

**Nomination of Michael J. Truncale to the U.S. District Court for the Eastern
Questions for the Record
Submitted May 2, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2004, you defended the gun manufacturer, Glock, Inc., in a product liability case. According to an expert report for the case available from online legal databases, the plaintiff alleged that the Glock 17 pistol was defective and unreasonably dangerous because the gun's low trigger energy made it susceptible to accidental discharge.
 - a. **What arguments did you advance on behalf of Glock, Inc. in this case?**
 - b. **What was the outcome of this case?**
 - c. **Have you represented Glock, Inc. or any other firearm manufacturer in any other case? If so, please describe the nature of these representation(s).**

As an attorney for Glock, Inc., I asserted that the accident was caused by the plaintiff's contributory negligence, as the evidence showed that the plaintiff kept his finger on the trigger while placing the gun in a holster. The case was resolved by confidential settlement, and I have not represented Glock, Inc. or another firearm manufacturer in another case.

2. In 2013, you represented three candidates to the Beaumont Independent School District (BISD) who sought to unseat three incumbent trustee members who represented with predominantly African American residents.
 - a. **How did you become involved in this case?**

I was approached by a diverse set of individuals who had been denied their right to have their names placed on the ballot for a school board election. My clients did not attempt to unseat anyone.

In December 2012, prior to your involvement in the BISD litigation, the U.S. Department of Justice's Civil Rights Division determined that a voting map adopted after a 2011 referendum was discriminatory against African American voters because it would "not offer the same ability to African American voters to exercise the franchise." In representing your clients, you argued to compel BISD to use this same map.

- b. **When you became involved in this case, were you aware that the Justice Department had determined that the voting map adopted in the 2011 referendum election had a racially discriminatory impact? If so, how did that factor into your decision to ask a court to compel the use of the map?**

When I became involved in the case, my representation was wholly unrelated to the 2011 map or the Justice Department's finding. The operative map at the time was a single-district map developed by the Beaumont Independent School Board. My focus was solely on getting my

clients on the ballot.

In the BISD litigation, you argued that BISD should be required to hold an election for all seven board trustee seats at the same time, even though BISD's practice had been to hold staggered elections. In April 2013, the Justice Department's Civil Rights Division issued a voting determination letter which found that requiring an election for all seven trustee seats at the same time would have the effect of removing "the black-preferred incumbent trustees" in the "three districts that provide black voters with the ability to elect candidates of choice."

- c. **When you argued for an election to be held for all seven trustee seats, were you aware of the Justice Department's April 2013 voting rights determination letter? If so, how did the letter's conclusion factor into your decision to argue that the court should allow the election for all seven seats simultaneously?**

I was aware of the letter but it played no part in shaping my arguments.

3. In multiple speeches and remarks you have expressed your personal views on immigration issues.
 - a. In May 2012, you participated in an interview titled Galveston County Republican Candidate Forum, in which the Justice Department maintains you said that "with regard to immigration, we must not continue to have the *magnets* coming in." **What are the "magnets" and where were they "coming in"?**

The statement, not well-articulated at the time and not a complete sentence, referred to economic inducements and benefits which some believe encourage individuals to come into the United States. Indeed, this concept is more well-articulated other remarks I made during the campaign, provided to the Senate in response to its Questionnaire.

- b. At the May 2012 Galveston County Republican Candidate Forum, you suggested that the U.S./Mexico border should be secured with troops. **Do you still believe that the U.S. military should be sent to the Southern border?**

I made many of the comments referred to herein in my capacities as a candidate for the United States Congress or as a political commentator. As a judicial nominee, it would be inappropriate for me to offer comments on any political matters. *See* Code of Conduct for U.S. Judges, Canon 5; *see also, id.* Canon 1, comment. I can commit to you and the Committee, however, that as a United States District Court judge, I would put all of my personal political views aside and fulfill my duty to "administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially discharge the duties incumbent upon me." 28 U.S.C. § 453.

- c. In your notes for June 2012 remarks at the Galveston County Republican Party Convention, you wrote "Opposed to Dream Act – Perm. Residence." **In light of sharing your personal views on this issue, will you commit to recusing**

yourself from any case involving DACA or DAPA if you are confirmed?

If I am so fortunate as to be confirmed, I will carefully review and address any real or potential conflicts by reference to 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

- d. At a 2012 candidate forum, and in notes for a debate in 2016, you expressed opposition to “sanctuary” cities and said Hillary Clinton’s support for such jurisdictions raised questions about her ability to keep the country safe. In light of sharing your personal views on this issue, will you commit to recusing yourself from any case involving “sanctuary” cities if you are confirmed?**

Please see my answer to Question 3(c) above.

4. In notes for June 2012 remarks you gave at the Galveston County Republican Party Convention, you wrote that you were the “only candidate” at a rally in protest of the 39th anniversary of *Roe v. Wade*. 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 textbook 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 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”?**

To a federal district judge all decisions of the United States Supreme Court, including *Roe v. Wade*, are super-stare decisis.

- b. Is it settled law?**

Yes

- c. Given your decision to highlight your participation in a protest against *Roe v. Wade*, will you commit to recusing yourself from any case where *Roe v. Wade* is implicated if you are confirmed? If not, please indicate under what**

circumstances your impartiality would not be questioned in a case involving *Roe v. Wade*?

Please see my answer to Question 3(c) above.

5. At a May 2012 Tea Party Forum, you said, “I don’t think we should be funding Planned Parenthood. I’d cut them off.”
 - a. **On what basis did you decide that Planned Parenthood should be “cut off” from funding? Which funding were you referring to?**

As a candidate for political office, I made a number of comments about ways in which Congress might reduce spending. The comment was a general statement, without reference to specific funding. Additionally, please see my response to Question 3(b) above.

- b. **Given your comments about Planned Parenthood, will you commit to recusing yourself from any case involving the organization if you are confirmed? If not, please indicate under what circumstances your impartiality would not be questioned in a case involving Planned Parenthood.**

Please see my response to Question 3(c) above.

6. In your notes for April 2014 remarks before the Golden Triangle Republican Women, you wrote “Wendy Davis’ claim to fame--kills little girls.”
 - a. **Please explain why you believe that Ms. Davis’ “claim to fame” is “kills little girls”?**

When Senator Harris asked you about these statements at your hearing, you responded: “With regard to that particular statement about that other politician from Texas [Ms. Davis], her statements many believe, both republicans and democrats, probably went beyond *Roe v. Wade*.” The Texas law Ms. Davis spoke about in the Texas Senate in 2013 was struck down as unconstitutional by the Supreme Court in a 2016 ruling that reaffirmed *Roe v. Wade* (*Whole Woman v. Hellerstedt*.)

- b. **Which statements by Ms. Davis were you referring to that “went beyond *Roe v. Wade*”?**

I was referring to many of Wendy Davis comments regarding abortion. My statement was not focused specifically on legislation enacted by the Texas Legislature, but rather some of her previously articulated positions that went well beyond *Roe v. Wade*.

7. In your notes for a series of July 2016 debates, you wrote that President Trump “is good for women.” **Please explain the ways in which you believe that President Trump is “good for women.”**

Please see my response to Question 3(b) above.

8. In notes for a May 2014 speech before the Golden Triangle Republican Women, you wrote “[h]ave you forgotten about the relentless attempts to make our elections a joke by allowing widespread voter fraud? It took Republicans to push through voter ID laws that protect the rights of citizens so that everyone get [*sic*] ONE VOTE PER PERSON.” In notes for September 2014 remarks before the Beaumont Rotary Club, you wrote that “voter fraud makes a mockery of our elections” and that voter ID laws are needed “so that everyone’s vote is protected from being diminished by someone who votes several times.”

At your confirmation hearing, in response to a question from Senator Hirono, you said that voter fraud is a political matter and you could not answer. However, you also spoke from personal experience when you said, “I was once an election judge and had people from other states come by wanting to vote and I denied their ballot because they weren’t even Texans or were properly registered so I mean I’ve seen that.”

- a. **Did you understand the people who inquired about their eligibility to vote in Texas to be engaged in voter fraud?**

I do not have enough information to speculate about the motives of those I observed as an election judge.

- b. **Please identify the “relentless attempts to make our elections a joke by allowing widespread voter fraud” to which you referred to in 2014.**

I identified the extent of my personal knowledge during my hearing.

- c. **Do you agree with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 Presidential election? If yes, please explain why.**

I have not reviewed the factual basis for any comments about illegal votes in the 2016 election.

9. In a July 2013 speech, you described the U.S. Supreme Court’s decision in *Shelby County v. Holder* (570 U.S. 2 (2013)), as a “victory.”
 - a. **Why did you consider the Supreme Court’s decision in *Shelby County v. Holder* to be a “victory”?**

As referenced in Question 2 above, I represented a diverse set of individuals who had been denied the opportunity to appear on a ballot for a school board election in protracted litigation. During the pendency of the litigation, the Supreme Court decided *Shelby County*. I considered it to be a victory because it meant that my clients rights to appear on the ballot would not be subjected to additional litigation and delays.

- b. **What other Supreme Court cases do you consider to be “victories”?**

As a nominee to an inferior court, it would not be appropriate for me to identify any Supreme Court cases as either “victories” or “defeats.” If I am so fortunate as to be confirmed, all Supreme Court precedent will be binding upon me.

10. The online archived version of a website for your campaign for the U.S. House of Representatives in 2012 contained an “On the Issues” page. The page stated that you support “Strong Pro-Life and Pro-Family Values.”

a. What do you believe are “Strong Pro-Life” values?

Please see my response to Question 3(b) above.

b. What do you believe are “Pro-Family Values”?

Please see my response to Question 3(b) above.

11. In notes for a speech in 2012, you praised Republicans for being the party of the “conservative social and family agenda.” **How would you describe the “conservative social and family agenda”?**

Please see my response to Question 3(b) above.

12. In an April 2012 radio interview, you thanked the Tea Party movement “for what it has meant to our country and to our Republican Party.” **Please describe what you believe the Tea Party has meant to the country and separately to the Republican Party.**

Please see my response to Question 3(b) above.

13. In 2006 remarks before the Jefferson County Young Lawyers Association, you said that the United States is in the midst of a “culture war” due to a “[d]ecline in moral values, tolerance of obscenity and a variety of forms of deviant behavior.”

a. Please identify the types of “deviant behavior” which you believe are contributing to a culture war in America.

I was referring to the sorts of serious issues that pervades the news daily: the production and dissemination of child pornography, the sexual abuse of children, human trafficking, sexual harassment, the abuse of women, the neglect of children, etc.

b. Is the United States still in the midst of a culture war? If yes, please explain the parameters of that “war.”

Unfortunately, these issues still exist.

14. In September 2013 remarks at Lamar University, you said “[s]ome would argue that one vestige of the Monarchy—namely the ‘King’s Bench’—is still enshrined by Art. III of

the Constitution that sets up a judicial system where judges are appointed for life. What a concentration of power! A job from which you cannot be fired except for high crimes and misdemeanors—whatever that is.”

- a. Do you believe that Article III of the U.S. Constitution is a “vestige of the Monarchy”?**

My comment, made in an academic setting, was simply an acknowledgement that some have argued that the appointive system for judges is a vestige of the Monarchy. See: Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of Electric Judiciary in Antebellum America*, 37 *Am.J. Legal Hist.* 190, 191-92 (1993).

- b. What do you understand the purpose to be of the independent judiciary with lifetime appointments created under the U.S. Constitution?**

The purpose of an independent judiciary with lifetime appointments is to protect federal judges against unwarranted interference from either the legislative or executive branch. This assures the independency of the judiciary and is one of the Constitution’s many brilliant features.

15. In a May 2014 speech before the Golden Triangle Republican Women, you referred to Texas as a “judicial hellhole.” **Why did you refer to Texas in this manner?**

I did not refer to Texas in that manner. I was referring to articles in the *Wall Street Journal*, the *Dallas Morning News*, and other publications that had referred to Jefferson County, Texas, as a “judicial hellhole” because it was difficult to get a fair trial there. I noted proudly that Jefferson County was no longer so considered.

16. In December 2004 remarks at a fundraiser for the Jefferson County ADR Center, you said that there was a “lack of trust in our court system.” **To which court system were you referring and what evidence do you have that there is a “lack of trust in our court system”?**

The statement was not a comment on a particular court or court system. I was referring to my experience as a mediator in over 2,000 cases, where I have noticed that many parties prefer to mediate their cases (and exercise a bit more control) than they can in the courts.

17. In notes for July 2016 debates related to the 2016 Presidential election, you made several comments about the Democratic Party and Hillary Clinton.

- a. In your notes, you wrote “The policies of dependency created by Democrats is DESTROYING BLACK COMMUNITIES.” Please identify these policies.**

Please see my response to Question 3(b) above.

- b. In your notes, you wrote the Democratic Party is the “[p]arty of division”**

and “identity politics.” **Please explain what you mean by these statements.**

Please see my response to Question 3(b) above.

- c. In your notes, you wrote that the policies of the Clinton and Obama Administrations have resulted in an increase in “welfare [and] staggering unemployment in minority community [*sic*].” **Please explain to which policies you referred.**

Please see my response to Question 3(b) above.

- d. In your notes, you wrote that Democrats use the “race/gender card [to get] votes.” **Please explain what you mean by this statement.**

Please see my response to Question 3(b) above.

- e. In your notes, you wrote that “Family, the Constitution, Hard Work, Trust in God, Perseverance, Personal Responsibility” are “under attack” by Democrats. **Please explain how Democrats have “attacked” each of these.**

Please see my response to Question 3(b) above.

18. In June 2011 remarks before the Golden Triangle Republican Women, you referred to President Obama as an “un-American imposter.”

- a. **Please explain why you believed President Obama is “un-American.” In what ways is he, in your view, “un-American”?**
- b. **Please explain why you believed President Obama is an “imposter.” In what ways is he, in your view, an “imposter.”**

Please see my response to Question 3(b) above. I will note that it is possible, however, that I was merely expressing frustration by what I perceived as a lack of overt patriotism on behalf of President Obama.

19. In notes for a July 2016 debate following the Republican National Convention, you wrote that Democrats have “declared war on the NRA.” **Please explain what you believe constitutes this “war” and how Democrats have “declared” it.**

Please see my response to Question 3(b) above.

20. **The website for your U.S. House of Representatives campaign in 2012 stated that you support “Defending 2nd Amendment Rights.” What constitutes defending Second Amendment rights, in your view?**

Please see my response to Question 3(b) above. In addition, it would be inappropriate for

me to express my opinion about a matter that may come before me if I am so fortunate to be confirmed as a federal district court judge. See Code of Conduct for U.S. Judges, Canon 3A(6).

21. 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 has held that the Second Amendment protects an individual right to possess a firearm unconnected with service in the militia. *District of Columbia v. Heller*, 554 U.S. 570, 598-600 (2008). As a judicial nominee, it would be inappropriate for me to opine on my personal views as to the merits or reasoning of a particular U.S. Supreme Court decision. If confirmed, I would faithfully apply the precedents of the Supreme Court, including *Heller*.

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

Certainly. The Court, in *Heller*, wrote: "We are aware of the problem of handgun violence in this country. . . . The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns." 554 U.S. 570, 636 (2008); see also *id.* at 626-27 & n. 26.

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

Please see my response to Question 21(a) above.

22. In a 2012 speech at a Tea Party Forum, you said that "[w]e need to look [at eliminating] agencies like the Department of Energy and the Department of Education, because they are wasteful." In that same speech, you said you could not "recall one single thing of any benefit to a single college student in Texas that came from the Department of Education."

a. Do you still believe the Department of Education should be eliminated? If so, why?

Please see my response to Question 3(b) above.

b. What do you understand to be the primary functions of the Department of Education?

I understand the Department of Education's mission to be "to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."

According to the Texas Higher Education Coordinating Board, in 2016, over 500,000 Texas college students received a federal Pell Grant. As you know, the federal Pell Grant program is administered by the Department of Education and provides grants for low-income college students.

c. Do you believe that the federal Pell Grant program is beneficial to low- income college students in Texas?

Please see my response to Question 3(b) above. I will note, however, I received a Pell Grant to defray a portion of my law school tuition.

d. Will you commit to recusing yourself from any case involving the Department of Education if you are confirmed?

Please see my response to Question 3(c) above.

23. In addition to the Department of Education, you said a 2010 Tea Party Forum that "[w]e need to look [at eliminating] agencies like the Department of Energy." In another 2012 speech you referred to the Environmental Protection Agency a "job killer."

a. On what basis did you make the comment that the Environmental Protection Agency is a "job killer"?

I was expressing my understanding, based on conversations with business leaders in Jefferson County, that EPA regulations has curtailed expansion of their business.

b. Do you still believe the Department of Energy should be eliminated?

Please see my response to Question 3(b) above.

c. Will you commit to recusing yourself from any case involving the Department of Energy if you are confirmed?

Please see my response to Question 3(b) above.

24. In your notes for televised debates during the 2016 Presidential election, you suggest that individuals who support the Black Lives Matter movement and/or those who protest police brutality "incite police shootings."

a. On what basis did you make your comment?

Respectfully, this question misinterprets my notes. The only discussion during the debate that I can recall regarding police shootings was the ambush of Dallas Police officers in July of 2016. All racist or ethnic hatred is wrong. All people are entitled to dignity and respect.

b. What is your understanding of the purpose of the Black Lives Matter movement?

My understanding is that Black Lives Matter is a movement of individuals who want to make sure that society and the justice system is fair, equitable, and treats all with dignity and respect.

25. During your Congressional campaign, you advocated for the repeal of the Affordable Care Act and called it an act of “government overreach.” In May 2012 remarks at a Tea Party Forum, you stated that the ACA would “create [federal] agencies that get between you and your doctor [and] lead to the rationing of healthcare.” In a May 2012 debate, you said that the ACA would send the federal government into bankruptcy.

a. Please explain your statement that the Affordable Care Act is “government overreach.” Do you still believe the Affordable Care Act is “government overreach”?

Please see my response to Question 3(b) above.

b. On what basis did you assert that the Affordable Care Act would “create [federal] agencies that get between you and your doctor [and] lead to the rationing of healthcare”?

Please see my response to Question 3(b) above.

c. On what basis did you assert that the ACA would send the federal government into bankruptcy?

Please see my response to Question 3(b) above.

d. Will you commit to recusing yourself from any case involving the Affordable Care Act or any legislation purporting to repeal it if you are confirmed?

Please see my response to Question 3(c) above.

26. The website for your campaign for the U.S. House of Representatives in 2012 contained an “On the Issues” page. The “On the Issues” page stated that you oppose “Federal

Government Intrusion Into Our Daily Lives.” **Please describe which federal government “intrusions” into “daily lives” you oppose.**

Please see my response to Question 3(b) above.

27. In a November 2013 speech, you said that Republicans “stand for the religious freedoms embodied in the First Amendment to the Constitution—freedom *of* religion, not freedom *from* religion.” **Please explain what you meant by this statement.**

Please see my response to Question 3(b) above. In addition, it would be inappropriate for me to express my opinion about a matter that may come before me if I am so fortunate to be confirmed as a federal district court judge. *See* Code of Conduct for U.S. Judges, Canon 3A(6). As a district court judge, I will follow all Supreme Court and Fifth Circuit precedent regarding the First Amendment’s Establishment and Free Exercise Clauses.

28. In 2012 remarks at the Golden Triangle Republican Women Candidates’ Forum, you stated that you have a “very conservative view[] of courts.” **Please explain what your “very conservative view[] of courts” is.**

I believe in judicial restraint. Judges should apply applicable precedent to the facts and not seek to reach out to decide issues not squarely presented in a case.

29. On your Senate Questionnaire, you indicate that you have been a member of the Houston Lawyers Chapter of the Federalist Society since 2014. The Federalist Society’s “About Us” webpage, explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

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

I did not author that statement and cannot speculate what the author intended by it. I will note that when I attended the SMU Dedman School of Law approximately 33 years ago, I found SMU to be a vibrant environment where all persons were respected and all viewpoints welcomed.

- b. How exactly does the Federalist Society seek to “reorder priorities within the**

legal system”?

I did not author that statement and cannot speculate what the author intended by it.

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

I did not author that statement and cannot speculate what the author intended by it.

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

a. Are you committed to following circuit court precedent if confirmed?

Absolutely. It would be my sworn duty.

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

Never.

c. Do you believe it is proper for a circuit court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

Circuit judges have the authority to write concurring or dissenting opinions concerning many topics; on rare occasion, it may be appropriate for a circuit judge to point to a perceived error that the Supreme Court might wish to correct – while applying it, of course.

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

A panel of the Fifth Circuit cannot overrule another panel’s decision “absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or by our *en banc* court.” *Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

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

Only the Supreme Court can decide when it is appropriate for the court to overturn its own precedent. As a nominee for a district court, it would be inappropriate for me to opine on the circumstances in which the Supreme Court would overturn its own precedent.

31. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some

experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

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

No.

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

No.

- c. What are your “views on administrative law”?**

It would be inappropriate for me to express my opinion about a matter that may come before me if I am so fortunate to be confirmed as a federal district court judge. *See* Code of Conduct for U.S. Judges, Canon 3A(6). As a district court judge, I will follow all Supreme Court and Fifth Circuit precedent regarding administrative law.

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

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

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

No.

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

I received the questions from the Office of Legal Policy at the Department of Justice on May 2, 2018. I reviewed the questions and drafted answers. I then shared the answers with the Office of Legal Policy. After talking with lawyers at the Office of Legal Policy, I made some revisions and requested the Office to present my responses to the Committee.

Senator Dick Durbin
Written Questions for Andrew Oldham and Michael Truncale
May 2, 2018

For questions with subparts, please answer each subpart separately.

Questions for Michael Truncale

1. In a May 5, 2014 speech before the Golden Triangle Republican Women you said “Have you forgotten about the relentless attempts to make our elections a joke by allowing widespread voter fraud? It took Republicans to push through voter ID laws that protect the rights of citizens so that everyone get [*sic*] one vote per person.” **Are you aware of evidence of widespread voter fraud? Please describe any such evidence.**

Please see my response to Question 8 of Senator Feinstein.

2. On January 18, 2006 you gave a speech before the Jefferson County Young Lawyers Association where you said that our nation is in a “culture war” because of a “decline in moral values, tolerance of obscenity and a variety of forms of deviant behavior.” **What did you mean by these comments?**

Please see my response to Question 13 of Senator Feinstein.

3. In a May 5, 2014 speech before the Golden Triangle Republican Women you described Texas as a “judicial hellhole.” **What did you mean by this?**

Please see my response to Question 15 of Senator Feinstein.

4. In a June 6, 2011 speech before the Golden Triangle Republican Women, you called President Obama an “un-American imposter.” **What did you mean by this?**

Please see my response to Question 18 of Senator Feinstein.

5. On July 16, 2013 at a rally in Beaumont you described the Supreme Court’s decision in the *Shelby County v. Holder* case as a “victory.” **Why did you view this case as a victory?**

Please see my response to Question 9 of Senator Feinstein.

6.
 - a. **Is waterboarding torture?**

I have not studied the issue, but I understand that Congress has passed legislation addressing waterboarding. Beyond that it would be inappropriate for me to express my opinion about a matter that may come before me if I am so fortunate to be confirmed as a federal district court judge. See Code of Conduct for U.S. Judges, Canon 3A(6).

b. **Is waterboarding cruel, inhuman and degrading treatment?**

Please see response to questions 6 (a).

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

Please see response to question 6 (a).

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

Please see my response to Question 8(c) of Senator Feinstein.

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

As a judicial nominee, I am bound by the Code of Conduct of United States Judges and am precluded from offering comments on political matters. *See* Code of Conduct for U.S. Judges, Canon 5; *see also, id.* Canon 1, comment. I would note, however, that under Article II, Section 2, Clause 2 of the United States Constitution, the President nominates judges to the Article III Judiciary “with the advice and consent of the Senate.”

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 personal knowledge about the Judicial Crisis Network or any other related organization. I know of no one or any organization making any donation or taking any action in support of my nomination. Other than that, though, it would be inappropriate for me to offer comments on political matters. *See* Code of Conduct for U.S. Judges, Canon 5; *see also, id.* Canon 1, comment.

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?

Please see my response to Question 9(a) above, as well as my response to Question 3(c) of Senator Feinstein.

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

Please see my response to Questions 9(a) and 9(b) above.

10.

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

I have not researched this issue, but because this issue could one day be the subject of future litigation it would be inappropriate for me to comment. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

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

Please see my response to Question 10(a) above.

11. **In your view, is there any role for empathy when a judge is considering a case?**

As a human being, I believe that I should always have empathy for all persons, including those who come before the court. As to judicial matters, I share the position of Justice Elena Kagan when she testified about this subject as follows: “I think it’s law all the way down. When a case comes before the court, parties come before the court, the questions 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 questions is—and this is true of constitutional law and it’s true of statutory law—the question is what the law requires.” *The 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., S Hrg, 111-1044, at 103 (2010).*

12. You say in your questionnaire that you have been a member of the Federalist Society since 2014.

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

I joined the Federalist Society when I was assisting my firm in establishing an office in downtown Houston. The meetings were two blocks from my office, and membership enabled me to have fellowship with other lawyers and to hear interesting presentations about various aspects of law.

- 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."

As a judicial nominee, I am bound by the Code of Conduct of United States Judges and am precluded from offering comments on political matters. *See* Code of Conduct for U.S. Judges, Canon 5; *see also, id.* Canon 1, comment.

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

I have never attended an annual convention of the Federalist Society.

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?**

Please see my response to Question 12(c) above.

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

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? The Foreign Emoluments Clause in Article I, Section 9, Clause 8, of the Constitution 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.

The meaning of the Emoluments Clause is an issue that has been raised in pending litigation. Therefore, it is inappropriate for me to comment on any matter pending or impending in any court. *See* Code of Conduct for U.S. Judges, Canon 3A(6) and Canon 1, commentary.

**Nomination of Michael J. Truncale to
the United States District Court
For the Eastern District of
Texas Questions for the Record
Submitted May 2, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”

- a. Do you agree with Justice Roberts’ metaphor? Why or why not?

As a general proposition, I agree with Chief Justice Roberts’ metaphor. As an attorney with over three decades of trial experience, however, I would offer one additional caveat: the trial judge must keep the strike zone the same for all parties. A good judge, like a baseball umpire, must keep his or her eye on the ball—never focused on the scoreboard or which team is at bat. The judge should never pick a winner before the trial begins. Instead, he or she must interpret the law and apply it to the facts of each case.

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

Generally speaking, the judge must apply statutes, regulations, and controlling precedent without regard to the “practical consequences” of the ruling or the timing of a ruling. Practical consequences should be considered when working with the parties to establish Discovery Control Orders that maximize the efficiency of the court’s resources, provide adequate discovery opportunities that are cost-effective for the parties, and provide the parties a meaningful opportunity to present the case. Also, practical consequences should be considered when evaluating a request for an injunction, since the movant must establish that he or she would suffer irreparable harm if the injunction were denied.

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?

Please see my response to Question 11 of Senator Durbin.

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

While a judge must set aside all personal opinions when evaluating a case, I hope that my personal experiences in life, will help me make wise decisions. Hopefully, these experiences will allow me to understand the circumstances of the criminal defendant and litigants, as well as the responsibilities and burdens of the lawyers practicing in the court.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

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

Throughout my career, it has been my privilege and pleasure to represent numerous indigent clients. When I do so, I expect my indigent clients to get the same equal justice under the law as my business clients. And I will commit to this Committee that I will do so if I am so fortunate as to be confirmed. I am the grandson of immigrants. My grandfather worked as a laborer earning 70 cents per day at a refinery located a short walk from his home on the Westside of Port Arthur, Texas. As an attorney, I represented the same refinery that had hired my grandfather. With that heritage, I will always strive to honor my oath to be impartial and to “administer justice without respect to persons, and do equal right to the poor and to the rich.” *See* 28 U.S.C. § 453.

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

I have dealt with discovery abuse and the high cost of discovery throughout my career. Such tactics are unacceptable. One procedure that has been implemented for years in the Eastern District of Texas to provide relief for litigants subjected to discovery abuse is the Discovery Hotline; it has been very effective for stopping discovery abuse.

5. You gave a May 2014 speech in which you stated your belief in widespread voter fraud. You said: “Have you forgotten about the relentless attempts to make our elections a joke by allowing widespread voter fraud? It took Republicans to push through voter ID laws that protect the rights of citizens so that everyone get [sic] ONE VOTE PER PERSON.”
 - a. What was the factual basis for your assertion that “widespread” voter fraud exists?

Please see my response to Question 8 of Senator Feinstein.

6. Recently confirmed Fifth Circuit Judge James Ho issued his first circuit court opinion this April. The case involved Austin, Texas’s \$350 limit on campaign contributions in city council elections, which a panel of the Fifth Circuit upheld unanimously. Before his confirmation, Ho had written in his personal capacity about campaign finance restrictions, calling for their abolishment, on First Amendment grounds. In his first opinion, Ho dissented from a denial of rehearing en banc. Ho’s opinion picked up on the themes expressed in his personal-capacity writings, arguing that notwithstanding Supreme Court precedent upholding the validity of contribution limits like Austin’s, he viewed Austin’s limits as unconstitutional. Ho wrote: “If you don’t like big money in politics, then you should oppose big government in our lives. Because the former is a necessary consequence of the latter . . . if there is too much money in politics, it’s because there’s too much government.”
 - a. In your view, is it appropriate for a judge to editorialize in an opinion on a policy

question, as Ho has done in the quote above?

If confirmed, I would be bound by all Supreme Court precedent and Fifth Circuit precedent. It would therefore be inappropriate for me to comment on Judge Ho's dissent from the denial of rehearing *en banc*.

- b. Would it be appropriate for a judge to advocate in an opinion in favor of bigger government?

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

- c. Do you agree that a reasonable observer could conclude from the quote above that Judge Ho has failed to put aside his personal views and to simply apply the law as an impartial jurist?

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

- d. You have spoken out against what you view as "judicial activism." Would you consider Ho's opinion, as quoted above, an example of judicial activism? Why or why not?

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

7. As a former candidate for political office, you have given public statements articulating your strong views on a wide range of controversial issues. Given your strong political views, why should litigants who appear before you in cases involving those issues feel confident that they will receive a fair hearing in your court?

Please see my response to Question 3(b) of Senator Feinstein.

8. At your confirmation hearing, you stated that you yourself "don't have any" implicit racial biases. How do you know that you don't?

Respectfully, I know who I am and where I came from. My family endured great difficulties after emigrating to America. As such, they made sure that I understood that all people should be loved, respected and treated equally, regardless of race, color, or creed. While I recognize that implicit racial bias, by definition, refers to a mindset that people do not believe that they have, I truly do not believe that I have implicit racial biases.

**Nomination of Michael J. Truncale, to be United States District Judge
for the Eastern District of Texas
Questions for the
Record Submitted
May 2, 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?

I would look to the factors enumerated by the Supreme Court in their cases concerning substantive due process. See, e.g., *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Loving v. Virginia*, 388 U.S. 1 (1967); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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

Yes.

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

Yes. In *Glucksberg* the Supreme Court noted that the Due Process Clause protects “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” It also stated that courts engage in “a ‘careful description’ of the asserted fundamental liberty interest” by “examining our Nation’s history, legal traditions, and practices.” 521 U.S. at 720-721.

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

Yes. As a district court judge in Texas I would be bound by the precedent of the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth Circuit. If the issue was not settled by either court, I would consider precedent from outside the circuit so long as it was persuasive.

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

Yes. When the Supreme Court issues an opinion, courts are bound “not only [by] the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe of Fla. v. Fla.*, 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 precedent of the Supreme Court and I would apply them faithfully in all applicable circumstances, just as I would any other precedent.

- f. What other factors would you consider?

I would consider all factors relevant under applicable Supreme Court and Fifth Circuit precedent.

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

The Supreme Court has held that the Fourteenth Amendment applies to discrimination on the basis of gender and race. 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 district court judge, I would be bound by all U.S. Supreme Court precedent on gender discrimination.

- 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 have not studied the question why litigation did not resolve this question until the 1990s.

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

In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), the Supreme Court held that the Fourteenth Amendment “does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.” *Id.* at 2607.

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

It would be inappropriate for me to express my opinion about a matter of active litigation.

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

The Supreme Court has held that the constitutional right to privacy protects a woman's right to use contraceptives. *Griswold v. Connecticut*, 381 U.S. 479 (1965). If confirmed, I would faithfully follow and apply all precedent of the Supreme Court and the Fifth Circuit on this issue, including *Griswold*.

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

The Supreme Court has held that the constitutional right to privacy protects a woman's right to obtain an abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I would faithfully follow and apply all precedent of the Supreme Court and the Fifth Circuit on the issue, including *Casey* and *Roe*.

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

The Supreme Court has held that the Constitutional right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders. *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully follow and apply all precedent of the Supreme Court and the Fifth Circuit on this issue, including *Lawrence*.

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

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

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage

thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

Courts have applied the Constitution to a changing society. *See e.g., Riley v. California*, 134 S. Ct. 2473, 2485-85 (2014). If confirmed and faced with this question in court, I would have to follow the precedent of the Supreme Court and the Fifth Circuit, in addition to the Federal Rules of Evidence, when considering and evaluating the evidence presented by the litigants.

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

Rule 702 of the Federal Rules of Evidence provides that an expert may testify “[i]f the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue.” *See also Daubert v. Merrell v. Dow Pharmas., Inc.*, 509 U.S. 579 (1993).

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?

While this is a question of academic interest, as a district court judge I would be bound by the seminal and important precedent of *Brown v. Board of Education*.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited May 2, 2018).

As a civil trial lawyer and mediator for over three decades, I have not had the occasion to consider this question.

- 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?

As a district court judge in Texas, the meaning of a given constitutional provision is whatever the Supreme Court and Fifth Circuit say it is. And if confirmed, I will faithfully follow all precedent from these courts.

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

Please see my response to Question 5(c).

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

In addition to the text of the Constitution and historical documents providing meaning of the text, I would faithfully follow and apply United States Supreme Court and Fifth Circuit precedent defining the contours of a constitutional provision.

- 6. From 2008 to 2017, you served on the Texas Federal Judicial Selection Committee. You noted that "this is a very important committee, because we screen all of the applicants who desire to become a federal judge. The very people who will be applying, hopefully, not rewriting the Constitution. And by the way, I am a strict constructionist when it comes to the United States Constitution. I believe . . . that it says what it means. It doesn't mean whatever someone in a robe says it should mean." In addition, in a 2009 speech during your introduction of the Chair of the Republican Party of Texas, you emphasized the importance of "securing conservatism on the Court."

- a. As a member of the Section Committee, when you reviewed applicants, please describe in detail the criteria you used to screen and evaluate applicants, including any specific judicial philosophy or ideological viewpoints.

In evaluating an applicant during my service on the bi-partisan Texas Judicial Selection Committee, I asked myself many questions, including the following: Does the applicant have a good reputation among member of the Bar and Judiciary? Does the applicant, by experience, demonstrate an ability to understand substantive and procedural rules of law? Does the applicant have the ability to set aside personal, political, or philosophical views and decide the case based solely on the evidence, pleadings, arguments of counsel, and applicable law? And, most importantly, will the applicant treat all people with dignity and respect, and with the applicant treat all litigants or parties with equal justice and fairness under the law? I did not look for candidates with any specific philosophy or viewpoint.

- b. What did you mean by your reference to "securing conservatism on the Court"? In your answer, please explain your intended meaning of the term "conservatism."

Please see my response to Question 28 of Senator Feinstein.

7. A necessary attribute of a federal judge is a rigorous commitment to factual accuracy. In remarks made in May 2012 at a Tea Party Forum, you stated that the Affordable Care Act (ACA) would “create [federal] agencies that get between you and your doctor [and] lead to the rationing of healthcare.” In addition, in a May 2012 debate, you asserted that the ACA would send the federal government into bankruptcy.

- a. What evidence did you evaluate before reaching your conclusions about the law?

Please see my response to Question 3(b) of Senator Feinstein.

- b. Do you agree that these statements are not factually accurate?

Please see my response to Question 3(b) of Senator Feinstein.

8. In your hearing, you were asked several times about implicit bias.

- a. What is your understanding of implicit bias?

Implicit bias occurs when someone holds negative associations in his or her mind, even though he or she may outwardly and consciously reject stereotypes or even support anti-discrimination efforts. In the area of race relations, implicit bias could affect how people act with people of another race. For example, a person with implicit bias may show less warmth or welcoming behavior toward members of other races. Moreover, such person may prejudice in a negative way a member of other races.

- b. Based on your understanding of what implicit bias means, do you agree that it can impact decision-making in the criminal justice system?

As I mentioned in the hearing, articles have been written indicating that implicit bias can impact decision-making in the criminal justice system.

9. Do you agree that it is unconstitutional to prevent some or all Muslims from entering the United States based on religion?

To the extent you are referring to President Trump’s executive order that is currently the subject of litigation, *see, e.g., Trump v. Hawaii*, No. 17-695 (S. Ct.), it would be inappropriate for me to comment on a matter of pending litigation under the Code of Conduct for U.S. Judges. To my understanding, however, the executive order does no such thing, and while this hypothetical seems far-fetched, it is inappropriate for me to comment on any matter which might be the subject of litigation in the future.

10. Do you agree that preventing some or all Muslims from entering the United States based on religion would violate the Immigration and Nationality Act INA?

Please see my response to Question 9 above.

11. A 2014 report by Justin Levitt published in the *Washington Post* (available at https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.dc645a28fb6b) found that since 2000, there were only 31 credible allegations of voter impersonation, during a period in which there were 1 billion ballots cast. Meanwhile, the Department of Justice has been involved in many successful cases against jurisdictions that violate the Voting Rights Act.

a. Do you agree that laws passed with the stated purpose of protecting “voter integrity” can suppress the votes of racial minorities?

Under the Code of Conduct for U.S. Judges, it would be inappropriate for me to comment on a matter that is in the court system or that could come before the court. *See* Code of Conduct for U.S. Judges, Cannon 3A(6).

b. In contrast to the data, you expressed concern in a May 2015 speech about “widespread voter fraud.” Do you stand by these remarks, and if so, what evidence do you have to support this claim?

Please see my response to Question 8 of Senator Feinstein.

c. At a July 2013 rally, you described the Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), as a “victory.” Please explain in detail why you consider this legal decision to be a victory.

Please see my response to Question 9(a) of Senator Feinstein.

Questions for the Record
For Michael Truncale, Nominee to the Eastern District of Texas
Senator Mazie K. Hirono
May 2, 2018

1. At your hearing, I asked you about a May 2014 speech you stated your belief in widespread voter fraud. In that speech, you said, “Have you forgotten about the relentless attempts to make our elections a joke by allowing widespread voter fraud?” In September 2014 remarks you said that “voter fraud makes a mockery of our elections” and that voter ID laws are needed “so that everyone’s vote is protected from being diminished by someone who votes several times.”

You touted voter fraud in order to push for and defend voter ID laws, yet when I asked you what the factual basis of your claims, you sought to dismiss this as a “political matter,” while citing vague and anecdotal evidence. I asked you about this because in fact widespread in-person voter fraud has been debunked numerous times. Despite multiple efforts to find proof of voter fraud, including President Trump’s embarrassing and now disbanded commission led by Kris Kobach, motivated searchers have never found evidence of more than a handful of instances of in-person voter fraud.

- a. **What research or facts were you relying on to conclude that our elections are a “mockery” and a “joke” because of widespread voter fraud?**

Please see my response to Question 8 of Senator Feinstein.

- b. **A district court judge needs to weigh facts, credit evidence, and apply the law to those facts. What does your endorsement of these widely and long-debunked claims say about your ability to make those kinds of judgments?**

As an attorney with over three decades of trial practice, I am keenly aware of the various burdens of proof required to prove claims and assertions in court. Likewise, I have extensive experience in the application of Rules of Procedure and Evidence, including the standards for the admission of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals*, and other precedent pertaining to the admissibility of evidence and the weight to be given to such evidence. If I am so fortunate to be confirmed as a federal district judge, I will use these legal standards, rules, and procedures to rule on the admissibility of evidence and to evaluate the weight and credibility of evidence.

2. I am also concerned by your public advocacy of the myth of widespread voter fraud because it has been used, as in Texas, to justify creating barriers to voting, which often make it harder for minorities and other vulnerable populations to vote.

Let’s talk about the Supreme Court’s narrow 5-4 decision in *Shelby County v. Alabama* striking down key parts of the Voting Rights Act. When Congress reauthorized the key expiring provisions of the landmark Voting Rights Act in 2006 it did so nearly unanimously after gathering testimony and other evidence in over 20 hearings and thousands of pages. That evidence clearly established the continuing need for Section 5 to ensure that the Constitution’s guarantees of equal access to the political process, regardless of race, would not be undermined by discriminatory practices. And yet, in *Shelby County*, the Roberts Court

ignored this evidence and the Court's long precedent, made its own determination about the value of the extensive evidence reviewed by Congress, and struck down these core provisions.

- a. At a July 2013 rally, you described the U.S. Supreme Court's decision in Shelby County as a "victory." **Why did you consider that decision a victory and for whom?**

Please see my response to Question 9 of Senator Feinstein.

3. In over 20 hearings and 40,000 pages, Congress found extensive evidence showing the continuing need for the pre-clearance provisions of the Voting Rights Act. We now know that Congress got it right and the Supreme Court got it wrong in Shelby County about the continuing need for Section 5 of the Voting Rights Act. Immediately after the Shelby County decision numerous states including your state of Texas that were previously covered by Section 5 immediately passed onerous voter ID laws and other barriers than affected the right to vote of thousands of Americans. Courts have found that some of these laws were enacted with discriminatory purpose, not only discriminatory intent.

- a. At a 2013 rally, you committed to continuing to "take action" against what you characterized as efforts by the Obama Administration to "ignore the decision" in Shelby County. **Do you believe Voter ID laws and other restrictions on voting enacted after Shelby County were the right action to take?**

Please see my response to Question 3(b) of Senator Feinstein.

- b. **What evidence do you have of the widespread voter fraud you told audiences makes a "mockery" of our elections justifying onerous Voter ID laws rather than the evidence found by Congress and borne out in our elections that barriers to voting impact the ability of thousands of Americans to vote?**

Please see my response to Question 8 of Senator Feinstein.

4. **If you are confirmed as a judge, how can you assure us that you understand that the Voting Rights Act of 1965 enforced the guarantees of equality enshrined in the 14th and 15th Amendments, and that the law is meant to protect the right of every American to vote, regardless of race or ethnicity?**

If I am so fortunate to be confirmed, I will faithfully follow and apply the Fourteenth and Fifteenth Amendments to the Constitution, the Voting Rights Act of 1965, and all relevant precedents of the Supreme Court and Fifth Circuit.

5. The Supreme Court's unanimous decision in *Brown v. Board of Education* is rightfully celebrated as one of the landmarks of American law. The Court's decision that having separate public schools for black and white children is an unconstitutional violation of the Equal Protection Clause of the 14th Amendment laid the groundwork for the Civil Rights Act, the Voting Rights Act and so many of the pillars of the civil rights movement. That is why I was so surprised to see at your hearing that you would not say that you believe it was correctly decided.

When asked by Senator Blumenthal whether you believe *Brown* was correctly decided, you refused to answer even though you acknowledge that segregation was wrong.

All Supreme Court nominees who have been asked about *Brown v. Board* have testified that they believe it was correctly decided, including Justice Gorsuch just last year. So it is perplexing and troubling that you will not answer. In order to assess your commitment to applying the law and the Constitution, we need to make sure that you understand it.

- a. Do you understand and agree with the Court’s interpretation of the Constitution in *Brown v Board of Education*, that racial segregation under the law is a violation of the Equal Protection Clause of the 14th Amendment?**

Segregation and racism have no place in our society. *Brown v. Board of Education* is a fundamental, important, and well-established precedent of the United States Supreme Court. As I stated in my hearing, the concept of “separate but equal,” enunciated in *Plessy v. Ferguson* and rejected in *Brown v. Board of Education*, was never equal and it created a horrible stigma for an entire race of people. If I am so fortunate to be confirmed, I would faithfully and joyfully apply the precedent of *Brown v. Board of Education*.

- b. As a matter of constitutional interpretation do you understand and believe that racial discrimination is a violation of the Equal Protection Clause of the 14th Amendment, so that you would apply that legal understanding to cases that come before you?**

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

- c. Just a few years ago *Obergefell v. Hodges* confirmed the right for people of the same sex to get married by applying the precedent from *Loving v. Virginia* that laws preventing black and white people from getting married violated the Due Process Clause and Equal Protection Clause of the 14th Amendment. That case was narrowly decided 5-4, so it is clear all the Justices did not agree with the majority’s interpretation of the application of precedent interpreting the 14th Amendment even though it is now the Supreme Court’s precedent. Do you understand and agree that, as the Supreme Court decided in *Obergefell*, the fundamental right to marry is protected by the Due Process and Equal Protection Clauses of the 14th Amendment, and would you be able to apply that precedent to the facts of cases that come before you if you are confirmed?**

Yes.

6. As a candidate for Congress in 2012, here is how you describes what you consider to be the danger posed by immigrants from Mexico. You said:

“We have all sorts of bad influences coming in [through the US-Mexico border]. We have drugs. We have illegal gangs. There is the possibility of bombs.”

You also said you wanted to put “boots on the ground” at the border because “we must not continue to have the magnets coming in.” I know there has been some question about whether you described these immigrants as “maggots” or “magnets” and I take you at your word that you called them “magnets,” but I still have serious concerns that this is your view of immigrants who have come to this country.

- a. What did you mean when you referred to immigrants as “magnets?”**

Please see my response to Question 3(a) of Senator Feinstein.

- b. If your view of people who have immigrated to this country is that they are “bad influences” and “magnets” how can litigants raising issues involving immigration be confident they will be treated fairly in your courtroom?**

Respectfully, I do not agree with your characterization of my comments. I come from a family of immigrants and truly appreciate the role and importance of immigrants in our society. I do not believe them to be bad people.

7. According to your notes for a June 2012 speech you gave at the Galveston County Republican Party Convention, you said that the United States must “secure the border” with Mexico because it is “flooded with drugs [and] gangs.” Your notes also said: “Opposed to Dream Act—Perm. Residence Instate Tuition—for illegals.” **Given your stated opposition to the DREAM act, to permanent residence for DREAMers and to any protection for the people you call “illegals” or in other contexts “magnets,” will you recuse yourself if any cases on these topics should come before you?**

Please see my response to Question 3(c) of Senator Feinstein.

8. At a May 2012 Tea Party Forum, you expressed support for the controversial Arizona law SB 1070. That law required undocumented immigrants to possess documentation at all times or face criminal charges. It permitted law enforcement officers to stop, detain, and arrest individuals if there was a “reasonable suspicion” that an individual was in the United States illegally.
- a. In your decision to support SB 1070, were you mindful of concerns raised by numerous civil rights organizations that the law constituted racial profiling and, if so, how did you resolve these concerns to be able to support the law?**

Respectfully, this question misconstrues my remarks. I did not “support . . . SB 1070.” I made general remarks regarding border security and passing reference to then-Attorney General Eric Holder’s Congressional testimony regarding SB 1070. In addition, please see my response to Question 3(b) of Senator Feinstein.

- b. We have seen numerous incidents in recent years showing the need to restore trust between minority communities and the police. In deciding to publicly support SB 1070, did you take into account concerns that the law would have a negative impact on public safety and law enforcement by exacerbating tensions between police and communities and diverting law enforcement resources to these kinds of un-American citizenship checks?**

Please see my response to Question 8(a) above.

9. You have been a strong advocate against constitutional protections for a woman’s right to an abortion. Notes for remarks you made during your 2012 campaign remarks read: “We must stop harming and killing children in and outside of the womb.” You touted being the “only candidate” at a rally in protest of the 39th anniversary of *Roe v. Wade* and you expressed your opposition to federal funding for stem cell research. At a May 2012 event at the Lake Jackson TEA Party Forum, you said, “I don’t think we should be funding Planned Parenthood. I’d cut them off.”

In your notes for April and May 2014 speeches, you wrote that Wendy Davis, the former Democratic candidate for Governor of Texas, “wants to kill babies five months into term” and “Wendy Davis’ claim to fame-kills little girls.”

- a. **How can we believe that you would be able to set aside such strongly-held views and apply the Supreme Court’s well settled precedent from *Roe v Wade* and *Planned Parenthood v. Casey* that a woman’s right to choose to terminate her pregnancy is protected by the Constitution?**

Please see my response to Question 3(b) of Senator Feinstein. I will add that as a district judge, I will faithfully apply and follow the well-settled precedent of the Supreme Court in *Roe v. Wade* and *Planned Parenthood v. Casey*.

- b. **If confirmed, will you recuse in cases involving the application of the precedent from *Planned Parenthood v. Casey*?**

Please see my response to Question 3(c) of Senator Feinstein.

- c. **At minimum, would you recuse yourself from any case in which *Planned Parenthood* is a party? If not, why not, since you have publicly stated your belief that the government should cut off funding for *Planned Parenthood*. How could any reasonable litigant believe you would be able to set aside these beliefs and preside fairly over the case?**

Please see my response to Question 3(c) of Senator Feinstein.

- d. **Let’s assume that you will be able to set aside your obvious personal beliefs as well as your years of devoted and consistent political advocacy for them. If taking this job means you that you would have to not only set aside views so strong that you equate abortion to the murder of “babies” and “little girls”, but that you would be required to make decisions directly at odds with them to “apply the law”, why do you want to take it?**

Becoming a federal district judge, and serving my country and the people of the Eastern District of Texas, would be the greatest honor and privilege of my life. Being a judge of ethics and integrity, and a judge who treats every person who comes before the court with dignity and respect, would be the culmination of all I have endeavored to do in my over three decades legal career, which I will note is different than my short-lived political career.

**Nomination of Michael Truncale to the
United States District Court for the Eastern District of Texas
Questions for the Record
Submitted May 2, 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?

Empirical studies have indicated that racial disparities and biases exist in the criminal justice system. Illegal bias motivated by racism should have no place in our society or in our criminal justice system. As a judicial nominee, however, it would be inappropriate for me to give the impression that I favor any one particular study. If confirmed, I am committed to preventing racism or illegal bias motivated by racism from existing in matters before the court.

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

Please see my answer to Question 1(a).

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

I have not, as practice over the last three decades has been focused primarily on a variety of civil law 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.

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.

My understanding, generally, is that many factors contribute to rates of crime and incarceration. As a practicing trial attorney and mediator during the past three decades, I have not had the opportunity to study the issue in detail. Therefore, I do not know if a direct link exists between increases in a state's incarcerated population and decreased crime rates in a particular state.

- 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 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. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.⁷ One study that examined over one billion ballots cast between 2000 and 2014, found only 31 credible instances of voter fraud.⁸ Despite this, President Trump, citing no information, alleged that widespread

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

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

voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

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

Please see my response to Question 8 of Senator Feinstein.

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

Please see my response to Question 8 of Senator Feinstein.

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

This is an active matter of litigation, and I am therefore precluded from commenting on it as a judicial nominee.

5. In June 2011 remarks before the Golden Triangle Republican Women, you called President Barack Obama, our nation’s first black president, “an un-American imposter.”

- a. What did you mean by that comment?

Please see my response to Question 18 of Senator Feinstein.

- b. For years, President Trump pushed the racist conspiracy theory that President Obama was not born in the United States. Do you believe that President Obama was born in the United States?

I do. It is my understand that President Obama was born in the State of Hawaii.

- i. Do you believe that the birther conspiracy theory was racist?

I do not subscribe to the birther conspiracy theory, nor have I studied the basis of that theory.

6. The Black Lives Matter movement was started in 2013 after George Zimmerman was cleared for the killing of Trayvon Martin. Since then, countless unarmed black men have been killed by police and oftentimes it is caught on camera. People who affiliate with Black Lives Matter care deeply about the injustices occurring in so many communities and want to see a more equitable justice system that treats all people with dignity and respect. You were a commentator during the RNC televised debates in 2016. In your notes for those appearances, you suggested that people who support the Black Lives Matter movement and/or those who protest police brutality “incite police shootings.” In

the same notes, you also criticized Democrats for “honor[ing] moms of people shot by cops” but not including “moms, etc, of cops killed by people inspired by B.L.M.M.”

- a. Do you believe supporters of Black Lives Matter and those who protest police brutality “incite police shootings?” If not, why did you say/write that in 2016?

Please see my response to Question 24 of Senator Feinstein.

- b. Why should someone who affiliates with the Black Lives Matter movement or someone who protests police brutality feel that you will be a neutral arbiter of their case given these comments?

Please see my response to Question 24 of Senator Feinstein. I will add, though, that my family endured great difficulties after emigrating to America. As such, they made sure that I understood that all people should be loved, respected and treated equally, regardless of race, color, or creed.

7. While you were a candidate for the U.S. House of Representatives, you referred to undocumented immigrants coming across the Southern border as “maggots.” Many people who show up at the Southern border are Central American people who are legitimately seeking asylum due to horrible violence and oppression in their home countries.

As a proud grandson of immigrants, I did not refer to undocumented immigrants as “maggots.” I have never referred to anyone as a “maggot.” I would never even think it.

- a. Do you believe that asylum seekers from Central America are “maggots?”

Absolutely not.

- b. Why would you refer to a fellow human as a “maggot?”

Never.

8. You supported a controversial Arizona law, which required undocumented immigrants to possess documentation at all times and permitted law enforcement officers to stop, detain, and arrest individuals if there was a “reasonable suspicion” that an individual was in the United States illegally.

Please see my response to Question 8 of Senator Hirono.

- a. Do you believe it is constitutional to racially profile someone and stop someone if you reasonably suspect he or she is in the country illegally? If so, please cite what Supreme Court precedent you are relying on in coming to this conclusion.

As a judicial nominee, it would be inappropriate for me to comment on matters that may come before me in my court. But I will state that I will faithfully follow all relevant Supreme Court and Fifth Circuit precedent regarding the Fourth Amendment

**Questions for the Record from Senator Kamala D. Harris
Submitted May 2, 2018
For the Nominations of**

Michael J. Truncale, to be United States District Judge for the Eastern District of Texas

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

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

The process of sentencing a defendant is governed by a careful application of the rules and procedures required by statute, binding case law, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. As part of this process, I would review carefully the Presentence Report and relevant filings made by the government and the defendant. I would consult with the presentence officer, review the applicable sentencing guidelines and case law pertaining to the guidelines, and consider the factors set forth in 18 U.S.C. § 3553(a). In addition, I would listen to or read any victim statements, and consider the presentations of counsel, the defendant, and relevant parties.

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

Please see my answer to Question 1(a).

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

Although the Guidelines are advisory, the Guidelines and Supreme Court precedent, including *U.S. v. Booker*, indicate circumstances and considers that could justify a departure or variance from the ranges specified in the Guidelines. Part K of Section 5 of the Guidelines sets forth circumstances in which it is appropriate to make departures above or below the sentencing ranges specified in the Guidelines. Furthermore, I would consider the factors listed in 18 U.S.C. § 3553(a) to determine whether a sentence above or below the Guideline ranges could be imposed. After analyzing the Guidelines and precedent, I would provide advanced notice if required by Federal Rule of Criminal Procedure 32(h). Finally, I would carefully consider the arguments of the parties before making a departure under the Guidelines.

d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than

discretionary or indeterminate sentencing.¹

i. Do you agree with Judge Reeves?

I have not familiarized myself with Judge Reeves' statement or the basis for his conclusion. This appears to be a policy matter which is for consideration by the Congress. As a judicial nominee, I am prohibited from expressing an opinion on the merits or non-merits of mandatory minimum statutes. As a federal district judge, I would be required to follow the law of mandatory minimums without injecting any personal views on their deterrent effect.

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

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

iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.

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

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

1. Describing the injustice in your opinions?

Mandatory minimum sentences have created significant and important debate in our country. However, Congress has the power to enact legislation on mandatory minimum sentences. The Executive Branch has the power to charge individuals with crimes potentially punishable by mandatory minimum sentences. As a judicial nominee, I am restrained from commenting on policy matters that are in the domain of other branches of government.

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

Please see my response to Question 1(d)(iv)(1).

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

² See, e.g., "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

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

Please see my response to Question 1(d)(iv)(1).

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

Yes.

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

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

A judge must be impartial and “administer justice without respect to persons, and to do equal right to the poor and to the rich.” *See* 28 U.S.C. § 453. Judges must ensure that judicial proceedings are fair, impartial, and equitable. It is imperative that a judge’s actions demonstrate to every person before the court, including a party, attorney, or family member of an accused defendant, that justice is being administered in a fair and equitable manner. If confirmed, I would be committed to this judicial imperative.

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

It is my understanding and believe that racial disparities exist in the criminal justice system, for example in incarceration rates. It is incumbent upon judges to prevent bias from affecting proceedings in court. I consider that the oath I will take, if confirmed, not only requires me to “administer justice faithfully and impartially without respect to persons,” to not only apply to “equal right to the poor and to the rich,” but equal rights to persons irrespective of race.

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

- a. **Do you believe that it is important to have a diverse staff and law clerks?**

Yes.

b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?

Yes.