

Nomination of Ryan Nelson to the U.S. Court of Appeals for the Ninth Circuit
Questions for the Record
July 18, 2018

QUESTIONS FROM SENATOR FEINSTEIN

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

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

Decisions of the Supreme Court of the United States are binding on all lower federal courts. It is never appropriate for a lower federal court to depart from Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

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?

Supreme Court precedent is absolutely binding on all lower federal courts. A circuit court judge may determine whether Supreme Court precedent is applicable to a particular case, and, if applicable, the precedent must be followed, whether in a concurring opinion, a dissent or an opinion for the court.

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

The Ninth Circuit may overturn its own precedent by sitting en banc. *See* Cir. R. 35-1 (“When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.”). Revisiting a prior decision through an en banc hearing is “not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity in the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a). In the Ninth Circuit, “Circuit precedent may be overturned without an en banc rehearing if the Supreme Court has ‘undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.’” *In re Bender*, 586 F.3d 1159, 1163 (9th Cir. 2009) (quoting *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (*en banc*)).

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

As a nominee to a lower federal court, it would be inappropriate for me to comment on the circumstances under which the Supreme Court should overturn its own precedent. The Supreme Court has occasionally reviewed at length the factors it

considers in deciding whether to overturn its own precedents, *see, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-69 (1992), but ultimately the decision is for the Supreme Court alone. The Supreme Court has, from time to time, overturned its own precedent. *See, e.g., Trump v. Hawaii*, 585 U.S. ___ (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — ‘has no place in law under the Constitution.’”) (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

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

- a. **Do you agree that *Roe v. Wade* is “super-stare decisis”? Do you agree it is “superprecedent”?**

Roe v. Wade is binding Supreme Court precedent, and binding on all lower court judges, regardless of what other label (like “super-stare decisis” or “superprecedent”) may be applied.

- b. **Is it settled law?**

Roe v. Wade is binding Supreme Court precedent, and I would fully and faithfully follow it if fortunate enough to be confirmed to the Ninth Circuit.

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

Obergefell v. Hodges is binding Supreme Court precedent, and I would fully and faithfully follow it if fortunate enough to be confirmed to the Ninth Circuit.

4. 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?

The Supreme Court's decision in *District of Columbia v. Heller* is binding precedent, and I would fully and faithfully follow it if fortunate enough to be confirmed to the Ninth Circuit. As a judicial nominee, it would not be appropriate to offer any personal view on any Supreme Court opinion, including any dissenting opinion of a particular Justice.

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

In *Heller*, the Court explained that the "right secured by the Second Amendment is not unlimited" and, although "not undertak[ing] an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008).

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

The majority and dissenting opinions in *Heller* discussed and debated the scope and applicability of the Supreme Court's prior decisions interpreting the Second Amendment, including *United States v. Miller*, 307 U.S. 174 (1939). Compare *Heller*, 554 U.S. at 621-25 (majority opinion's discussion of *Miller*), with *id.* at 676-79 (Stevens, J., dissenting) (principal dissenting opinion's discussion of *Miller*). Beyond observing this aspect of the opinions in *Heller*, please see my response above to question 4(a).

5. In September 2017, you received a number of Questions for the Record (QFRs) from members of the Senate Committee on Energy and Natural Resources in relation to your nomination to be Solicitor of the Interior Department. Several of these QFRs related to climate change and its causes. In one set of QFRs, Senator Sanders asked whether, as President Trump claimed, "climate change [is] a hoax," whether "it is caused by human activity," and whether "the combustion of fossil fuels contributes to climate change." You responded in relevant part: "I believe that the climate is changing and many factors influence that change."

At your hearing for the Ninth Circuit seat to which you have been nominated, you were asked whether you agree that human activity is one of the primary factors contributing to climate change. You responded in relevant part: "I am not a scientist in that area, but I do agree based on the knowledge that I have that human activity has contributed."

a. Why were you unwilling in September 2017 to acknowledge directly that human activity contributes to climate change?

I do not view my answers in September 2017 as indicating an unwillingness to acknowledge that human activity contributes to climate change. As I said then, “many factors influence that change.” While I did not identify any specific factor, one of those factors is human activity.

b. Why are you now willing to acknowledge that human activity has contributed to climate change?

Please see my answer to question 5(a).

c. What other factors contribute to climate change?

I am not a scientist in that area. I do not know all of the many factors that contribute to climate change.

d. To what degree does human activity now contribute to climate change?

I am not a scientist in that area and do not know to what degree human activity contributes to climate change.

e. Do you agree that the combustion of fossil fuels contributes to climate change? Please answer “Yes” or “No.” If your answer is “No,” explain why you do not believe that fossil fuels contribute to climate change.

Yes.

6. In connection to your nomination to be Solicitor of the Interior Department, you were also asked in a QFR about the policy implications of President Trump’s America First Energy Plan. You responded: “I am convinced that President Trump’s and Secretary Zinke’s goals for the Department, including the America First Energy Plan, will not only preserve but increase the value of our natural resources for future generations.”

a. At the time you provided your response, what evidence did you have that “President Trump’s and Secretary Zinke’s goals for the Department, including the America First Energy Plan, will not only preserve but increase the value of our natural resources for future generations”?

President Trump and Secretary Zinke announced many goals, including the America First Energy Plan, that were designed with the goal to balance use of our natural resources with preserving natural resources for future generations. At the time I provided my response, I believed that if successfully implemented, those goals would not only preserve but increase the value of our natural resources for future generations.

7. In written testimony delivered during your nomination hearing to be Solicitor of the Interior Department, you wrote: “I believe our natural resources were divinely created and given as a gift for our benefit, enjoyment and use, consistent with the laws adopted by this body. If confirmed, my mission as Solicitor will be to ensure that the Nation’s natural resources are put to productive use and preserved and that our cultural heritage is protected and passed on to the next generation. I am convinced that President Trump’s and Secretary Zinke’s goals for the Department will not only preserve but increase the value of our natural resources for future generations.”

a. What does “productive use” mean?

Productive use means using natural resources for our benefit, enjoyment and use, consistent with the laws adopted by Congress.

b. What did you mean by “cultural heritage”?

By “cultural heritage,” I meant those cultural issues specifically within the purview of the Department of the Interior as delegated by Congress, including protecting National Parks, monuments, Native American heritage and other similar issues.

c. How did President Trump’s and Secretary Zinke’s “goals for the Department” “increase the value of our natural resources”?

By protecting natural resources, the value of those resources increases for future generations.

d. Why is it important for the “value of our natural resources” to increase?

As a policy matter that may have been relevant to the position I had been nominated for as Solicitor for the Department of the Interior, I generally viewed it as important not only to make productive use of our natural resources, but also to pass along the benefits of our natural resources to future generations.

8. According to a September 21, 2016 article in the *East Idaho News*, Donald Trump Jr. visited Idaho Falls for a private meeting at Melaleuca. (Nate Eaton, *Trump Jr. visits Idaho Falls for private meeting at Melaleuca*, EAST IDAHO NEWS.COM (Sept. 21, 2016))

a. Who arranged for the meeting with Donald Trump Jr. to take place?

I do not know who arranged for the meeting.

b. What was the purpose of the meeting?

I do not know the intended purpose of the meeting. The CEO said he wanted to introduce the Melaleuca management team to Donald Trump Jr.

c. Did you meet with Donald Trump Jr. during his visit to Melaleuca?

Yes.

d. If so, what was discussed during your meeting, and who else attended?

I attended a brief meeting with Donald Trump Jr. and others on the Melaleuca management team. I don't recall all of the issues discussed, but do recall a general discussion about the outlook of the presidential election.

e. If not, with whom did Donald Trump Jr. meet, and what was discussed during that meeting?

Please see my answer to question 8(d).

9. You note in your Questionnaire that one of the ten most significant litigated matters that you personally handled was *Melaleuca v. Foundation for National Progress*, a defamation lawsuit filed against the Foundation for National Progress, which owns the investigative reporting outlet *Mother Jones*. The suit stemmed from claims by Melaleuca that *Mother Jones* had defamed both Melaleuca and its CEO, Frank Vandersloot, in a 2012 article. The *Mother Jones* piece at issue highlighted the connections between Mr. Vandersloot and Mitt Romney, who was at the time running for President. The article also discussed Mr. Vandersloot's response to an article by a local Idaho Falls journalist, Peter Zuckerman, who reported on a sex abuse scandal involving a local Boy Scout leader. According to *Mother Jones*, Melaleuca's defamation suit was "filed . . . in Bonneville County, Idaho, and asked for damages of up to \$74,999—exactly \$1 under the amount at which the lawsuit could have been removed to federal court." (Clara Jeffery & Monika Bauerlein, *We Were Sued by a*

Billionaire Political Donor. We Won. Here's What Happened, MOTHER JONES (Oct. 8, 2015))

a. Were you involved in the decision to sue *Mother Jones*? If so, what was your role?

Yes. As General Counsel for Melaleuca I was involved in advising my client about all litigation matters. For this lawsuit, the company hired a national law firm as counsel of record and I served as local Idaho counsel in the case.

b. Were you involved in the decision about the venue in which to file suit? If so, why did you choose to file the suit in Bonneville County?

One of my roles as General Counsel was to advise my client about litigation matters. But any comment about specific litigation advice or decisions, including my specific advice or the advice of national counsel of record, is protected by attorney-client privilege and would be improper for me to address.

c. Were you involved in the decision about how much to pursue in damages in the defamation suit? If so, why did you choose to seek \$74,999 in damages?

One of my roles as General Counsel was to advise my client about litigation matters. But any comment about specific litigation advice or decisions, including my specific advice or the advice of national counsel of record, is protected by attorney-client privilege and would be improper for me to address. In public documents in the case, however, my client indicated he would only seek \$1 in damages and publicly explained that his purpose for bringing the lawsuit was not for monetary damages but to correct the record and defend his reputation.

10. According to your Questionnaire, as a Deputy Assistant Attorney General in the Justice Department's Environment and Natural Resources Division, you "managed the Appellate Section" of the Division. In that capacity, you "oversaw the Division's appeals and [served as] advisory and reviewing counsel on the Division's Supreme Court docket" in several noteworthy cases "where the Office of the Solicitor General was counsel of record."

a. As "advisory and reviewing counsel on the Division's Supreme Court docket," did you ever conceive of, recommend, or advocate for a particular legal position or a specific legal argument that the Division ultimately adopted? If so, please describe.

Any conversations I would have had in the context of discussion of a particular litigation position, either within the Division or with the Office of Solicitor General is protected by attorney-client privilege, attorney work product and perhaps other privileges such as Executive Privilege.

b. As "advisory and reviewing counsel on the Division's Supreme Court docket," did you ever recommend that the Division should not take a particular litigation

position or should not make a specific legal argument that the Division nevertheless adopted? If so, please describe.

Please see my answer to question 10(a).

11. One of the “Division’s appeals” during your time as the DAAG in charge of the Appellate Section was *Massachusetts v. EPA*. According to your Questionnaire, you served as “advisory and reviewing counsel” on the Government’s Supreme Court merits briefing, which was submitted in 2006. Supporting the EPA’s decision *not* to regulate greenhouse gases (GHGs) from new motor vehicles, the brief for which you were “advisory and reviewing counsel” argued in relevant part that the EPA’s refusal to regulate GHGs was “a reasonable exercise of agency discretion” and reflected, among other things, that the science surrounding climate change was “complex and still evolving.” The brief also argued that “the economic and political significance of greenhouse gas regulation counsels hesitation in the absence of clear congressional guidance.” (Brief of the Federal Respondent, *Massachusetts v. EPA*, 549 U.S. 497 (2007), 2006 WL 3043970)

- a. Please provide evidence to support the claim that as of 2006, the science surrounding climate change was “complex and still evolving.”**

To the best of my recollection, there was undisputed record evidence in that case that even with the adoption of the proposed regulation, there would be no material impact on reducing climate change. And the scientific record was varied on precisely when any specific tipping point may occur for climate change.

- b. When considering environmental regulations undertaken pursuant to environmental statutes like the Clean Air Act or Clean Water Act, how should**

courts balance the environmental or ecological benefits of regulation with the regulation’s “economic and political significance”?

Environmental regulations, just like all regulations, should be reviewed consistent with principles of administrative law including the Administrative Procedures Act and relevant Supreme Court precedent. As a general matter, part of the balancing that you refer to would depend on many factors, including whether the environmental statute at issue specifies factors to be considered.

12. According to your Questionnaire, while you were in private practice in Washington, D.C., you represented a pro bono defendant in a case called *Dean v. United States*. The defendant, Marthell Dean, was convicted of murder and killing a police officer in Washington and sentenced to two life sentences. Your Questionnaire states that you represented Mr. Dean in two consolidated appeals.

a. How did you come to represent Mr. Dean in these consolidated appeals?

My law firm had a pro bono practice and I asked to work on a case. I was assigned to assist on the motion for a new trial for Mr. Dean and then handled the appeals before the D.C. Court of Appeals.

b. What lessons did you draw from your pro bono representation of Mr. Dean?

It was an honor to provide Mr. Dean the legal representation that he needed and deserved in a case that so fundamentally affected his personal liberty. The underlying facts were a tragedy for all involved. The law firm, including myself and others, devoted hundreds of hours of representation to his defense. I learned many lessons, including how important it is to have qualified counsel at early stages of the case, as trial proceedings have a major impact on further motions and appeal, particularly in a criminal case.

13. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 1997. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?

I have not previously read this webpage and cannot comment on the Federalist Society's views expressed there. This is not an issue I recall ever hearing about or discussing at any Federalist Society event that I attended.

b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?

Please see my answer to question 13(a).

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

Please see my answer to question 13(a). I appreciate that the Federalist Society places a premium on the United States Constitution.

14. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?

My interview with officials from the White House and the Department of Justice in February of 2018 covered a wide range of topics, and I do not recall the details of all of the questions and answers, including who posed each of the questions. To the best of my recollection, there was some discussion of administrative-law issues in the context of my clerkship on the DC Circuit and work for the Department of Justice and the Office of Management and Budget, and also in relation to my understanding of the Supreme Court's relevant precedents.

a. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?

No.

b. What are your “views on administrative law”?

Federal administrative law is a vast body of law, governed and guided in part by

the Administrative Procedure Act and legal doctrines and other principles embodied in precedent of the Supreme Court and reflected in decisions of lower federal courts. If fortunate enough to be confirmed to the Ninth Circuit, I will fully and faithfully follow all applicable precedent in these (and all other) areas.

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

The Ninth Circuit has stated that it may be appropriate to consider legislative history when a statute is ambiguous. *See, e.g., Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 9th Cir. 2006) (“consideration of legislative history is appropriate where statutory language is ambiguous. Ambiguity, however, is at least a necessary condition.”).

16. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received the above questions on July 18, 2018, and immediately began preparing responses. I then shared draft responses with members of the Department of Justice Office of Legal Policy, received comments, and then finalized my answers. Each of the answers provided above (and in response to questions from other members of the Committee) is my own, and I have authorized the Office of Legal Policy to submit these answers to the Committee.

Senator Dick Durbin
Written Questions for Ryan Nelson, James Carroll, Stephen Clark, John O'Connor
July 18, 2018

For questions with subparts, please answer each subpart separately.

Questions for Ryan Nelson

- 1. Please discuss any involvement you have had in responding to state or federal investigations or working with state or federal regulators while you have been working at Melaleuca.**

Please see my answer to Senator Whitehouse's questions 1(a) and 1(b).

As General Counsel I have advised the company in responding to federal or state audits, inspections or inquiries from the Department of Labor, Department of Transportation, EEOC, Idaho Human Rights Commission, FDA, various state unemployment commissions and other state and local entities, as well as regulators from various foreign countries.

I was also involved in some initial proactive outreach to the FTC to coordinate opposition to federal legislation that was being proposed by other direct selling companies and the Direct Selling Association (DSA). In Melaleuca's view, that proposed legislation would have improperly restricted the FTC's authority to prosecute pyramid schemes. Melaleuca has stood basically alone among direct selling companies in advocating in concert with consumer groups for maintaining robust enforcement action by the FTC to ensure that direct selling companies are operating legally. Melaleuca successfully opposed the bills being pushed by the DSA and other direct selling companies. I recused myself from further involvement with any regulatory or legislative advocacy, including any involvement with this ongoing legislation regarding the FTC, after my nomination as Solicitor to the Department of the Interior in August 2017.

- 2. While you were Deputy Assistant Attorney General in the Justice Department's Environment and Natural Resources Division in 2008, you gave a presentation about Massachusetts' lawsuit that sought for the EPA to regulate greenhouse gases from motor vehicles under the Clean Air Act in order to address climate change. As you know, the Supreme Court had concluded in the 2007 case *Massachusetts v. EPA* that the EPA had the authority to regulate these gases.**

In your presentation, according to PowerPoint slides you provided to this Committee, you said that there are "good reasons for declining to regulate at this time." Among those reasons you cited were "Scientific uncertainty and ongoing studies."

What is the scientific uncertainty you referenced about climate change and greenhouse gases?

To the best of my recollection, there was undisputed evidence in the *Massachusetts v. EPA* case that even adopting the regulation to regulate greenhouse gases from motor vehicles would have no material impact on climate change. And the scientific record was varied on precisely when any specific tipping point may occur for climate change. The science on climate change has been revised and studies, including the cost-benefit analysis of any such regulations, were ongoing. I was not at the Department of Justice as the EPA and others worked through those issues.

3.

a. **Is climate change caused by human activity?**

Yes.

b. **Is climate change influenced by human activity?**

Yes.

c. **Does the combustion of fossil fuels contribute to climate change?**

Yes.

d. **Can changes in human activity have an effect on the rate of climate change?**

Yes.

4.

a. **Do you believe that judges should be “originalist” and adhere to the original public meaning of constitutional provisions when applying those provisions today?**

Lower court judges should adhere to whatever meaning the United States Supreme Court has assigned to constitutional provisions when applying those provisions today. Indeed, it is rare for a circuit court to consider a true case of “first impression” in the sense that there is no Supreme Court precedent that bears on the question at issue in the case.

b. **If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today?** To the extent you may be unfamiliar with the Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

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

Please see my answer to question 4(a).

5. You say in your questionnaire that you have been a member of the Federalist Society since 1997.

a. **Why did you join the Federalist Society?**

It was a great opportunity in law school to discuss legal questions of importance and I am generally inquisitive.

b. **Was it appropriate for President Trump to publicly thank 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."

Mindful of my obligations to avoid discussing political issues, *see* Canon 5, Code of Conduct for United States Judges; see also Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office."), I have no knowledge of how President Trump compiled his Supreme Court shortlist. The Constitution generally provides the President with the power to nominate judges, in conjunction with the Senate's authority to advise and consent regarding those nominations.

c. **Please list each year that you have attended the Federalist Society's annual convention.**

I have attended portions of several Federalist Society annual conventions and cannot recall the specific years. The last Federalist Society annual convention that I recall attending was in November 2016.

d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See <https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899>) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

I did not attend.

6.

a. **Is waterboarding torture?**

It is my understanding that waterboarding constitutes torture where it is intentionally used “to inflict severe physical or mental pain or suffering” upon a detainee. 18 U.S.C. § 2340(1).

b. Is waterboarding cruel, inhuman and degrading treatment?

It is my understanding that Congress amended the Detainee Treatment Act through Section 1045 of the National Defense Authorization Act for Fiscal Year 2016. The law provides that no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual. 42 U.S.C. § 2000dd-2(a)(2). It is also my understanding that waterboarding is not authorized in the Army Field Manual.

I am generally aware that cruel, inhuman and degrading treatment can separately be a violation of customary international law and perhaps create a cause of action in United States courts under that standard. If I were fortunate enough to be confirmed to the Ninth Circuit, and this legal issue were to arise before me as a judge, I would apply binding Supreme Court and Ninth Circuit precedent addressing cruel, inhuman and degrading treatment, including the relevant United States statutes, in deciding that legal question.

c. Is waterboarding illegal under U.S. law?

Please see my answers to questions 6(a) and 6(b).

7. Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?

I have no personal knowledge about that question. It is my understanding, however, that there are several pending lawsuits related to the election. As a judicial nominee, I cannot comment on pending litigation. Moreover, this is a political issue about which I cannot ethically opine. *See* Canon 5, Code of Conduct for United States Judges; see also Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).

8. Do you think the American people are well served when judicial nominees decline to answer simple factual questions?

I believe that judicial nominees should answer questions to the best of their ability within the confines imposed by the Code of Conduct for United States Judges and any other restrictions that govern their conduct.

9. 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 a number President Trump's nominees.

- a. **Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.**

I have no knowledge of any such donations, and am not aware of the Judicial Crisis Network supporting my nomination. Because the question of whether any such donations are problematic is a question of ongoing political debate, Canon 5 in the Code of Conduct for United States Judges prohibits me from offering my own opinion on the question.

- b. **If you learn of any such donations, will you commit to call for the 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?**

If confirmed, I will carefully apply the recusal requirements outlined in Canon 3 of the Code of Conduct for Judges, 28 U.S.C. § 455, and any other relevant materials. Beyond that, the question of disclosure or nondisclosure of any donations is a matter of ongoing political debate. Accordingly, Canon 5 of the Code of Judicial Conduct prohibits me from commenting on it.

- c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my answers to questions 9(a) and 9(b).

10.

- a. **Do you interpret the Constitution to authorize a president to pardon himself?**

I have not researched this question. As a legal question that could come before me as a judge if I were fortunate enough to be confirmed, it would be inappropriate for me to offer my opinion on this question. If I were fortunate enough to be confirmed to the Ninth Circuit and this legal question arose before me as a judge, I would faithfully apply binding Supreme Court and Ninth Circuit precedent to address a specific case or controversy.

- b. **What answer does an originalist view of the Constitution provide to this question?**

Please see my answer to question 10(a).

**Nomination of Ryan Nelson to the
United States Court of Appeals
For the Ninth Circuit
Questions for the Record
Submitted July 18, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. An article published on September 4, 1992 in the *Orlando Sentinel* titled “State Checks Out Melaleuca’s Marketing Plan” reported on an investigation by the Florida attorney general into Melaleuca. The article also reported: “Melaleuca has signed agreements with Idaho and Michigan in which it agreed to stop its distributors from promising prospective salespeople that they could make thousands of dollars a month selling the products.”
 - a. Is this news report an accurate representation of the interactions between Melaleuca and the states of Florida, Idaho, and Michigan respectively?

The news report appears to be generally accurate based on the knowledge that I have. The investigations in Idaho, Michigan and Florida all occurred more than 17 years prior to my joining Melaleuca. As the article notes, “Officials in both states [Idaho and Michigan] cleared the company’s marketing plan and blamed renegade ‘distributors’ for any problems.”

On July 1, 1991, Melaleuca entered into an Assurance of Discontinuance with the State of Michigan, agreeing to enforce its policies against Marketing Executives. In response to the initial notice from the Michigan AG, Melaleuca terminated several Marketing Executives who were violating Melaleuca’s policies. The Attorney General did not find any violations of law and the Assurance “does not constitute an admission of guilt.” 1991 Assurance of Discontinuance, para. 5. Melaleuca paid \$250 toward “investigative costs,” which was reduced because of Melaleuca’s “cooperation in resolving this matter.” *Id.*, paras. 6(G) & (H).

On October 17, 1991, Melaleuca entered into an Assurance of Voluntary Compliance with the State of Idaho, which stated, “The Attorney General has carefully reviewed and has discussed with Melaleuca representatives Melaleuca’s June 1, 1991, Marketing Plan and Statement of Policies, Customer Agreement, Independent Marketing Executive Agreement and Product Catalog and, without endorsing the Plan, has identified no areas where Melaleuca’s June 1, 1991, Marketing Plan and Statement of Policies, Customer Agreement, Independent Marketing Executive Agreement and Product Catalog violates Idaho law, and has determined no grounds to take enforcement action against Melaleuca under Idaho law.” Para. 4. The Idaho Attorney General did find that certain Marketing Executives had violated Melaleuca’s policies and therefore Melaleuca agreed to enforce its policies going forward. Melaleuca agreed to pay \$500 as “reimbursement for the expenses, investigative costs, and attorneys’ fees incurred by the Attorney General in this matter.” *Id.*, para. 10. Melaleuca has had no further inquiry or investigation from the Idaho

Attorney General in the 27 years since entering into this Assurance of Voluntary Compliance.

In 1992, the State of Michigan investigated Melaleuca based on some complaints it had received about assertions that Marketing Executives had been making. On May 5, 1992, Melaleuca entered into an Assurance of Discontinuance which again required Melaleuca to enforce its policies and added the additional requirement Melaleuca adopt a Compliance Officer position and report disciplinary action and policy updates to the Attorney General. Melaleuca paid \$2,500 “for investigative costs incurred by the Department of the Attorney General.” 1992 Assurance of Discontinuance, paras. 6(H) & (I). The Attorney General did not find any violation of law and the Assurance “does not constitute an admission of guilt.” *Id.*, para. 7. At some point shortly after, the Michigan Attorney General requested that Melaleuca stop sending in further reports of disciplinary actions and policy updates to the Attorney General’s office. Melaleuca has had no further inquiry or investigation from the Michigan Attorney General in the 26 years since entering into this Assurance of Discontinuance.

Sometime in 1992, the Florida Attorney General requested information from Melaleuca, which is presumably the reference in the *Orlando Sentinel* article. Melaleuca responded to the Florida Attorney General’s inquiries and heard nothing further on the matter. Melaleuca has had no further inquiry or investigation from the Florida Attorney General in the 25 years since.

- b. What involvement, if any, did you have with ensuring Melaleuca’s compliance with these or any related agreements with state government agencies, including any that pre-dated your tenure at Melaleuca?

The agreements with Michigan and Idaho occurred in 1991 and 1992, seventeen years prior to me joining Melaleuca. It’s not clear that there were any ongoing legal obligations under the Assurance of Voluntary Compliance or Assurances of Discontinuance when I joined Melaleuca in 2009.

Nevertheless, as General Counsel, I was heavily involved in ensuring that Melaleuca remained compliant with all federal and state laws, and that Marketing Executives complied with Melaleuca’s policies. During my tenure, I nearly doubled the size of our Compliance Department, which reported directly to me. In addition to several attorneys, I also oversaw a group of several employees solely focused on ensuring that our Marketing Executives were compliant with Melaleuca’s policies and with the law. The Legal Department also overhauled Melaleuca’s Policies and Procedures several times throughout my tenure to update it based on current marketing practices, including the use of various forms of social media by Marketing Executives. And the Legal Department and Policy Department increased investigatory capacity by engaging outside resources to review and receive automatically generated reports of what Marketing Executives were saying online about Melaleuca’s products and compensation plan.

At my direction, the Legal Department and Policy Department instructed and

trained as required; and investigated, fined and terminated Marketing Executives when necessary. We enforced all Melaleuca policies, including those that require that Marketing Executives only use Melaleuca-provided marketing material, refrain from speaking with the press, and never refer to the FDA, FTC, or any Attorney General Office as having approved Melaleuca's products or business plan. We have investigated hundreds and terminated dozens of Marketing Executives who violated these policies, including some higher status Marketing Executives. We have always been clear that Melaleuca's policies apply uniformly, regardless of status with the company. And we trained the Marketing Executives regularly at several meetings each year about the company's policies and the need to comply. Melaleuca has become one of the largest direct selling companies within the United States and the company has had a remarkable record of compliance.

In addition, under my direction, the Legal Department reviewed all marketing materials and compensation updates. We ensured that all marketing materials were compliant with law and that the Marketing Executives understood that they were not permitted to promote any Melaleuca products beyond the claims detailed in Melaleuca's marketing materials and could not speak to the press. Melaleuca now sells more than 500 products. As General Counsel, I sought to ensure that Melaleuca's product offerings enhanced the company's commitment to provide real products to real customers at competitive prices.

The Legal Department also reviewed compensation updates to ensure that the focus remained on real product sales and the recruitment of real customers, and avoided pitching solely a business opportunity. As a result, while Melaleuca has nearly 200,000 independent businesses in the United States, it serves more than 500,000 customers in the United States who do nothing more than purchase a small amount of product on a monthly basis. Melaleuca has maintained an unprecedented product-focused direct sales business to ensure compliance with all applicable laws.

These are just some examples of what I did as General Counsel to ensure that Melaleuca complied with any relevant laws, including any remaining legal obligations from those agreements with Idaho and Michigan 27 years ago.

2. During your employment with Melaleuca, were you involved in ensuring compliance with any agreements reached between Melaleuca and the U.S. Food and Drug Administration, including any that pre-dated your tenure at Melaleuca?

To my knowledge, there have never been any agreements reached between Melaleuca and the FDA. The FDA did issue a warning letter to Melaleuca more than a decade prior to my tenure as General Counsel. FDA warning letters are not necessarily unusual and my understanding is that Melaleuca at the time responded timely and fully to the warning letter and no issue has arisen since then.

During my tenure as General Counsel, Melaleuca was regularly audited by the FDA. There were never any issues that led to any further investigation or warning letter by the FDA.

3. As a judge, would your personal views prevent you from objectively evaluating scientific evidence that demonstrates that there is overwhelming consensus that human activity is a contributing factor to climate change?

No. The art of good judging is tethering yourself so closely to the rule of law and the Constitution, including any legal evaluation of scientific evidence in a specific case or controversy, that personal beliefs do not dictate the outcome of any issue or case.

4. You suggested that Senator Hirono “misquoted” you during your nominations hearing before this Committee. In your response to Questions for the Record to the U.S. Senate Committee on Energy and Natural Resources regarding your nomination to be Solicitor of the Department of the Interior, you stated: “I am convinced that President Trump’s and Secretary Zinke’s goals for the Department, including the America First Energy Plan, will not only preserve but increase the value of our natural resources for future generations.”

- a. Does the statement quoted above accurately reflect your response to the question?

Please see my answer to Senator Hirono’s question 3.

- b. Should you be confirmed, would you be disqualified under the Code of Conduct for United States Judges from hearing cases related to the Trump administration’s America First Energy Plan?

Please see my answer to Senator Hirono’s question 3.

5. According to your responses to this Committee, on May 8, 2007, you were a speaker at an event hosted by the Yale Federalist Society. At that time, you were employed by the U.S. Department of Justice.

- a. What compensation did you receive for this speaking engagement, including but not limited to speaker’s fees, food, travel, and lodging?

To the best of my recollection, I was compensated for food, travel and lodging but received no speaker fee.

- b. What entity paid for your food, travel, lodging and other expenses?

Based on the records I have reviewed, it appears the Federalist Society paid for travel, one night’s lodging and perhaps some food during the presentation.

- c. If the U.S. government paid for your expenses, what steps did you take to comply with federal ethics rules?

Please see my answer to question 5(b).

- d. If any outside entity, including any chapter of the Federalist Society, paid for any portion of your expenses, what steps did you take to comply with federal ethics rules?

To the best of my recollection, I would have cleared all travel and speaking engagements, including this one, through the Environment and Natural Resources Division's ethics officials. I regularly consulted with the Division's ethics officials on a number of issues.

6. 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?

Yes. The art of good judging is tethering yourself so closely to the rule of law and the Constitution that personal beliefs do not dictate the outcome of any case.

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

A judge should consider all consequences of a ruling and be aware of intended and unintended results of a decision to the extent possible.

7. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
 - a. What role, if any, should empathy play in a judge's decision-making process?

A judge should have empathy for all parties before him in any case, regardless of the merit of their arguments as a legal matter. All judges take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453.

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

The art of good judging is tethering yourself so closely to the rule of law and the Constitution that personal beliefs do not dictate the outcome of any case.

8. 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.

9. What assurance can you provide this Committee and the American people that you

would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

All judges take an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich.” 28 U.S.C. § 453. I take that obligation seriously. As to my experiences as a lawyer, I have represented the “little guy” in several legal matters, including Marthell Dean in *Dean v. United States*, 938 A.2d 751 (D.C. 2007), who I represented pro bono in a motion for a new trial and on appeal from his murder convictions.

And for the last several years as General Counsel for Melaleuca, I have indirectly represented the “little guy” in the form of hundreds of thousands of independent contractor Marketing Executives whose interests are aligned with Melaleuca’s legal interest. For example, I have brought cases, obtained injunctions and recovered millions of dollars in damages—much of which has been paid to Marketing Executives who were harmed—against unethical competitors violating the law and harming the independent businesses of Melaleuca’s Marketing Executives.

With this background in mind, I would accord any litigant that appears before me the same respect and attention to legal arguments. Indeed, for many indigent or pro se litigants, I am generally aware that, under Ninth Circuit precedent, they may be entitled to even greater deference in ensuring that their legal arguments are appropriately considered. I would follow Ninth Circuit precedent and ensure that happens in all cases that come before me.

Senate Judiciary Committee
“Nominations”
Questions for the Record
July 11, 2018
Senator Amy Klobuchar

Questions for Ryan Nelson, Nominee to the Ninth Circuit Court of Appeals

- How would you view the importance of adhering to precedent – even precedent where you felt that the case was wrongly decided – if you are confirmed to the Ninth Circuit?

For nearly 20 years, as an appellate lawyer, I have fashioned every legal argument based on the importance—indeed necessity—of lower courts adhering to binding precedent of superior courts. That approach would not change—and my obligation would only increase to follow binding precedent, if I were fortunate enough to be confirmed to the Ninth Circuit.

A good judge will not always agree with the outcomes that he reaches in the decisions that he makes. The art of good judging is tethering yourself so closely to the rule of law and the Constitution that personal beliefs do not dictate the outcome in any case.

- If you are confirmed, you will be hearing cases as part of a panel of judges. In your view, is there value to finding common ground—even if it is slightly narrower in scope—to get to a unanimous opinion on appellate courts?

Yes.

**Nomination of Ryan Nelson, to be United States Circuit Judge for the
Ninth Circuit
Questions for the Record
Submitted July 18, 2018**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

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

Yes. And if fortunate enough to be confirmed to the Ninth Circuit, I would faithfully apply United States Supreme Court and Ninth Circuit precedent regarding the role that express enumeration of a particular right plays in the case at issue.

- 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 *Washington v. Glucksberg*, 521 U.S. 702 (1997), I would consider sources including the common law, practice in the American Colonies, state statutes and judicial decisions, and long-established traditions.

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

Yes. If the right has been previously recognized by the Supreme Court or the Ninth Circuit, then those decisions would bind me. Absent any such holding from those two courts, I could look to decisions from other courts of appeals as persuasive authority.

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

Yes.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Both *Casey* and *Lawrence* are binding precedent, and if fortunate enough to be confirmed to the Ninth Circuit, I would apply them faithfully along with other binding precedent.

- f. What other factors would you consider?

I would consider any other binding precedent from the United States Supreme Court or the Ninth Circuit, and any factors described therein.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Fourteenth Amendment applies to both race and gender. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996).

- 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?

As a lower court judge, I will follow Supreme Court precedent interpreting the Fourteenth Amendment, including *United States v. Virginia*, and any other binding precedent on the issue.

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

I do not have any information on why the legal issues raised in *United States v. Virginia* did not reach the Supreme Court earlier, or why *United States v. Virginia* was filed or resolved at the time when it was filed or resolved.

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

The Fourteenth Amendment requires that same-sex couples to be afforded the right to marry "on the same terms accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

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

It is my understanding that this question is the subject of litigation, and Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits me from answering it.

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

Yes, under the Supreme Court's decisions 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?

Yes, under the Supreme Court's decisions in cases including *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

- 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?

Yes, under the Supreme Court's decision 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 questions 3(a) and 3(b).

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
- a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

If fortunate enough to be confirmed to the Ninth Circuit, as a lower court judge, I would follow all binding Supreme Court and Ninth Circuit precedent. Where applicable precedent from those two courts make it appropriate to consider such evidence, I would do so in accordance with that precedent.

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

The role of sociology, scientific evidence, and data depends on the nature of the judicial analysis at issue. If fortunate enough to be confirmed to the Ninth Circuit, I would consider binding Supreme Court and Ninth Circuit precedent to determine what role each of those sources should play in a given case.

5. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full

development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

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

My understanding is that there has been a significant amount of scholarly discussion of this topic during the last several decades. *See, e.g.*, Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995); Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881 (1995); Steven G. Calabresi & Michael W. Perl, Originalism and Brown v. Board of Education, 2014 Mich. St. L. Rev. 429; *see also* Calabresi & Perl, 2014 Mich. St. L. Rev. at 432 n.7 (collecting other academic debaters). If I were fortunate enough to be confirmed to the Ninth Circuit, from the perspective of a lower court judge, however, that discussion is an academic one, and does not impact the binding force of *Brown* in any way.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited July 17, 2018).

This is an academic debate that does not change the force of Supreme Court precedent. That said, Supreme Court decisions show that in some instances discerning the original public meaning of certain provisions of the Constitution may not be easy. *See, e.g.*, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). But that does not change the legal force and precedential nature of the Supreme Court’s decisions.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

If I were fortunate enough to be confirmed to the Ninth Circuit, for a lower court judge, the original public meaning of a constitutional provision is dispositive when the Supreme Court has decided that it is dispositive. If, on the other hand, the Supreme Court has decided that some other mode of interpretation is appropriate in interpreting the meaning of a constitutional provision, that is dispositive. I would faithfully apply binding precedent of the Supreme Court regardless of their methodology.

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

Please see my answer to question 5(c).

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

If fortunate enough to be confirmed to the Ninth Circuit, as a lower court judge, I would be bound by Supreme Court and Ninth Circuit precedent in any case involving the interpretation of a constitutional provision. I would consider the arguments of the parties as well as all applicable law (including law regarding what sources the Supreme Court and the Ninth Circuit have consulted in construing constitutional provisions) and precedent and the specific facts of the case.

6. During your confirmation hearing, I asked you whether enhanced integration techniques are necessary for military effectiveness and whether they are permissible. You responded by saying that waterboarding is illegal according to Congress and that you did not intend to convey your personal views in a brief that you authored.
- a. In your view, should enhanced interrogation techniques be permissible?

Please see my answers to Senator Durbin's questions 6(a), 6(b) and 6(c). It is my understanding that there are several pending lawsuits raising legal questions about interrogation techniques. As a judicial nominee, I cannot comment on legal issues in pending litigation. Moreover, Congress and the President have addressed this political issue, about which I cannot ethically opine. *See* Canon 5, Code of Conduct for United States Judges; see also Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

- b. In your view, are enhanced interrogation techniques necessary for military effectiveness?

Please see my answer to Senator Blumenthal's question 3(b).

7. As a law student at the J. Reuben Clark Law School at Brigham Young University, you edited a law review article by then-professor (now Utah Supreme Court Justice) Thomas Lee entitled, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*. The article concluded that "the prevailing doctrine of stare decisis at the time of the framing and throughout the nineteenth century generally rejected the notion of a diminished standard of deference to constitutional precedent." What standard of deference should Supreme Court precedents such as *Roe v. Wade*, *Lawrence v. Texas*, and *Obergefell v. Hodges* receive?

Please see my answer to Senator Feinstein's questions 1(a) and 1(d).

**Questions for the Record for Mr. Ryan
Nelson Submitted by Senator Richard
Blumenthal July 18, 2018**

1. As the Deputy Assistant Attorney General for the Environment and Natural Resources Division (ENRD) at the Department of Justice, you oversaw attorneys in the division working on *Massachusetts v. EPA*. As you know, this case involved 19 private organizations who filed a rulemaking petition asking the EPA to regulate greenhouse gas emissions from new motor vehicles, pursuant to the EPA's authority under the Clean Air Act. In 2003, the EPA denied the rulemaking petition. A number of state and local governments intervened to seek review of the EPA's order. The ENRD authored a brief in this case claiming that the science surrounding climate change was "complex and still evolving."

- **What role did you play in forming the government's position on this matter?**

My predecessor at ENRD argued *Massachusetts v. EPA* before the DC Circuit. I was not involved in drafting or reviewing any brief that ENRD filed in the DC Circuit. My involvement in the case was working with the Office of the Solicitor General as advisory and division counsel in the case before the Supreme Court.

- **Did you approve the characterization, in this brief, of the science surrounding climate change as "complex and still evolving"?**

I was not involved in any brief authored or filed by ENRD in the DC Circuit. The Supreme Court brief was filed by the Office of the Solicitor General and I would have advised on the brief but not approved it. To the best of my recollection, there was undisputed record evidence in the *Massachusetts v. EPA* case that even adopting the regulation to regulate greenhouse gases from motor vehicles would have no material impact on climate change. But the scientific record varied on precisely when any specific tipping point may occur for climate change.

2. When you were nominated to be the interior Department's Solicitor, you refused to answer a question for the record from my colleague, Senator Sanders, as to whether you agreed with President Trump's claim that "climate change is a hoax." You were also asked whether climate change is caused by human activity, and whether the combustion of fossil fuels contributes to climate change, but you failed to answer either question.

- **Is climate change caused by human activity?**

Yes.

- **Does the combustion of fossil fuels contribute to climate change?**

Yes.

- **Do you agree with President Trump that climate change is a "hoax"?**

I do not know specifically to what President Trump was referring when he made his statement. As a general matter, I do not believe climate change is a "hoax."

3. In 2004, you helped draft a Supreme Court amicus brief in *Al Odah v. United States*, arguing that U.S. courts lacked the “jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base.” Your brief argued that “alien enemies captured and held abroad have no right of access to domestic courts.” You suggested that allowing judicial review would “degrade[]” the military’s “effectiveness” and “have a disastrous impact on our ability to glean critical intelligence from those we capture.” The Supreme Court disagreed, holding in *Rasul v. Bush* 6-3 that U.S. district courts have jurisdiction to hear habeas challenges brought by detainees at Guantanamo.

- **Do you believe that the Suspension Clause of the Constitution provides that detainees held in Guantanamo Bay have the right to file habeas petitions in federal court?**

The amicus brief filed by Citizens for the Common Defense in the *Al Odah v. United States* case did not address the Suspension Clause. I have not studied that legal question or formed an opinion on it. If I were fortunate enough to be confirmed to the Ninth Circuit, and a case raising that question were to come before me, I would faithfully apply binding Supreme Court precedent, including *Rasul v. Bush*, 542 U.S. 466 (2004), as well as binding Ninth Circuit precedent in addressing that question.

- **Do you believe that the Supreme Court’s decision in *Rasul* has “degrade[d] the military’s effectiveness,” as you argued in your brief?**

I do not have specific insight into whether the military’s effectiveness has been downgraded since *Rasul*. But some military officials have suggested as much. Balancing personal liberties with military effectiveness, especially given the wartime conditions at issue at the time of those decisions, is an important issue. This country has debated that issue over the past 16 years and tried to appropriately balance those interests based on the threats that exist at any given time.

Senator Mazie K. Hirono
Questions for the Record for Ryan Nelson

1. In *Laird v. Tatum*, 409 U.S. 824 (1972), then-Justice Rehnquist stated the following:

“Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.

“It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”

In the above statements, Chief Justice Rehnquist acknowledges that the notions and experiences that judges have developed over the course of their lives influence their interpretation of the Constitution.

- a. Do you agree with Chief Justice Rehnquist’s observations? Do you believe that there will be times on the bench that a judge will bring personal experiences and views to bear on their decisions?**

I agree with Chief Justice Rehnquist’s observations. I believe the art of good judging is tethering yourself so closely to the rule of law and the Constitution that personal beliefs do not dictate the outcome of any case.

- b. What does Justice Rehnquist’s observation suggest about reassurances from judicial nominees that they will simply apply precedent, particularly in areas where many have strong convictions, or in circumstances where the facts of a case do not line up precisely with a precedent and a judge has discretion in what precedent to apply and how it would apply?**

Lower court judges should adhere to Supreme Court and binding circuit precedent when applying the law. Indeed, it is rare for a circuit court to consider a true case of “first impression” in the sense that there is no Supreme Court precedent that bears on the question at issue in the case.

2. You served as General Counsel to an employer, Frank Vandersloot, who has been described as “bullying” reporters and bloggers to take down articles critical of him or his company by threatening legal action.

Sexual assault and sexual harassment are significantly underreported by victims. Do you think threats of legal action against reporters who expose such sexual misconduct could discourage victims from coming forward or discourage public accountability on this issue?

I have never been involved in any case involving threats of legal action against reporters

who expose sexual misconduct. Sexual misconduct is egregious, unacceptable, harmful to innocent victims and should be prevented and rectified whenever possible. Victims should be encouraged to come forward and appropriate public accountability against perpetrators should be sought.

3. At the hearing, you failed to recall your statement in support of the Trump Administration's America First Energy Plan. In response to questions for the record for the Committee on Energy and Natural Resources you wrote, "I am convinced that President Trump's and Secretary Zinke's goals for the Department, including the America First Energy Plan, will not only preserve but increase the value of our natural resources for future generations."

After having refreshed your memory, given your explicit support for “President Trump’s and Secretary Zinke’s goals for the Department [of Interior], including the America First Energy Plan,” and federal law that requires recusal “in any proceeding in which [one’s] impartiality might reasonably be questioned,” will you commit recusing yourself in matters challenging the Administration’s actions on these issues, if confirmed?

In my written statement and opening statement to the Committee on Energy and Natural Resources, I stated, “I am convinced that President Trump’s and Secretary Zinke’s goals for the Department will not only preserve but increase the value of our natural resources for future generations.” That was my recollection of my September 2017 quote during my hearing before this Committee. Once you clarified you were quoting from my response to Questions for the Record, and not my prior written statement, I acknowledged there could be a difference and agreed to review my responses. You correctly quoted from my response to Questions for the Record and I apologize for any needless confusion created by my initial answer.

As to recusal, please see my answer to Question 24 from my Senate Judiciary Questionnaire.

I believe it would be premature to decide whether I should recuse myself until I have an actual case or controversy pending before me, if I were fortunate enough to be confirmed to the Ninth Circuit. But I would consult with all resources available at the Ninth Circuit in making a determination of whether I should disqualify myself in any particular case and act consistent with their recommendation. And in that consultation process, I would definitely be mindful of your direction that appearance of a conflict is an important factor to be considered under the statute.

4. In your Senate Judiciary Questionnaire, you stated that you served as “supporting counsel” for an amicus brief for Citizens for the Common Defense in *Al Odah v. United States*. But the brief indicates that you were also the client for that brief because you are listed as a member of Citizens for the Common Defense. That brief argued that foreign nationals detained at Guantanamo could not challenge their indefinite detention in court. The Supreme Court ultimately rejected that argument. The amicus brief also identifies other members of Citizens for the Common Defense, including John Yoo and Steven Bradbury, who authored memos justifying torture practices during the Bush Administration.

a. Between 2002 and 2006, did you receive a copy of these memos or discuss the contents of these memos with any government official?

No.

b. At any point, have you expressed agreement with or support for these memos by John Yoo and Steven Bradbury?

No.

**Nomination of Ryan Douglas Nelson
United States Circuit Court for the Ninth Circuit
Questions for the Record
Submitted July 18, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

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

I believe racial bias exists in America and remains a very real and important challenge for our country and many individuals and institutions. The criminal justice system, like many other institutions, is susceptible to racial discrimination. Issues of racial discrimination regularly arise in litigation, including in criminal cases.

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

Yes.

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

While I have not studied implicit racial bias in depth, I am aware generally that the issue has received important attention in scholarly studies and broader public reporting. I have attended general training at prior employers, including my law firm, the Department of Justice and Melaleuca. And, as General Counsel, I have been involved in overseeing training of corporate managers in addressing issues

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

² *Id.*

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

⁴ *Id.* at 8.

of discrimination. To my knowledge, Melaleuca has never had a claim of racial discrimination filed against it during my tenure.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

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

I am generally aware that others have concluded that many factors contribute (to different degrees and in different ways) to fluctuations in crime rates. I have not studied the issue, however, and therefore do not have sufficient knowledge or expertise to offer an informed view on the question.

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

Please see my answer above to question 2(a).

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

Yes.

4. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.⁷

- a. Do those statistics alarm you?

Yes.

- b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

⁷ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

The Supreme Court addressed this issue in *McCleskey v. Kemp*, 481 U.S. 279 (1987). If I were fortunate enough to be confirmed to the Ninth Circuit, I would be bound to apply *McCleskey v. Kemp*, as well as all binding Supreme Court and Ninth Circuit precedent in light of the facts presented in a particular case.

- c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

Please see my answer above to question 4(b).