there were plausible legal arguments supporting the constitutionality of DOMA, which Congress had enacted by lopsided majorities and which many courts had then upheld on the reasoning I described.

10. During your hearing, I asked you about a speech you gave to the Federalist Society in which you called a decision holding that overcrowded and dangerous prison conditions can violate the Eighth Amendment "frankly shocking." You replied that your concerns arose out of the possibility that the holding would result in the release of thousands of incarcerated individuals but that you were unaware of the prison conditions aspect of the case and did not follow any developments after the final holding.

- a. Why did you call a Supreme Court opinion "frankly shocking" when you were not fully apprised of the facts and/or consequences of the opinion?

I formed my view based on a careful reading of the majority and dissenting opinions in that case. The Supreme Court affirmed an injunction ordering the release of up to 46,000 convicted criminals from the California prison system, despite itself recognizing the "unprecedented sweep and extent" of "[t]he population reduction potentially required," and despite acknowledging that the "release of prisoners in large numbers" is "a matter of undoubted, grave concern." *Brown v. Plata*, 563 U.S. 493, 501 (2011).

- b. Should the presence of practical considerations prevent a court from upholding an Eighth Amendment claim?

Not necessarily. However, it is settled law that injunctions must take into consideration potential harms to third parties and the public interest. *See, e.g., eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

11. On January 26, 2017, Acting Deputy Attorney General Sally Yates informed White House Counsel Don McGahn that National Security Advisory Michael Flynn posed a national security risk. On March 8, 2017, Flynn registered as a foreign agent, claiming to have conducted \$530,000 worth of lobbying work before Election Day.

- a. Given what you know now, should Michael Flynn have been named as National Security Advisor?
- b. What is your understanding of why Flynn continued to work in the administration for 18 days after Yates' report?
- c. Do you believe Michael Flynn was a national security vulnerability during his time in

the Trump administration?

- d. Is it ever appropriate for a registered foreign agent to be a member of the President's national security team?

I did not work on the hiring or termination of Gen. Flynn, and I have no knowledge of the facts bearing on these questions.

12. In response to questions from Senator Durbin, you told the Committee at your nomination hearing that waterboarding is "likely torture in many circumstances." According to the United States Code, 18 U.S.C. § 2340 defines torture as an act "intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control." "Severe mental pain or suffering" includes in its definition "the intentional infliction or threatened infliction of severe physical pain or suffering," "the administration or application, or threatened administration or application . . . [of] procedures calculated to disrupt profoundly the senses," and "the threat of imminent death."

- a. Having taken time to review the matter, is waterboarding torture?

Under the governing statute, waterboarding would constitute torture if it were intentionally used "to inflict severe physical or mental pain or suffering" upon a detainee. 18 U.S.C. § 2340(1). However, I have not worked on any matters regarding this statute, nor on any matters involving the use of waterboarding. Thus, I could not reliably opine on every possible hypothetical involving the statute and the technique. Finally, I would note that waterboarding may well constitute "cruel, inhuman, or degrading treatment" within the meaning of Section 1003 of the Detainee Treatment Act of 2005, which was designed to afford detainees greater protection than that provided by the prior criminal prohibition on torture.

- b. If your answer to 12(a) is anything other than "yes", explain why waterboarding may fall outside the definition of torture?

Please see my answer to your Question 12(a).

13. The Justice Department intervened in a private employment lawsuit in July, arguing that the ban on sex discrimination in the Civil Rights Act of 1964 does not protect workers on the basis of their sexual orientation. Sarah Isgur Flores, a Justice Department spokeswoman, said, "The White House Counsel's Office has known about this for a long time."

- a. Were you aware of or involved in any way with the Justice Department's decision to file a brief in *Zarda v. Altitude Express Inc.* or adopt the position that the Civil Rights Act of 1964 does not protect workers from discrimination based on their sexual orientation?

I provided legal advice regarding the Justice Department's amicus filing in *Zarda*.

- b. Do you agree with the Justice Department's position under current precedent?

As a lawyer for the President, it would be improper for me to express my personal views

on this or any other pending client matter.

- c. Why did the Justice Department, with the backing of the White House Counsel's Office, submit the brief even though the Court had not requested its views?

As explained in the *Zarda* amicus filing, the United States has significant interests in the question whether Title VII prohibits employment discrimination on the basis of sexual orientation, both because the federal government enforces Title VII and because it is subject to Title VII as the Nation's largest employer.

Questions for the Record for Greg Katsas
Submitted by Senator Richard Blumenthal
October 24, 2017

1. The federal recusal statute imposes mandatory requirements on judges—and it is as concerned with actual bias as it is with the appearance of bias. You have mentioned a number of issue areas that you worked on in your role in the White House Counsel’s Office, listed below. However, because you have declined to inform this Committee of the scope of your involvement in these issues, you must either recuse yourself from these matters entirely or reveal the specific scope of your involvement. Otherwise, litigants and the public will reasonably question your impartiality on these matters.

a. Will you recuse yourself from any cases relating to:

- **any matter that has been investigated (or reported to have been investigated) by Special Counsel Robert Mueller?**
- **rules and regulations issued by the Trump administration concerning security standards for traveling to America?**
- **the Presidential Advisory Commission on Election Integrity?**
- **the Deferred Action for Childhood Arrivals program?**
- **federal action subject to the Justice Department’s October 6, 2017, memo on Federal Law Protections for Religious Liberty?**
- **health insurance coverage of contraception under the Affordable Care Act?**

As explained below, I cannot answer these questions in the abstract.

- b. If you answered “no” to any of the above, please explain how that would be consistent with the statutory requirement that judges recuse themselves in any case in which their impartiality might reasonably be questioned.**

Under the governing statute, I would have to recuse myself from any case in which, while in the Executive Branch, I had participated as a counsel or advisor or expressed an opinion on the merits, *see* 28 U.S.C. § 455(b)(3); any case in which I had personal knowledge of disputed facts, *see id.* § 455(b)(1); and any case in which my impartiality might reasonably be questioned, *see id.* § 455(a). Applying these standards, I can commit to recusing myself from any case that I worked on while in the Executive Branch, any challenge to presidential or agency action on which I provided advice, and any matter involving the Special Counsel on which I provided advice. However, the

phrase “any cases relating to” such matters sweeps substantially more broadly. Without further study of the relevant law, and knowledge of the relevant facts of a particular case, I cannot determine whether my impartiality might reasonably be questioned in hypothetical matters “relating to” ones that I worked on.

2. You have indicated that you have been called upon to provide advice to President Trump on “virtually any legal issue of interest and not handled directly by the White House Counsel or by one of the other Deputy Counsels.” According to the *New York Times*, Michael Flynn told Don McGahn on January 4—two weeks before inauguration—that he was under federal investigation for working as a paid lobbyist for Turkey during the campaign. In addition, after Flynn lied to Vice President Mike Pence about his contacts with Russian officials, Acting Attorney General Sally Yates told Don McGahn that Flynn was vulnerable to blackmail for lying to Pence.

a. Did you advise the President concerning the firing of National Security Advisor Michael Flynn?

No.

b. When, if at all, were you made aware that Flynn was (1) under federal investigation, and/or (2) vulnerable to blackmail for lying to Vice President Pence?

I was not made aware of either issue.

c. Were you involved in the decision to wait to fire Flynn for 18 days after the White House was made aware that Flynn had lied about his Russian contacts and was vulnerable to blackmail?

No.

3. In July, the Department of Justice filed an amicus brief in an employment discrimination case before the Second Circuit, *Zarda v. Altitude Express*. In the brief, the DOJ argued that Title VII of the Civil Rights Act of 1964 did not protect employees from being discriminated against on the basis of their sexual orientation. The EEOC has held that Title VII does protect against sexual orientation discrimination. When asked about the decision-making process that led to this amicus brief and other anti-LGBT actions, including the ban on transgender Americans serving in the military, the DOJ spokeswoman said, “The White House Counsel’s office has known about this for a long time.”

a. What role did the White House Counsel’s Office play in developing the administration’s position on employment discrimination on the basis of sexual orientation?

As a general matter, the White House Counsel's Office coordinates with the Department of Justice regarding certain litigation matters. However, as explained by then-Solicitor General Kagan, it would be inappropriate for me to reveal any "internal deliberations in any particular case" between the White House and DOJ. *See Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 257-58 (2010) (oral testimony of Elena Kagan).

b. Were you involved in advising any administration officials about employment discrimination on the basis of sexual orientation?

I provided legal advice regarding the amicus brief filed in *Zarda*.

○ **Will you recuse yourself from cases related to this issue?**

Please see my answer to your Question 1(b).

c. Were you involved in advising any administration officials on the ban on transgender Americans serving in the military?

I provided legal advice regarding the August 25, 2017 presidential memorandum titled "Military Service by Transgender Individuals."

○ **Will you recuse yourself from cases related to this issue?**

Please see my answer to your Question 1(b).

4. You have been a frequent critic of the Supreme Court's decisions in favor of reproductive rights. In a June 2016 podcast for the Federalist Society, for example, you referred to "the right to abortion, which isn't in the Constitution, which has all these made-up protections."

a. Do you believe that there is a right to privacy protected by the Constitution?

The Supreme Court has long held that the liberty component of the Due Process Clause protects various aspects of privacy, in a line of cases stretching from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

b. What "made-up protections" do you believe are attached to the right to abortion?

Please see my answer to Senator Feinstein's Question 20(a).

- c. **Will you adhere to Supreme Court precedent set by a line of case law—including *Roe* and *Casey*—that has determined that the Constitution guarantees a right to privacy?**

Yes.

Senator Mazie K. Hirono
Questions for the Record
Gregory Katsas

In 2007, you testified in the Senate Indian Affairs Committee against the Native Hawaiian Reorganization Act. In response, a bi-partisan trio of former DOJ officials Neal Katyal, Viet Dinh and Christopher Bartolomucci, provided the Committee with an in-depth analysis, in which they wrote that your testimony “does not muster a coherent and credible legal argument against the bill. It presents a caricatured view of the text of S. 310 and the governing law, and should not be considered an authoritative guide for resolving legal disputes in this area.”

In their testimony, Dinh and his co-authors criticized you for characterizing the bill as improperly dividing people on the basis of race and ancestry, and I agree. The bill described the group of people to be awarded status not just be race and ancestry, but by virtue of residency and sovereignty.

1. Were you, as the Dinh testimony puts it, “endeavoring to create a constitutional problem where none exists?”

I provided this testimony in my official capacity as a member of the Department of Justice, which recognized the constitutional question as significant. In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court held that a voting preference for descendants of aboriginal Hawaiians “implicates the same grave concerns as a classification specifying a particular race by name,” *id.* at 517; that the issue “whether Congress may treat the native Hawaiians as it does the Indian tribes” raises “questions of considerable moment and difficulty,” *id.* at 518; and that, even if Congress could treat native Hawaiians as an Indian tribe, the Fifteenth Amendment, which applies to both Congress and the States, still would not “permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs,” *id.* at 522. These holdings raised questions about the proposed Native Hawaiian Government Reorganization Act of 2007, which would have sought to permit an ancestrally-defined group of Native Hawaiians to vote on whether to constitute itself as an Indian tribe. The Office of Hawaiian Affairs retained the individuals you have mentioned in order to defend the Act, so they naturally opposed the testimony that I gave on behalf of the Department. Nonetheless, Professor Dinh and General Katyal have signed a letter stating that I have “earned a well-deserved reputation for judgment, integrity, and a commitment to the rule of law” and strongly supporting my confirmation.

2. Do you still think Native Hawaiians ought to be treated differently from other indigenous groups?

In the context of voting rights, a preference for Native Hawaiians would raise the constitutional questions noted above.

3. Do you think Congress does not have the power to legislate in the area?

Congress has broad legislative powers under Article I, Section 8 of the Constitution, but it must exercise those powers consistent with limitations imposed by the Fifth and Fifteenth Amendments.

You claimed in your testimony that “S. 310 effectively seeks to undo the political bargain through which Hawaii secured its admission into the Union in 1959”.

4. Why should the failure to recognize Native Hawaiians at the time of Hawaiian statehood have any effect on congressional power to recognize them after the fact?

My testimony articulated the prevailing views at the time Hawaii secured admission into the Union as a policy consideration, not as a basis for narrowly construing congressional power.

5. If a case on a similar piece of legislation were to come before you, would you recuse yourself?

Under the governing statute, I would have to recuse myself from any case in which, while in the Executive Branch, I had participated as a counsel or advisor or expressed an opinion on the merits, *see* 28 U.S.C. § 455(b)(3); any case in which I had personal knowledge of disputed facts, *see id.* § 455(b)(1); and any case in which my impartiality might reasonably be questioned, *see id.* § 455(a). Without knowing more about how “similar” the hypothetical piece of legislation would be to the proposed Native Hawaiian Government Reorganization Act of 2007, I could not assess whether recusal would be appropriate.

In a June 2016 Federalist Society podcast, you referred to “the right to abortion, which isn’t in the Constitution, which has all these made-up protections.”

6. Is the right to abortion made up?

The Supreme Court repeatedly has recognized a constitutional right to abortion, including in cases such as *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). For the context and import of my 2016 podcast, please see my answer to Senator Feinstein’s Question 20(a).

7. In your view, do women have a constitutional right to make decisions about their own reproductive health?

Yes, under the abortion decisions mentioned above and related decisions recognizing a right to use contraceptives. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. What, if any, limits are there on that right?

The Supreme Court has specified limits on the abortion right in a line of decisions addressing what does or does not constitute an undue burden on the right, including *Planned Parenthood v. Casey*.

Just this past April, during a Federalist Society speech on health care, you stated, “[b]oy I think just having the contraceptive thing kick up right around this time is really a great illustration of our point of the threat to individual liberty when the federal government gets too big.”

9. How is the idea that women should have their medical needs met by their health insurance policies a “threat to individual liberty”?

Your question refers to a speech that I made in April 2012, as a lawyer representing individuals and small businesses challenging the requirement in the Affordable Care Act to buy health insurance. In that capacity, I argued that individual liberty would be impermissibly threatened if Congress could force individual employers, against their sincere religious objections, to provide employees with insurance coverage for abortion or contraceptives. A majority of the Supreme Court later agreed. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

10. When women don’t have the ability to have control over their reproductive health, isn’t that a threat to their individual liberties?

Yes, but that is a different issue from the one I was addressing about whether employers can be compelled to provide abortion or contraceptive coverage over their sincere religious objection.

In a Federalist Society speech on DOMA, you questioned the well-being of children raised by same-sex parents. You said, “[i]t seems to me pretty self-evident, but at least a debatable point that other things being equal, the best arrangement for a child is to be raised by both of the child’s biological parents.”

11. What is wrong with children being raised in same-sex households, where they may not be raised by both of their biological parents?

I did not suggest that there is anything wrong with children being raised in same-sex households. For the full context and import of my comments, please see my answer to Senator Feinstein’s Question 21(a).

You have argued against the consideration of LGBT individuals as a politically powerless class.

12. Do you deny that members of the LGBTQ community have been denied equality, jobs, social acceptance and political power throughout history, including during the history of the United States?

No. What I argued, as a private commentator and former DOJ litigator, was that the Justice Department had reasonable grounds for defending the Defense of Marriage Act,

including reasonable grounds for arguing that DOMA should not be subjected to heightened scrutiny under the equal-protection component of the Fifth Amendment.

13. What do you consider the definition of a politically powerless class?

Under the line of Supreme Court decisions addressing the question of what particular classifications trigger heightened equal-protection scrutiny, a politically powerless class is one that has “no ability to attract the attention of the lawmakers.” *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-47 (1985).

In testimony before the United States Commission on Civil Rights, you were quite clear about your views on the government switching sides in pending litigation. You said “[s]uch reversals are extremely rare—and for good reason: they inevitably undermine DOJ’s credibility with the courts, and they inevitably raise suspicion that DOJ’s litigating positions may be influenced by political considerations.

14. Were you involved with approving DOJ’s reversal in its position in the Texas voting rights case?

No.

15. Was DOJ’s decision to reverse its position in the Texas voting rights case political?

The legal basis for DOJ’s current position is set forth in the briefs it has filed in the litigation. I have no reason to believe that political considerations underlie that position.

When Donald Trump issued a presidential pardon to Joe Arpaio for his conviction of criminal contempt of court resulting from his willful violation of an injunction by a federal court, there was outrage among lawyers and legal academics. They argued, and I agree, that it undermines the judicial branch’s power to enforce the law, and in this case, to enforce the constitutional rights of the people Arpaio was abusing by his blatantly unconstitutional practices. It was also a slap in the face to the Department of Justice, where the prosecutors had been battling Arpaio for years, and enduring his attempts to evade responsibility for his outrageous behavior. I know the Presidential power to pardon is broad, but just because a president has that power doesn’t mean they should use it.

16. Did you do any work on the Arpaio pardon?

No.

17. Did you advocate for it or advise against it?

I did not advocate or advise one way or the other.

There is no question that your resume and credential are very impressive. I don’t question them. But what does concern me when I look at your career is how willing you have been to put those

talents in the service of a very conservative, ideological agenda. Your career in the Bush Justice Department reads like one controversial case after another, where politics seem to have influenced the legal arguments you made. Cases like *El Masri*, *Boumediene*, and the abortion cases. You didn't have to take the job or handle those cases, and by your own description you were deeply involved in creating the legal strategy and arguments.

And now, in the Trump White House, you have been involved in work related to some of the worst exercises of executive power we have ever seen: the Muslim Ban, the pardon of Joe Arpaio, the rollback of transgender and LGBT rights, the blank check to employers to stop covering birth control, and so many more.

18. With a record like that, how can we trust that you will be a non-ideological, non-partisan and even-handed judge on the D.C. Circuit?

Thank you for your generous comments about my resume and my credentials. As for political and ideological diversity in the cases that I have worked on over my career, please see my answer to Senator Feinstein's Question 3, and consider also the following pro bono representations: *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), where I spent hundreds of hours representing an injured woman seeking to resurrect tort claims against a corporate defendant; *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017), where I secured habeas relief for a convicted murderer on the ground of ineffective assistance of counsel; and *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999), where I successfully argued for monetary relief for migrant farmworkers severely injured on their way to work. As for my service in the Justice Department and White House Counsel's Office, I would emphasize that I believe public service to be an honorable calling. The government positions for which I have advocated are well within the bounds of responsible lawyering. For example, the government's position in *El-Masri* prevailed before a unanimous circuit panel, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); the government's position in *Boumediene* prevailed by 2-1 in the court of appeals, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), then lost by 5-4 in the Supreme Court, 553 U.S. 723 (2008); and the government's position in the abortion cases prevailed in the Supreme Court, *Gonzales v. Carhart*, 550 U.S. 124 (2007). I have also faithfully implemented and enforced decisions that I had previously opposed as an advocate, as explained in my answers to Senator Feinstein's Questions 7(c) and 17(b). Finally, the nine letters of recommendation submitted to this Committee on my behalf—including three letters from five career DOJ attorneys who have worked with me on a daily basis over the course of several years—attest at length to my fairness and impartiality.