

Senator Chuck Grassley
Questions for the Record

Judge Brett Kavanaugh
Nominee, Associate Justice of the Supreme Court of the United States

1. I'd like to give you a chance to respond to some of the issues raised last week regarding contraceptives and abortion rights.
 - a. When responding to Senator Cruz's question about your opinion in *Priests for Life v. United States Department of Health & Human Services*, you said: "It was a technical matter of filling out a form, in that case with—that—they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were—as a religious matter, objected to." Why did you use the term "abortion-inducing drugs"?

RESPONSE: That was the position of the plaintiffs in that case, and I was accurately describing *the plaintiffs'* position. At the hearing, I was not expressing an opinion on whether particular drugs induce abortion; I used that phrase only when recount the plaintiffs' own assertions.

- b. Senator Blumenthal and others on the Committee asked you about a March 24, 2003 email in which you addressed legal scholars' views of *Roe v. Wade*. Please explain the context of that email. In particular, did you express any personal view in that email on whether *Roe v. Wade* was "settled law"?

RESPONSE: That email commented on the views of legal scholars. It did not describe my own views.

2. Last Tuesday, as the Committee recessed for a break, a man approached you and extended his hand as you left the hearing room. Media reports later identified the man as Fred Guttenberg, the father of a shooting victim from Marjory Stoneman Douglas High School in Parkland, Florida. Please explain your reaction to Mr. Guttenberg.

RESPONSE: As I was leaving the hearing room for a recess last Tuesday, a man behind me yelled my name, approached me from behind, and touched my arm. It had been a chaotic morning with a large number of protestors in the hearing room. As the break began, the room remained noisy and crowded. When I turned and did not recognize the man, I assumed he was a protestor. In a split second, my security detail intervened and ushered me out of the hearing room.

In that split second, I unfortunately did not realize that the man was the father of a shooting victim from Parkland, Florida. Mr. Guttenberg has suffered an incalculable loss. If I had known who he was, I would have shaken his hand, talked to him, and expressed my sympathy. And I would have listened to him.

3. During the hearings last week, Senator Leahy asked you about your role in the nomination of Judge William Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Since your hearing,

the media has reported on emails you wrote regarding that nomination while in the White House Counsel's Office, as well as the nomination of Judge Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit.

During your time in the White House Counsel's Office, were you the person primarily responsible for handling either of these nominations? If not, did you work with others in the White House Counsel's Office to support these nominations? If you did support these nominations, what sort of work did you perform?

RESPONSE: As I stated in response to written questions after my 2004 hearing, it is fair to say that all of the attorneys in the White House Counsel's Office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations. As I have accurately explained before, I was not the primary person in the Counsel's Office assigned to Judge Pryor's or Judge Pickering's nomination.

4. Senator Leahy asked you about former Judiciary Committee staff member Manuel Miranda. Senator Leahy asked whether you knew that Miranda took files without authorization from Democrats on the Senate Judiciary Committee. When you received these emails, did you know that some of the materials you received from Mr. Miranda had been taken from the files of Senate Democrats without their authorization?

RESPONSE: No.

5. During the hearings last week, Senator Leahy asked you about a September 17, 2001 email you sent to John Yoo, an attorney in the Office of Legal Counsel at the Department of Justice. In the email, you asked about legal research regarding potential surveillance techniques.

- a. Please explain the context of that email.

RESPONSE: As I explained at the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office. The email on September 17, 2001, mere days after the attacks, was sent in that context.

- b. Please explain that email in light of your testimony to the Committee in 2006 regarding the National Security Agency's (NSA) Terrorist Surveillance Program.

RESPONSE: As I explained at the hearing last week, I testified accurately in 2006 that I did not learn about the Terrorist Surveillance Program, or TSP until I read about it in a *New York Times* article in December 2005. I was not read into that program. As I understand it, the September 17, 2001, email was not referring to the TSP, which did not exist at that time.

The Honorable Jeff Flake
Questions for the Record
U.S. Senate Judiciary Committee
“The Nomination of Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States”
September 10, 2018

1. Should a president be able to use his authority to pressure executive or independent agencies to carry out his directives for purely political purposes?

RESPONSE:

No one is above the law.

Many of the greatest moments in Supreme Court history have come when the independent judiciary has stood up for the principle that no one—not even the president—is above the law. Frequently, these moments have occurred during times of political crisis. For example, the *Youngstown Steel* case arose during the Korean War. President Truman seized steel mills to aid the war effort. His action was well-intentioned, but the Supreme Court stepped in and said the President lacked authority to seize private property. As Justice Jackson’s landmark concurring opinion in that case made clear, the Commander-in-Chief remains subject to both the Constitution and the laws passed by Congress, even in the national security context.

Another example of this principle is *United States v. Nixon*, a unanimous decision authored by Chief Justice Burger and joined by two other Nixon appointees holding that President Nixon had to produce the tapes. Likewise, in *Clinton v. Jones*, two of President Clinton’s appointees to the Court ruled against him, holding that a sitting president does not have the power to delay civil litigation against him in his personal capacity for unofficial acts.

The importance of enforcing constitutional and statutory constraints on the Executive also arose in *Hamdan v. United States*, in which I wrote the opinion for the D.C. Circuit. That military commission prosecution was initially brought by President George W. Bush’s Administration against Salim Hamdan, an associate of Osama bin Laden’s. Hamdan challenged his conviction on the ground that it violated *ex post facto* principles. Although the case was a marquee prosecution for the Bush Administration in the war on terror—and was very important to the President who appointed me to the D.C. Circuit—I concluded that Hamdan’s argument was correct, and I wrote an opinion vacating his conviction.

For courts to have the authority to stand up to the other branches, it is critical that they maintain independence. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

The independence of the judiciary is critical to the confidence the American people have in our system of government. As you have eloquently said, “[judicial] independence goes both ways,” which is why “[e]lected politicians shouldn’t seek to interfere with the judicial power and the courts shouldn’t interpose themselves into political affairs.” As a federal judge, I appreciated how you explained during the hearing last week that you “certainly do not think it is in our interest to bring the element of politics any closer to the judiciary.” That is why I cannot comment on issues likely to come before me or on current political controversies, in keeping with the nominee precedent from all eight sitting Supreme Court Justices. Indeed, this is why, as a judge, I no longer vote in elections.

In my experience serving in the Executive Branch, I worked with countless men and women who were deeply dedicated to good government and to serving the public with the highest integrity. These men and women worked early mornings and late nights to serve the American people and give them the best government possible. Throughout that experience, my colleagues and I lived by the principle that everything the Government does must be based on sound legal principles and a legitimate factual basis. Pure politics is never enough. That’s a principle I have lived by throughout my entire career, and it is one I will continue to live by whether I continue as a circuit judge or am confirmed to the Supreme Court. I have never and will never bow to public pressure from any president, any Senator, or any other political actor—and I am confident that my colleagues in the judiciary will never do so either.

Nomination of Brett Kavanaugh to be Associate Justice of the Supreme Court
Questions for the Record
Submitted September 10, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. You have referred to *Roe v. Wade* as “settled law.”
 - a. **Can the Supreme Court overrule a longstanding decision even if it is considered settled law?**
 - b. **Was *Abood v. Detroit Board of Education* (1977) settled law before 2016?**
 - c. **Was *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) settled law before 2006?**
 - d. **Was *Michigan v. Jackson* (1986) settled law before 2008?**
 - e. **Was *Austin v. Michigan Chamber of Commerce* (1990) settled law before 2009?**

RESPONSE: As discussed at the hearing, “the judicial power clause of Article III” and “Federalist 78” make clear that respect for precedent is “part of the proper mode of constitutional interpretation.” If confirmed, I would respect the law of precedent given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

2. When we met in my office, I raised concerns about your potentially being the fifth vote to overturn *Roe*. You said that it is important to be aware of the real-world implications of Court decisions. However, you have never lived in a world where women did not have safe, legal reproductive care.
 - a. **Please explain your understanding of what it means for a woman to be able to control her reproductive life.**
 - b. **What is your understanding of how women are being affected in states in which access to reproductive care has been curtailed?**

RESPONSE: As I discussed during the hearing, I understand the importance that people attach to *Roe v. Wade*, the depth of feelings about the decision, and the real-world importance of the issue. Both *Roe* and *Casey* are precedents of the Supreme Court entitled to respect under the law of precedent. Importantly, *Roe* has been reaffirmed many times over the past 45 years, including in *Casey*, which specifically analyzed the stare decisis factors at great length and is itself a precedent on precedent.

3. If *Roe v. Wade* were overruled, and the decision whether to permit abortions was left to the states:
- a. **Should there be an exception on abortion bans to protect the health or life of the mother?**
 - b. **Would an abortion ban without such an exception be constitutionally permissible?**
 - c. **Should there be an exception on bans on abortion in cases of rape and incest?**
 - d. **Would an abortion ban without such an exception be constitutionally permissible?**

RESPONSE: As a sitting judge and nominee, principles of judicial independence prevent me from speculating about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

4. In a 2017 speech at the American Enterprise Institute, you described Justice Rehnquist as your “first judicial hero.” You said that Justice Rehnquist “clearly wanted to overrule *Roe* and *Casey* and did not have the votes.” You also praised Justice Rehnquist for “stemming the tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” (9/18/2017 Speech at AEI – From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist).
- a. **What are the judicially created “unenumerated rights” you were referring to?**

RESPONSE: The *Glucksberg* case involved the claimed right to assisted suicide. As I discussed at the hearing, it is well-settled that the Constitution protects unenumerated rights. This speech was intended to spell out the consequential impact of Chief Justice Rehnquist’s work, by describing “five different areas of his jurisprudence, where he had helped the Supreme Court achieve . . . a common sense middle ground that has stood the test of time” I did not discuss particular unenumerated rights in my speech. Rather, in describing Chief Justice Rehnquist’s important contributions to the law with *Washington v. Glucksberg*, 521 U.S. 702 (1997), I agree with Justice Kagan that the decision provides the primary test that “the Supreme Court has relied on for forward-looking future recognition of unenumerated rights”—and *Glucksberg* cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

5. In that same speech, you also said: “In case after case during law school, I noticed something. After I read the assigned reading, I would constantly make notes to myself: Agree with Rehnquist majority opinion. Agree with Rehnquist dissent. Agree with Rehnquist analysis. Rehnquist makes a good point here. Rehnquist destroys the majority’s reasoning here. At that time, in 1987, Rehnquist had been on the Court for 15 years, almost all of it as an associate justice. And his opinions made a lot of sense to me. In class after class, I stood with Rehnquist. That often meant in the Yale Law School environment of the time that I stood alone. Some things don’t change.”

a. Which Justice Rehnquist dissents did you agree with in law school?

RESPONSE: Please see my response to Question 4. My speech specifically noted that “I do not agree with all of [Chief Justice Rehnquist’s] opinions.” As I explained at the hearing, principles of judicial independence make it inappropriate for me, like Justice Kagan, to give a thumbs up or thumbs down on particular opinions. That said, the precedential holdings of the Supreme Court are those contained in majority opinions, not dissents.

b. Was Justice Rehnquist’s dissent in *Roe v. Wade* one of the dissents with which you agreed in law school?

RESPONSE: See my answer to Question 5.a.

c. If so, has your view changed since then?

RESPONSE: See my answer to Question 5.a.

d. Was your statement that you “stood alone” and “some things don’t change” an acknowledgement that your views are outside the mainstream?

RESPONSE: No.

6. You have called Justice Scalia one of your “heroes” in a number of speeches over the years. In one of these speeches from 2016, you praised Justice Scalia’s view that “courts have no legitimate role . . . in creating new rights not spelled out in the Constitution.” You asked the audience to think about Justice Scalia’s dissent in *Casey* on abortion. (6/2/2016, “Remembering Justice Scalia,” George Mason University). In *Casey*, Justice Scalia said “the issue is whether [the right to abortion] is protected by the Constitution of the United States. I am sure it is not.” (*Casey*, at 980).

a. Is the right to decide whether to continue a pregnancy a Court created right?

RESPONSE: In *Roe v. Wade*, the Supreme Court grounded a right to abortion in its understanding of “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.” 410 U.S. 113, 153 (1973). The holding of *Roe* has been reaffirmed many times since 1973, including in *Casey*, and is entitled to respect under the law of precedent. *Casey* is precedent on precedent. The reference in my speech set forth above merely attempted to summarize Justice Scalia’s jurisprudence in certain areas.

b. What “new rights not spelled out in the Constitution” do you believe the Court has created?

RESPONSE: This reference in my speech set forth above merely attempted to summarize Justice Scalia’s jurisprudence in certain areas.

7. Even if *Roe v. Wade* is not completely overruled, the “undue burden” test from *Planned Parenthood v. Casey* might be applied in a manner that severely restricts access to reproductive care.

a. What’s the practical difference to women if *Roe* is not overruled but gutted?

RESPONSE: *Roe v. Wade* is a precedent of the Supreme Court entitled to respect under the law of precedent. Importantly, *Roe* has been reaffirmed many times over the past 45 years, including, most recently, in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ____, 136 S.Ct. 2292 (2016). *Casey*, moreover, specifically analyzed the stare decisis factors at great length in reaffirming *Roe* and is itself a precedent on precedent. As a nominee, it would not be proper to speculate about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

b. What has been the practical impact of the undue burden test on women’s access to reproductive care in states with strict limits on abortion?

RESPONSE: It would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their issue in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

8. In an interview with CNN, Senator Graham said about you and *Roe*, “there is a process to overturn a precedent and I think he understands that process.” (Graham on CNN State of the Union, 9/2/18).

a. Was *Roe* discussed at your mock hearings in preparation for your nomination hearing?

RESPONSE: In preparation for the hearing, various people, including Senators, Administration personnel, and former law clerks provided advice on a range of legal matters. While I received a wide range of advice, the answers I gave at the hearing were my own.

b. What were you advised to say?

RESPONSE: Please see my response to Question 8.a.

9. One of your former law clerks wrote that when it comes to “enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh.” (Sarah E. Pitlyk, *Judge Brett Kavanaugh’s Impeccable Record of Constitutional Conservatism*, National Review (July 3, 2018))

- a. Is that an accurate assessment of your record? If not, how would you qualify the statement?**

RESPONSE: I speak for myself. I am an independent judge and have been for 12 years. My opinions show that independence.

10. In your opening statement on Tuesday, September 4, you said you would “interpret the Constitution as written, informed by history and tradition.” As you know, the history and tradition of this country has disfavored women, minorities, Native Americans, immigrants, LGBT people, individuals with disabilities, and many more.

- a. When you said “history and tradition,” to whose history and tradition were you referring?**

RESPONSE: The Supreme Court has repeatedly stated that the Constitution “must be interpreted according to its text, by considering history, tradition, and precedent” *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

- b. How does your view of “history and tradition” take into account the fact that classes of people have historically been disfavored?**

RESPONSE: Please see my response to Question 10.a.

- c. Does the “history and tradition” of the United States include the decision on who to marry?**

RESPONSE: Please see my response to Question 10.a.

- d. Does the “history and tradition” of the United States include a woman’s right to use contraceptives?**

RESPONSE: Please see my response to Question 10.a.

- e. Does the “history and tradition” of the United States include a woman’s right to choose whether to terminate a pregnancy?**

RESPONSE: Please see my response to Question 10.a.

11. In *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the Supreme Court held that states cannot prohibit the use of contraceptives because doing so would violate a constitutional right to privacy. Senator Harris asked whether you believed that *Griswold* and *Eisenstadt* were correctly decided. You responded that you have “no quarrel” with Justice White’s concurrence in *Griswold*.

a. Is *Griswold* settled law?

b. Is *Eisenstadt* settled law?

c. What did you mean when you said you have “no quarrel” with Justice White’s concurrence in *Griswold*? Did you mean you agree with his concurrence, or something else?

RESPONSE: As I explained at the hearing, “Justice White’s concurrence in *Griswold* was a persuasive application of *Pierce* [*v. Society of Sisters*, 268 U.S. 510 (1925)] and *Meyer* [*v. Nebraska*, 262 U.S. 390 (1923)].” At the hearing, I said that I agreed with Chief Justice Roberts and Justice Alito about those cases.

12. Does a pharmacist have a constitutional right to refuse to fill a prescription for contraception on the basis of the pharmacist’s religious beliefs?

RESPONSE: This subject involves an area of ongoing litigation and is a matter that could come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

13. You testified: “Being a good judge means paying attention to the words that are written, the words of the Constitution, the words of the statutes that are passed by Congress. Not doing what I want to do, not deferring when the executive rewrites the laws passed by Congress, but respect for the laws passed by Congress, respect for the rule of law, the words put into the Constitution itself.”

a. Where in the text of the First Amendment text are businesses mentioned?

RESPONSE: As I said at the hearing, in my decision in *United States Telecom Association v. FCC*, I followed the Supreme Court’s *Turner Broadcasting* decision. Specifically, I explained in that opinion that “[t]he Supreme Court’s landmark decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner Broadcasting II*), established that those foundational First Amendment principles apply to editors and speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment.” 855 F.3d 381, 427 (D.C. Cir. 2017). *Turner Broadcasting* is a business. The Supreme Court has applied the First Amendment to businesses in many other cases. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

b. What in U.S. history demonstrates that the founding fathers intended the First Amendment to recognize religious beliefs of companies and businesses?

RESPONSE: Under existing Supreme Court precedent, some constitutional rights apply to businesses. I am bound to follow those precedents subject to the rules of precedent. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

14. The Affordable Care Act (ACA) plays a vital role for millions of Americans in this country. Thanks to the ACA, people across the nation can no longer be denied coverage by insurance companies because of preexisting conditions. Families throughout the country enjoy the security and certainty that comes with having quality health coverage. Jackson Corbin made precisely these points in his testimony on September 7, when he said: “If you destroy protections for pre-existing conditions, you will leave me and all the kids and adults like me without care or without the ability to afford our care — all because of who we are.” (Corbin Testimony at p. 3)

a. Do you believe Congress has the authority to enact legislation that prevents discrimination based on health status?

RESPONSE: As I explained in *Seven-Sky v. Holder*, 661 F.3d 1, 52 (2011), “[t]he elected Branches designed [the Affordable Care Act] to help provide all Americans with access to affordable health insurance and quality health care, vital policy objectives.” I further noted that “[c]ourts must afford great respect to that legislative effort and should be wary of upending it.” *Id.* at 53. Nevertheless, as I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment further on a matter that may come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

- b. At any point before or after your nomination to the Supreme Court, has anyone from the Trump Administration discussed with you your views on the Affordable Care Act or Congress’s ability to regulate the health insurance market more generally? If so, who and what was discussed?**

RESPONSE: I was asked questions similar to those posed by the Senators on the Senate Judiciary Committee during preparation for the hearing and during preparation for meetings with individual Senators. I have given no hints, forecasts, or previews, and I have made no commitments.

- c. During your nomination hearing, you spoke frequently of the fact that you were aware of or considered “real-world consequences” of judicial decisions. Have you ever experienced being denied coverage for a preexisting condition? Have you ever been denied health insurance? Have you or your family ever been uninsured?**

RESPONSE: No, as to me and my immediate family (my wife and daughters). I do not know as to other members of my extended family.

- d. If not, what steps have you taken to understand what it would be like if the Affordable Care Act were struck down?**

RESPONSE: Please see my response to Question 14.a.

15. In a September 2017 speech at the American Enterprise Institute (AEI), you praised decisions authored by Chief Justice Rehnquist striking down federal statutes on the grounds that they were beyond Congress’s Commerce Clause power. One of those decisions, *United States v. Lopez*, found the Gun-Free School Zones Act unconstitutional. The other, *United States v. Morrison*, held that parts of the Violence Against Women Act (VAWA) providing a federal civil remedy for victims of gender-motivated violence were unconstitutional. At AEI you said that these two decisions “were critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power.”

- a. Why was it “critically important” for the Supreme Court to strike down gun restrictions?**

RESPONSE: As explained in my answers to Questions 4 and 5, this speech was intended to spell out the consequential impact of Chief Justice Rehnquist’s work by describing “five different areas of his jurisprudence.”

- b. Why was it “critically important” for the Supreme Court to strike down the ability for victims of sexual violence to sue for civil damages in federal courts?**

RESPONSE: Please see my response to Question 15.a.

- c. **In light of your emphasis on considering real-world consequences, what do you believe are the real-world consequences of your narrow view of the Commerce Clause?**

RESPONSE: Please see my response to Question 15.a.

- d. **Specifically, what has been the impact of striking down that section of the Violence Against Women act?**

RESPONSE: Please see my response to Question 15.a.

- e. **What has been the impact of striking down the Gun Free Schools Act?**

RESPONSE: Please see my response to Question 15.a.

16. You also connected *Lopez* and *Morrison* to the Supreme Court's 2012 decision concerning the Affordable Care Act, *NFIB v. Sebelius*, saying: "Although it is not often the first thing discussed about [*NFIB v. Sebelius*], we do remember that a five-justice majority said that the Commerce Clause did not give Congress authority to require citizens to purchase a good or service." (*From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, Speech at AEI (Sept. 18, 2017))

- a. **Why did you think it is important to highlight that decision?**

RESPONSE: The *NFIB* case is of course an important precedent.

- b. **Do you believe the Court was correct in *NFIB v. Sebelius* in concluding that Congress does not have authority under the Commerce Clause to regulate health care?**

RESPONSE: As I explained at the hearing, principles of judicial independence make it inappropriate for me, like Justice Kagan, to give a thumbs up or thumbs down on particular opinions.

17. In your dissent in *Seven-Sky v. Holder*, a 2011 case concerning the constitutionality of the Affordable Care Act's individual mandate, you wrote the following: "Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." (*Seven-Sky v. Holder*, 661 F.3d 1, 50 n. 43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))

- a. **On what basis did you conclude that the President is the ultimate arbiter of whether a law "that regulates private individuals" is constitutional?**

RESPONSE: As I said at the hearing, footnote 43 of my opinion in *Seven-Sky v. Holder* refers to the concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, which says the executive branch has the "exclusive authority and

absolute discretion whether to prosecute a case.” And in *Heckler v. Chaney*, the Supreme Court said this principle applies to civil enforcement as well. The limits of prosecutorial discretion are uncertain.

b. Where in the Constitution is the President given this authority?

RESPONSE: In *United States v. Nixon* and *Heckler v. Chaney*, the Supreme Court recognized the power of prosecutorial discretion.

c. Has this conclusion ever been adopted by a majority in any Supreme Court decision? If so, which decision?

RESPONSE: Yes. In the criminal context, the Supreme Court has stated that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974). As I said at the hearing, the Supreme Court recognized that the doctrine of prosecutorial discretion applies in the civil context in *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985).

d. Is there any constitutional limit on the ability of a President to undermine or otherwise refuse to enforce duly enacted legislation?

RESPONSE: As I have explained, those limits are debated.

18. You have expressed opinions in the past about immunity of sitting presidents from investigation, indictment, and prosecution. Although you were asked about these issues during your hearing, your answers were unclear. Accordingly, please answer the following questions with a simple yes or no:

- a. Do you believe that the Constitution prohibits the criminal investigation of a sitting president?**
- b. Do you believe that a sitting president can be required to respond to a grand jury subpoena consistent with the Constitution?**
- c. Do you believe that the Constitution prohibits the indictment of a sitting president?**
- d. Do you believe that the Constitution prohibits the prosecution of a sitting president?**

RESPONSE: I discussed these issues at length at the hearing.

19. You have written that “the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even before a charge or trial.” (*In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013))

a. Do you believe the President’s pardon authority is subject to any limits?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

20. In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court said it is “settled” that a President’s conduct – before or while in office – can be investigated. The Court cited *U.S. v. Nixon* and said that a court may require a President to cooperate in the investigation of possible misconduct.

a. Was *Clinton v. Jones* correctly decided?

b. Have any Supreme Court rulings called it into question?

RESPONSE: *Clinton v. Jones* is a precedent of the Supreme Court entitled to all the respect due under the law of precedent.

21. You have stated: “it makes no sense at all to have an independent counsel looking at the conduct of the President.” (Georgetown Panel – Independent Counsel Statute Failure, Feb. 19, 1998)

a. Do you stand by that statement?

RESPONSE: As I discussed at the hearing, Congress decided not to reauthorize the independent counsel statute in part because of the significant flaws in the statute. As I also explained at the hearing, the appointment of an independent counsel under that now-expired statute is distinct from the appointment of a special counsel under separate statutory authority and Executive Branch regulations. I have repeatedly stated my approval of the general system of special counsels.

22. You have argued that “an independent counsel should never be appointed to prosecute the President because a sitting President should not be subject to criminal indictment.” (The President and the Independent Counsel, Georgetown Law Journal, July 1998)

a. Do you stand by that statement?

RESPONSE: Please see my response to Question 18.

23. You have said: “If the President were the sole subject of a criminal investigation, I would say no one should be investigating that at all.” (Independent Counsel Structure & Function, Georgetown Law Journal Symposium, Feb. 19, 1998.)

a. Do you stand by that statement?

RESPONSE: As I said at the hearing, no one is above the law, including a President. The primary dispute is over whether a President may be criminally prosecuted while he is in office or whether such a prosecution should instead be deferred until after a President leaves office. For 45 years, the Department of Justice has stated that a sitting President may not be indicted while in office. Regardless, the House and the Senate also possess the impeachment and removal powers.

24. During my questioning, I pointed out that when you worked in the Office of Independent Counsel Ken Starr investigating President Clinton, you argued for aggressive questioning of the President. But you have also taken the opposite position. For example, in a panel discussion in 1998, you said: “If the President were the sole subject of a criminal investigation, I would say no one should be investigating that. That should be turned over immediately to the Congress.” (Video, *Independent Counsel Structure & Function*, Georgetown Law Journal Symposium (Feb. 19, 1998))

In your response, you indicated that the events of September 11, 2001, were what caused you to change your mind about investigating the President. You said: “What changed was September 11th. That is what changed. So after September 11th, I thought very deeply about the presidency, and I thought very deeply about the independent counsel experience, and I thought very deeply about how those things interacted.”

But you said that “no one should be investigating” the President on February 19, 1998—three-and-a-half years before September 11, 2001.

a. What changed your mind before September 11th when you argued against the President being the sole subject of a criminal investigation in 1998?

RESPONSE: I have described my views at that time in my writings and at the hearing.

25. As discussed above, in February 1998, after you had left the Independent Counsel’s Office, you publicly expressed serious concerns about having an independent counsel conduct an investigation into a sitting President. You stated that Congress should be the body investigating the President. Yet you returned to work for the Independent Counsel in April or May 1998.

a. Why did you return to work for the Office of the Independent Counsel?

RESPONSE: I returned to the Independent Counsel’s Office at the request of Judge Starr to assist the Office, including to argue a case in the Supreme Court in June 1998.

26. You have said that the president should have “absolute discretion” to decide when to appoint a special prosecutor, and that any such prosecutor should be nominated by the President and confirmed by the Senate. (Georgetown University Law Center, Feb. 19, 1998)

- a. **If the president is a possible target or subject of an investigation, does he still have “absolute discretion” to select the person who will investigate?**
- b. **If the president’s close associates are the possible target or subject of an investigation, does he still have “absolute discretion” to select the person who will investigate?**

RESPONSE: My comments in 1998 were policy proposals, not statements of law. Given my position now as a sitting judge and nominee, it would be inappropriate for me to comment on these questions.

27. During your White House tenure, many of President Bush’s signing statements specifically asserted that he would interpret laws “consistent with the constitutional authority of the President to supervise the unitary executive branch” and would disregard laws he deemed inconsistent. I asked you during your hearing about one such statement that President Bush issued regarding the Detainee Treatment Act of 2005, reserving the President’s right to disregard that law’s ban on torture if it interfered with his constitutional authorities as President. (Signing Statement, H.R. 2863, Dec. 30, 2005)

- a. **You said at your hearing that this signing statement would have crossed your desk when you were Staff Secretary, and you recalled that “there was debate” about it. What position did you take in that debate?**

RESPONSE: As discussed at the hearing, I do not specifically remember any comments I made or the details of who within the government took what position, but I do recall that there was internal debate and controversy about the signing statement. The White House Counsel ordinarily would have been in charge of the final recommendation for signing statements. As Staff Secretary, my role was not to replace the legal or policy advisors, but rather to make sure that the President had the benefit of the views of advisors, as any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk.

- b. **At that time, what did you know about interrogation techniques being used on detainees or combatants or about memos written by the Office of Legal Counsel regarding interrogation techniques?**

RESPONSE: As I explained during the hearing, I was not read into the program involving the controversial enhanced interrogation techniques, and I was not involved in crafting the legal memos justifying that program. Your report for the Intelligence Committee and the DOJ Office of Professional Responsibility report confirm that point. I became aware of the program and the memos when they were publicly disclosed in news reports in 2004.

c. Was the Bush Administration planning to disregard any of the provisions of the Detainee Treatment Act?

RESPONSE: As I stated during the hearing, I recall that there was internal debate and controversy about a signing statement for the Act.

d. Did the Bush Administration ever disregard requirements of the Detainee Treatment Act of 2005?

RESPONSE: See my answer to Question 27.b.

28. You have written in opinions, and said in public appearances, that the President may decline to enforce a law that he thinks is unconstitutional “even if a court has held or would hold the statute constitutional.” (*Seven-Sky v. Holder*, 661 F.3d 1 (2011))

a. Did President Bush ever exercise this authority?

RESPONSE: This portion of the footnote referred to prosecutorial discretion. I believe President Obama relied in part on the power of prosecutorial discretion in the DACA program.

b. If so, what was your role in advising on this authority when it was exercised?

RESPONSE: While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk.

c. Do you still believe the President has this authority?

RESPONSE: Prosecutorial discretion has been recognized by the Supreme Court as part of the President’s executive authority. The extent of that discretion is the subject of litigation.

d. Are there any limits to the President’s authority to decline to enforce a law he thinks is unconstitutional?

RESPONSE: As I noted in *In re Aiken County*, “it has occasionally been posited that the President’s power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution) and thus might yield if Congress expressly mandates civil enforcement actions in certain circumstances,” 725 F.3d 255, 264 n.9 (2013). Whether there are limits on the President’s authority is the subject of pending litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

e. If the President and the Supreme Court disagree, which branch's interpretation is controlling?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. As I also stated at the hearing, when the Supreme Court issues a ruling prohibiting the President from doing something or ordering the President to do something, the Supreme Court's word is the final word, subject of course to a constitutional amendment or a subsequent overruling by the Court. *See Cooper v. Aaron*, 358 U.S. 1, 23 (1958).

29. The Committee has an email from your time in the White House where Deputy National Security Adviser Steve Hadley asks for your review of talking points defending the Administration's position on torture. The talking points read: "the President has never considered authorizing torture under any circumstances." (Email from Harriet Miers to Brett Kavanaugh, Fw: let me know when you get this...thx (June 12, 2004)). This email asking for your input was sent four days after the *Washington Post* reported on legal memos justifying the use of brutal enhanced interrogation techniques

a. Did you respond to this email? Did you provide any feedback on these talking points? If so, what was your response or feedback?

RESPONSE: As noted, I became aware of the program and the memos when they were publicly disclosed in news reports. I do not recall what reaction, if any, I had in response to the talking points that you mention from more than 14 years ago. As Staff Secretary, my usual role would have been to send draft talking points around for comment and input from other staff members.

b. At that time, what did you know about these memos or the interrogation techniques being considered by the United States?

RESPONSE: Please see my response to Question 29.a.

c. If you did not know about the OLC memos or the interrogation techniques, why were you being asked to review talking points?

RESPONSE: I was Staff Secretary. Please see my response to Question 29.a.

d. The talking points stated that the Bush Administration "has never considered authorizing torture." Did you believe it was accurate at the time?

RESPONSE: Please see my responses to Question 29.a and 29.b.

e. Knowing what you know today, do you believe that this was accurate?

RESPONSE: Please see my responses to Questions 29.a and 29.b.

30. On November 1, 2001, President Bush issued Executive Order 13233, which significantly restricted and slowed the release of records under the Presidential Records Act by giving sitting and former presidents the ability to delay the release of records indefinitely. (It has since been rescinded.) Some of the limited number of documents we have received from your time in the White House Counsel's Office suggest that you were involved with this executive order.

a. Please describe the nature and extent of your work or advice on this executive order or related issues.

RESPONSE: I worked on it. While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. I do not recall my work or involvement in all of these matters.

b. What is the justification for withholding from public view presidential records that are not protected by a legitimate claim of executive privilege?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

c. The Presidential Records Act was enacted in 1978 to enhance the public's access to presidential records. Do you believe President Bush's executive order served that purpose?

RESPONSE: The order speaks for itself.

31. Congress has established several independent agencies, such as Security Exchange Commission and Federal Communications Commission, which are important for enforcing our laws and safeguarding Americans' rights. Congress requires the President to have good cause to remove the heads of these agencies to insulate them from political interference. You objected to this limit on the President's power and struck down the "for cause" requirement in a case involving the Consumer Financial Protection Bureau. (*PHH Corp. v. CFPB*, 839 F.3d 1 (2016))

The *en banc* D.C. Circuit disagreed and overturned your decision, holding that the CFPB's for-cause provision was constitutional under *Humphrey's Executor v. United States*, a 1935 Supreme Court decision that established the constitutionality of independent agencies.

a. In light of this, how can you contend that your opinion was consistent with *Humphrey's Executor*?

RESPONSE: As I explained at the hearing, I concluded in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 8 (2016), that the Consumer Financial Protection Bureau was unconstitutionally structured. As a single-Director independent agency exercising substantial executive authority, the Bureau was "the first of its kind and a historical anomaly." *Id.* at 17. In light of the historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, I concluded that *Humphrey's Executor* could not be stretched to cover the Bureau's novel agency structure. *Id.* at 8.

b. The CFPB was designed to protect consumers. How did your opinion in this case protect consumers?

RESPONSE: My opinion enforced the requirements of the Constitution as I understood them in light of Supreme Court precedent. My opinion in the *PHH* case would not have halted the CFPB's ongoing operations to protect consumers or otherwise fulfill its statutory mission. My opinion would have made the CFPB director removable for cause, rather than at will, and left the Bureau able to continue its duties.

c. What is the real-world impact of this decision?

RESPONSE: The impact of my dissenting opinion, if adopted, would have been to make the CFPB director removable at will, rather than for cause. The remainder of the statute would have remained in place.

d. What do you believe would be the real-world impact of allowing a President to fire heads of independent agencies at will?

RESPONSE: Please see my answer to Question 31.c.

32. You wrote in your dissent that the CFPB’s single-Director structure “threatens individual liberty more than the traditional multi-member structure does.”

a. What individual liberty is threatened?

RESPONSE: As I explained in my opinion, in the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head. *See PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 183 (2018) (Kavanaugh, J., dissenting). A multi-member structure helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty. *Id.*

b. Does the individual liberty you are referencing refer to financial services providers?

RESPONSE: It refers to anyone affected by the actions of the CFPB.

c. Where in the statute is this interest for financial service providers outlined?

RESPONSE: Please see my answer to Question 32.b. As relevant here, my decision was based on the Constitution as interpreted by Supreme Court precedent.

d. Where in the Constitution is there language applying individual liberty rights to companies?

RESPONSE: The Supreme Court has explained, including in cases involving entities rather than individuals, that “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010) (internal quotation marks and citation omitted).

33. The *en banc* majority decision in *PHH* stated that *Morrison v. Olson* “remains valid and binding precedent.”

a. Do you agree with that statement?

RESPONSE: My dissent in *PHH* speaks for itself.

34. Throughout his administration, President George W. Bush frequently issued signing statements reserving the right not to enforce laws or portions of laws he believed encroached on the President's constitutional authority. According to Professor Peter Shane, in President Bush's first six years in office, he "raised nearly 1400 constitutional objections to roughly 1000 statutory provisions, over three times the total of his 42 predecessors combined." (Peter M. Shane, *Madison's Nightmare: Executive Power and the Threat to American Democracy* (2009))

a. During your time in the White House Counsel's office, were you involved in any of these statements?

RESPONSE: While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. I do not recall my work or involvement in all of these matters.

b. Which ones and what was your involvement?

RESPONSE: While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. I do not recall my work or involvement in all of these matters.

35. Jay Bybee was nominated for an open seat on the Ninth Circuit and confirmed to that position by the Senate in March 2003, during your time in the White House Counsel's office.

a. Did you recommend him for the seat? If so, why?

b. What role did you play in his confirmation process?

c. At the time, were you aware of Mr. Bybee's view on executive authority or the "unitary executive"?

d. Were you aware of any of the memos he had written advocating an expansive view of presidential war powers (including memos that he had authored or signed regarding the power to transfer terrorists, interrogation of combatants or detainees, or the sharing of grand jury information under the PATRIOT Act)?

- e. **Did you learn about the existence of any of these memos before his confirmation by the Senate? If not, when did you first become aware of these memos?**
- f. **Do you believe that the Senate should have known about these memos and had access to all information relevant to Mr. Bybee's involvement in these issues before it confirmed him? If not, why not?**

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nominations was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was responsible for district court nominations from certain states and circuit court vacancies were handled as they arose. Judge Bybee's nomination was not one of the nominations that I primarily was assigned to during my service in the White House Counsel's Office. While I do not have specific recollection of all of the circumstances surrounding Judge Bybee's nomination, including comments that I made, I do recall that I regularly discussed many judicial nominations, and suggested concerns or offered ideas and opinions where I believed them to be relevant. As I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations." I knew that Judge Bybee was a highly respected academic who was strongly supported by Senator Harry Reid.

- g. **Do you believe the Senate, in considering your nomination, is entitled to all information relevant to your possible involvement in these issues? If not, why not?**
- h. **Has the Committee been provided all documents relevant to your knowledge or involvement in post-9/11 terror policies and programs?**
- i. **Same question for:**
 - i. **warrantless surveillance?**
 - ii. **interrogation of combatants and detainees?**
 - iii. **transfer of terrorists or combatants (including rendition)?**
 - iv. **detention of combatants?**
 - v. **military tribunals or commissions?**

RESPONSE: As I said during the hearing, this is an issue for the Senate, the Executive Branch, and President Bush. Many of the same issues have arisen in confirmation proceedings for current and recent members of the Supreme Court including Chief Justice Roberts, Justice Kagan, Justice Alito, and Justice Scalia.

36. Emails provided to the Committee indicate that John Yoo also was considered as a potential nominee for the 9th Circuit.

- a. **Did you recommend Mr. Yoo as a nominee for the Ninth Circuit? If so, why?**
- b. **At the time, were you aware of Mr. Yoo's view on executive authority or the "unitary executive"?**
- c. **Were you aware of any of the memos he had written advocating an expansive view of presidential war powers (including memos regarding warrantless surveillance, the power to detain combatants, or the interrogation of combatants or detainees)? If not, when did you first become aware of these memos?**
- d. **Did you ever recommend Mr. Yoo for any other positions within the Administration? If so, when, what positions, and why did you recommend him? For each such position, please also indicate whether you knew, at the time, of his views of executive authority or involvement in Office of Legal Counsel memos related to surveillance, interrogation, or detention.**
- e. **When Mr. Yoo withdrew his name from consideration as a possible nominee to the Ninth Circuit, you asked "why??? . . . he was my magic bullet." What did you mean? How was Mr. Yoo a "magic bullet"? Why did he withdraw?**

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nominations was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was responsible for district court nominations from certain states and circuit court vacancies were handled as they arose. While I do not have specific recollection of all comments that I made during my service in the White House Counsel's Office, I do recall that John Yoo was considered as a potential nominee for the Court of Appeals for the Ninth Circuit. He was a highly respected academic at Boalt Hall. I cannot speak to why Mr. Yoo withdrew his name from consideration as a possible nominee. Beyond that, I regularly discussed many judicial nominations, and suggested concerns or offered ideas and opinions where I believed them to be relevant. As I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations."

37. You worked extensively on judicial nominations while you were in the White House Counsel's office.

- a. **As part of the judicial nomination process, did you consider or discuss whether a potential nominee would help the president as a member of the judiciary? If so, please identify the specific candidates or nominees and why they were viewed as helpful to the president.**

RESPONSE: While I do not have specific recollection of all comments that I made during my service in the White House Counsel's Office, I do recall that I regularly discussed many judicial nominations, and suggested concerns or offered ideas and opinions where I believed them to be relevant.

38. In 1994, I was the author of the federal Assault Weapons Ban (AWB) which contained a sunset provision. As the sunset approached, I worked to renew the legislation — in 2003, 2004, and again in 2005. You were at the White House during that time, serving in the role of Staff Secretary.

- a. **While serving in the Bush White House, did you meet with—or discuss the renewal of the assault weapons ban with—the NRA or any other advocacy group? Please describe those meetings and/or discussions, including who you met or spoke with.**
- b. **What did the NRA or other advocacy groups request?**

RESPONSE: As I explained at the hearing, I worked on a wide variety of issues during my time in the Bush White House. As Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters that I was not read into, would likely have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, as well as other Presidential actions. I do not recall all of the matters that crossed my desk during this time. Further, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. During that time, I met with many people on a variety of issues, but I do not now have a specific recollection of such a meeting about this bill.

- c. **At the White House, did you ever discuss or work on the assault weapons ban and/or other Second Amendment issues? If so, what was the nature of your work and/or discussions? I am not asking if you were the primary person, I am asking if you worked on the issue at all.**

RESPONSE: Please see my response to Questions 38.a and b.

- d. **If you did not work on the assault weapons ban or other Second Amendment issues, were you ever consulted on these issues?**

RESPONSE: Please see my response to Questions 38.a and b.

- e. Did you ever discuss whether President Bush should support renewal of the assault weapons ban? If so, what was your view?**

RESPONSE: Please see my response to Questions 38.a and b.

- f. What was your view on the constitutionality of the assault weapons ban at the time you served in the White House?**

RESPONSE: Please see my response to Questions 38.a and b.

- g. If your view has changed, how has it change?**

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on a policy or litigation matter that may come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. This approach is essential for the independence of the Judiciary, as is revealed by prior nominee precedent.

39. Also during your time as Staff Secretary, the National Rifle Association strongly backed a landmark lawsuit against the District of Columbia related to the District's handgun ban. The lawsuit in that case, *District of Columbia v. Heller*, commenced in 2003.

- a. Did you ever discuss this lawsuit with the NRA or any other advocacy group? If so, which group and what was your position?**

RESPONSE: Please see my response to Questions 38.a and b.

- b. What was your view on the decision to file the lawsuit at the time it was filed?**

RESPONSE: Please see my response to Questions 38.a and b.

40. During your hearing, I asked you about assault weapons being in "common use." You stated: "Semiautomatic rifles are widely possessed in the United States. There are millions and millions and millions of semiautomatic rifles that are possessed so that seemed to fit common use and not being a dangerous and unusual weapon."

- a. What was the source for your statement that there are "millions and millions and millions of semiautomatic rifles that are possessed"?**

RESPONSE: In my dissent in *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), I provided sources and noted that about 40 percent of rifles sold in 2010 were semi-automatic. I also noted and provided a citation to the record that approximately two million semi-automatic AR-15 rifles have been manufactured since 1986. These statements were consistent with statements made by the majority opinion in that case. *See id.* at 1261 ("We think it clear enough in the record that semi-automatic rifles and

magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.”).

b. Do you believe that people commonly utilize assault weapons? If so, what is the evidence for that assertion?

RESPONSE: Please see my response to Question 40.a.

41. In your dissent in the D.C. Circuit’s *Heller* case, you analogized assault weapons to semiautomatic rifles, which you then said were like semiautomatic handguns. Assault weapons like the AR-15, however, are just civilian versions of M-16s.

a. From a constitutional perspective, what makes an AR-15 more like a semiautomatic handgun than like an M-16?

RESPONSE: My dissent in *Heller* discusses this question in some detail. Beyond the discussion set forth in that dissent, I believe it would be inappropriate for me to offer further commentary. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

42. In 2003, while you were in the White House Counsel’s office, the Supreme Court decided to hear two cases involving the University of Michigan’s efforts to increase racial diversity on campus—*Grutter v. Bollinger* and *Gratz v. Bollinger*. The Bush Administration filed briefs in these cases arguing that the University of Michigan’s programs were unconstitutional.

a. What was your view on whether the Bush Administration should oppose the University of Michigan’s efforts to increase racial diversity on campus?

b. Did you support an argument that only race-neutral programs can be used to try to achieve racial diversity on campus?

RESPONSE: As a lawyer in the White House, any views I expressed would have been in keeping with trying to advance President Bush’s legal and policy agenda. As a judge and a nominee, your question implicates issues that remain in dispute and that may come before me as a judge. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the

political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue. I will note that my views 15 years ago as a White House attorney do not dictate my views now as a judge.

43. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), Chief Justice Roberts wrote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

a. Do you agree with Chief Justice Roberts’s statement?

b. Do you believe that a majority of the Court supported this statement?

RESPONSE: *Parents Involved in Community Schools v. Seattle School District No. 1*, is a precedent of the Supreme Court entitled to the respect due under the law of precedent. Your question implicates the meaning of—and significance of—a specific portion of the Chief Justice’s opinion. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case.

44. In 2012, you wrote the majority opinion in *South Carolina v. United States*, which allowed South Carolina’s voter ID law to go into effect. The other two judges on the panel wrote a concurring opinion that highlighted the critical importance of the Voting Rights Act. The concurring opinion said that the Voting Rights Act had played a “vital function” in keeping the voter ID law from being “more restrictive” and that the Voting Rights Act has “continuing utility” in “detering problematic, and hence encouraging non-discriminator, changes in state and local voting laws.”

a. Why didn’t you join the concurring opinion?

b. What did you disagree with in the concurring opinion and why?

RESPONSE: I wrote the unanimous opinion in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.C. Cir. 2012), which was joined in full by Judges Kollar-Kotelly and Bates. *Id.* at 52 (Kollar-Kotelly, J., concurring); *id.* at 53 (Bates, J., concurring). Both Judges referred to my opinion as “excellent.” *Id.* at 52 (Kollar-Kotelly, J., concurring); *id.* at 53 (Bates, J., concurring). In that opinion, I noted that “[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history.” *Id.* at 32-33. Our opinion *blocked* enforcement of South Carolina’s voter ID law for the 2012 elections.

45. Section 2 of the Voting Rights Act prohibits drawing election districts in a manner that is meant to dilute the voting power of minorities. In 1982, Congress strengthened Section 2 to allow plaintiffs to prove a violation of the Voting Rights Act where a local electoral practice had the effect of denying to racial or language minorities an equal opportunity to participate in the political process. That same year, the Supreme Court held in *Thornburgh v. Gingles* that plaintiffs could also bring a challenge under Section 2 alleging that legislative maps were drawn in a way that infringed on racial minorities' rights to vote.

a. Do you consider *Gingles* to be settled law?

b. Is it correct law?

RESPONSE: *Thornburg v. Gingles*, 478 U.S. 30 (1986), is a precedent of the Supreme Court entitled to the respect due under the law of precedent. As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.

46. In the 2003 case *Lawrence v. Texas*, the Supreme Court held that states may not intrude into the bedrooms of same-sex couples. Justice Kennedy's majority opinion explained that laws prohibiting intimacy between same-sex couples are unconstitutional because states "cannot demean their existence or control their destiny by making their private sexual conduct a crime."

Justice Scalia—a justice whom you have described as a "hero" and a "role model"—dissented. He argued that the government had the authority to ban intimate sexual activities between consenting gay adults. He wrote: "Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive."

a. Do you agree with Justice Kennedy's opinion or Justice Scalia's?

RESPONSE: As a sitting judge, I am bound to follow Supreme Court decisions, subject to the law of precedent. However, as I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on existing precedent. The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

b. Is *Lawrence* settled law? Is it correct law?

RESPONSE: *Lawrence v. Texas* is a decision of the Supreme Court entitled to respect under the law of precedent. As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary. In accordance with nominee precedent, I will follow the lead of the current Justices in declining to offer my view as to whether recent precedents of the Supreme Court were correctly decided. For example, when asked to give her opinion on Supreme Court precedents, Justice Kagan said she would not give a thumbs up or thumbs down on Supreme Court precedents. She explained that this was a principle of judicial independence. The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

c. *Lawrence* overruled *Bowers v. Hardwick* (1986). Was *Bowers* settled law before it was overruled?

RESPONSE: *Bowers* was overruled for the reasons set forth in *Lawrence*. The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

d. Can a business legally fire an LGBT employee to “protect” other employees from the LGBT employee’s “lifestyle”?

RESPONSE: See my response to Question 46.a.

e. In your White House role, did you provide any legal or policy advice concerning the Court’s *Lawrence* decision? If so, what did you advise?

RESPONSE: I do not remember specifics, but it seems possible that there would have been internal discussions of major Supreme Court decisions such as *Lawrence*.

47. In a 1971 case called *Lemon v. Kurtzman*, the Supreme Court established a three-factor test to decide whether a government’s action violates the Establishment Clause. Several Supreme Court justices have suggested that the Court should abandon the *Lemon* test in favor of a test that accommodates more government aid to religion and more of a religious presence in government.

a. Is *Lemon* settled law? Is it correct law?

b. Do you support the continued application of the *Lemon* test, or do you favor a different test? If so, please explain what you view as the appropriate test and how it addresses entanglement between religion and government?

RESPONSE: As I set forth in my dissent in *Newdow v. Roberts*, “the Supreme Court’s Establishment Clause jurisprudence does not set forth a one-size-fits-all test.” 603 F.3d 1002, 1017 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (citing *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (opinion of Kennedy, J.); *Van Orden v. Perry*, 545 U.S. 677, 686 (plurality opinion); *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring in part and concurring in judgment)).

48. The Office of Independent Counsel Ken Starr has been described as “notoriously leaky” because of how often its attorneys spoke to the press about the investigations into President Clinton and First Lady Hillary Clinton. (Josh Gerstein, *‘Brett was involved’: Inside Supreme Court nominee’s work for Bill Clinton probe*, Politico (July 22, 2018)). In your response to the Senate Judiciary Questionnaire, you acknowledged that you spoke to reporters “on background as appropriate or as directed.” (Kavanaugh SJQ at 41).

- a. **While working in the Office of Independent Counsel, did you ever speak with reporters about any of the Office’s investigations into President Clinton or Hillary Clinton (including your investigation into the death of Vince Foster) while those investigations were ongoing?**
- b. **If so, what type of information did you provide to reporters?**
- c. **Did you ever provide any reporters—or anyone else—with information learned through grand jury proceedings or witness interviews?**
- d. **Have you ever provided any information to the press in violation of a statutory or ethical obligation to keep such information confidential?**

RESPONSE: As I said at the hearing, I spoke to reporters at the direction or authorization of Judge Starr consistent with the law.

49. In March 1995, while working in the Office of Independent Counsel Ken Starr, you wrote a memo pushing to broaden the investigation to cover a “full-fledged investigation of [Vince] Foster’s death.” (Kavanaugh Memo to Starr, 3/24/95). By that time, three separate investigations had concluded that Mr. Foster committed suicide, and as you admitted in your memo, the Independent Counsel might lack prosecutorial jurisdiction over any crime uncovered in relation to that death. You nonetheless pursued the allegation that Mr. Foster was murdered, and the theory that he had an affair with Hillary Clinton, for three more years.

- a. **What specific evidence led you to question the conclusion that Mr. Foster had committed suicide and decide, instead, that a “full-fledged” investigation of Mr. Foster’s death was still warranted? Please identify the source(s) for the evidence that justified this conclusion.**

RESPONSE: The decisions regarding the Vince Foster investigation were ultimately made by Judge Starr. Given the persistent public questions about the causes of Mr. Foster’s death, Judge Starr stated that it was important to thoroughly investigate the matter and provide a definitive conclusion. That conclusion was ultimately that Mr. Foster committed suicide. Our report on the Foster death has stood the test of time.

- b. **Did you rely on allegations generated by conservative right-wing media outlets in deciding to pursue a “full-fledged” investigation of Vince Foster’s death? For example, did Chris Ruddy, Ambrose Pritchard-Evans, Hugh Sprunt, Reed Irvine, or Rush Limbaugh provide you with any information about Mr. Foster before you made the decision to re-investigate his death? If so, what specific information did they provide and what weight was it given?**

RESPONSE: Please see my response to Question 49.a.

- c. **In a June 1995 memo, you wrote that “we have asked numerous witnesses about Foster’s alleged affair with Mrs. Clinton.” (Kavanaugh Memo to Starr et al. re: “Summary of Foster Meeting on 6-15-05”, 6/16/95.) Did you lead or participate in this questioning? Were you present during the questioning? Did you object to any of the questions that were asked?**

RESPONSE: Please see my response to Question 49.a.

- d. **Webster Hubbell has stated that Office of Independent Counsel attorneys investigating the death of Vince Foster asked him a number of sexual questions in early 1995, including specifically asking if Hillary Clinton and Vince Foster had engaged in an affair. (Jane Mayer, *Dept. of Inquiring Minds: The Webster Hubbell investigation: Was it about sex?* The New Yorker (Aug. 9, 1999)). Did you participate in the questioning Mr. Hubbell? If so, what was your role? If you were present, did you object to any of the questions that were asked?**

RESPONSE: Please see my response to Question 49.a.

- e. **Did you ever speak with reporters about the investigation into whether Mr. Foster had committed suicide or had been murdered?**

RESPONSE: Please see my response to Question 49.a.

f. Did you ever speak with reporters about the investigation into whether Hillary Clinton and Vince Foster had engaged in an affair?

RESPONSE: Please see my response to Question 49.a.

50. Your Starr-investigation era files from the National Archives include a number of complete files devoted to articles from Christopher Ruddy and others who were strong proponents of the Vince Foster murder conspiracy theory. For example, NARA File no. 70105096, labeled “Foster Death—Articles by Ruddy,” is 195 pages long. It includes articles entitled “Foster’s Death Site Strongly Disputed,” by Ruddy, and a partial transcript from a Rush Limbaugh Radio Broadcast entitled “Foster Note a Forgery.” A separate file, NARA File No. 70105100, includes what appears to be a summary analysis of the film “The Death of Vincent Foster: What Really Happened?” and an extended report from Hugh Sprunt entitled “The official record contradicts the Foster suicide conclusion,” which appears to have been faxed to your office on September 27, 1995.

a. How often did you or others working on your behalf speak with or otherwise interact with each of the following individuals: Ambrose Pritchard-Evans; Hugh Sprunt; Reed Irvine; and Rush Limbaugh?

RESPONSE: Please see my response to Question 49.a.

b. Were any of these individuals a source for your investigation? If so, what specific information did they provide and what actions did you take in response?

RESPONSE: Please see my response to Question 49.a.

51. A November 13, 1995 memorandum from Starr deputy Hickman Ewing to File, subject line “Chris Ruddy,” states that “At noon, Saturday, November 4, 1995, I checked my Little Rock voicemail. Brett Kavanaugh had called at 5:50 p.m. on Friday, November 3 leaving a voicemail to the effect: “I got a voicemail message from Ruddy. He said he had talked to [a witness]. He said that [the witness] was disappointed by the way he was treated in the grand jury. He said he was treated as a suspect. Ruddy knows some of the questions that Brett Kavanaugh asked. Why did Brett ask [the witness] if the guy in the park grabbed his genitalia. Brett said on the voicemail to me, ‘I didn’t ask him that. *I did ask him about sexual advances by the other man in the park. John Bates and I want you to call Ruddy—at least get him off the [sexually explicit] part. I am worried about that.*”’ (Memo from Ewing to File re: “Chris Ruddy,” (Nov. 13, 1995) (emphasis added)). Hickman Ewing followed your directions and called Ruddy back the day that he received your voice mail (November 4).

a. Was the Independent Counsel office seeking to influence Mr. Ruddy’s articles?

RESPONSE: Please see my response to Question 49.a.

- b. In a July 15, 1995 memorandum welcoming a new investigator to your team, you recommended that the investigator familiarize himself with the investigation using a number of sources, including “the Ruddy articles.” (Memo from Kavanaugh to Clemente re: “Vince Foster” (July 15, 1995)). Did you and your team consider Chris Ruddy to be a source for your investigation? Please explain any steps taken in response to information provided by Mr. Ruddy.**

RESPONSE: Please see my response to Question 49.a.

- c. How does your direction to Mr. Ewing to discuss grand jury information with a journalist—i.e., your direction that he discuss with Mr. Ruddy the questions asked of a grand jury witness—comply with grand jury secrecy requirements? Please provide legal support for your position.**

RESPONSE: Please see my response to Question 49.a.

52. In 1998, Ken Starr stated that it was appropriate for attorneys with the Independent Counsel’s office to speak to the media in order to defend its ongoing investigation from attacks made by the Clinton Administration. (Adam Clymer, *Starr Admits Role in Leaks to Press*, New York Times (June 14, 1998)).

- a. Is this a valid reason to discuss an ongoing investigation with reporters?**

RESPONSE: That was a decision made by Judge Starr.

- b. At the time, what was the Department of Justice’s policy regarding public discussion of an ongoing investigation?**

RESPONSE: I do not recall. As I stated at the hearing, any conversations that I had with reporters were at the direction or authorization of Judge Starr.

- c. What is your personal view on whether prosecutors should discuss an ongoing investigation with reporters?**

RESPONSE: Please see my response to Question 52.a.

- d. Do you believe that your discussions with reporters during your time in the Starr Independent Counsel Office about the Vince Foster investigation were appropriate? Were they fair?**

RESPONSE: Yes.

53. Between March and August of this year, President Trump attacked Robert Mueller's work in at least 127 tweets. The number of such attacks has sharply increased since May.

a. Do you believe that it would be appropriate for Mr. Mueller or members of his team to discuss details of the investigation in light of these attacks?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

54. In 2006, the Department of Justice fired numerous U.S. Attorneys for political reasons, in a process that has been described as "chaotic and spiked with petty cruelty." (Amy Goldstein, *E-Mails Reveal Tumult in Firings and Aftermath*, Washington Post (Mar. 21, 2007)).

According to the Department of Justice report on the dismissals, "the process to remove the U.S. Attorneys originated shortly after President Bush's re-election in November 2004," at which time you were serving as White House Staff Secretary. (U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, at 16 (Sept. 2008)). The report indicates that beginning in early 2005, Deputy White House Counsel David Leitch, Department of Justice official Kyle Sampson, and White House Counsel Paralegal Colin Newman engaged in email discussions in which Sampson suggested replacing fifteen to twenty percent of all U.S. Attorneys who may not have been "loyal Bushies." (*Id.* at 17).

Sampson first circulated a proposed U.S. Attorney target list in March 2005, after Alberto Gonzales became Attorney General. (*Id.*) You had served under Gonzales in the White House Counsel office. Sampson circulated this list to Associate White House Counsel Dabney Friedrich, at the request of White House Counsel Harriet Miers, on March 23, 2005. (*Id.* at 22). Sampson and Monica Goodling, who was appointed as Counsel to the Attorney General in October 2005 and as DOJ White House Liaison in April 2006, regularly interacted with the individuals at the Executive Office of the Presidency, including with Sara Taylor, a top aide to Karl Rove, regarding U.S. Attorney target lists from March 2005 until the U.S. Attorneys were removed in December 2006. (*Id.* at 22-67).

The DOJ OIG “found significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys.” (*Id.* at 325-26). It further concluded that “the White House was more involved than merely approving the removal of Presidential appointees” for at least three U.S. Attorneys, but was unable to fully determine what role the White House played in all removals because White House officials, including Karl Rove and Harriet Miers, declined to participate in the DOJ OIG investigation. (*Id.* at 337-38).

- a. Please describe any interactions you had with Kyle Sampson, Monica Goodling, or any other Department of Justice official regarding the dismissal of U.S. Attorneys.**

RESPONSE: As you mention, I was serving as Staff Secretary during the period you reference. As I explained during the hearing, during my time as Staff Secretary, any issue that reached the President’s desk from July 2003 until May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time or all interactions I had during those years. In terms of the substance of my work, my role was not to replace the President’s policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. Please describe any interaction you had with Karl Rove, Sara Taylor, Dabney Friedrich, David Leitch, Colin Newman, Harriet Miers, or any other White House official regarding the dismissal of U.S. Attorneys.**

RESPONSE: Please see my response to Question 54.a.

- c. Did you ever receive or comment on any list of proposed U.S. Attorneys targeted for dismissal or replacement?**

RESPONSE: Please see my response to Question 54.a.

55. During your time in the White House there were also reports that White House officials were actively involved in politicized hiring by the Department of Justice. (Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, New York Times (July 29, 2008)). In fact, according to the Department of Justice’s Inspector General, officials at the White House developed a method—taught through a seminar and distributed in a document called “The Thorough Process of Investigation”—for searching the Internet to determine a candidate’s political leanings. Through this process, DOJ officials used search terms to screen applicants using terms like “abortion,” “homosexual,” “Florida recount,” or “guns.” (U.S. Department of Justice Office of Professional Responsibility and Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, at 20 (July 28, 2008)). The DOJ Inspector General’s report on this issue concluded that Department of Justice officials used the results of these searches to improperly discriminate against candidates for career positions at DOJ. (*Id.* at 20, 135).

- a. Did you ever discuss screening job applicants to determine political affiliation or ideology? If so, when, who was involved, and what was discussed?**

RESPONSE: Please see my response to Question 54.a.

- b. Were you involved in developing any methods for screening job applicants based on political affiliation or ideology? If so, when, who was involved, and what methods were developed?**

RESPONSE: Please see my response to Question 54.a.

- c. Were you aware of or did you attend any seminars or training sessions where screening job applicants based on political affiliation or ideology was discussed? If so, what was your involvement?**

RESPONSE: Please see my response to Question 54.a.

- d. Were you aware of or did you assist in preparing the document entitled “The Thorough Process of Investigations,” or any other document discussing screening job applicants based on political affiliation or ideology? If so, what was your involvement?**

RESPONSE: Please see my response to Question 54.a.

- e. When did you first become aware that candidates were being screened based on political affiliation or ideology? What did you do when you learned about this? Did you ever object to this practice? If so, when? Are your objections memorialized in any way?**

RESPONSE: Please see my response to Question 54.a.

- f. Were you involved in hiring decisions that took into account the political affiliation or ideology of any candidate? If so, please explain the position being filled and why such considerations were taken into account.**

RESPONSE: Please see my response to Question 54.a.

56. After the U.S. Attorney scandal was made public, it became apparent that a number of White House officials communicated with each other and with Department of Justice officials using Republican Party-affiliated e-mail accounts. For example, J. Scott Jennings, the White House deputy director of political affairs, used a “gwb43.com” email address to discuss replacing one U.S. Attorney. (R. Jeffrey Smith, *GOP Groups Told to Keep Bush Officials’ E-Mails*, Washington Post (March 27, 2007)).

Some have suggested that Karl Rove actually directed the firing of U.S. Attorneys so that the fired attorneys could be replaced with political picks. (Dan Froomkin, *The Rovian Theory*, Washington Post (March 23, 2007)). However, because Rove primarily conducted his official business using an RNC-based email address, official investigations were unable to fully assess his role in the scandal. (*See id.* (noting that “According to one former White House official familiar with Rove’s work habits, the president’s top political adviser does ‘about 95 percent’ of his e-mailing using his RNC-based account.”)).

A 2007 House Oversight and Government Reform Interim Staff Report concluded that “at least 88 White House officials had RNC e-mail accounts. (Committee on Oversight and Government Reform, *The Use of RNC E-Mail Accounts by White House Officials* (June 18, 2007)). Some have suggested that Bush White House officials strategically used these political email accounts to keep particular information secret. Notably, in a 2003 email, Jennifer Farley, a deputy in the White House Office of Intergovernmental Affairs, told Jack Abramoff aide Kevin Ring that “it is better to not put this stuff in writing in [the White House] ... email system because it might actually limit what they can do to help us, especially since there could be lawsuits, etc.” (R. Jeffrey Smith, *GOP Groups Told to Keep Bush Officials’ E-Mails*, Washington Post (March 27, 2007)).

- a. Did you ever use a non-government email address during your time in the White House, including any email address from the rnchq.org, gwb43.com, georgewbush.com, or any other email affiliated with a political candidate or organization, or registered to a political campaign? (If so, please identify those accounts.)**

RESPONSE: In addition to my White House email address, I had a personal email address that I may have used on occasion for personal matters. That personal account was not affiliated with any email server run by the Republican National Committee. I did not have a personal device that could access personal emails. And White House employees were not able to access personal emails from our work computers, as I recall. To the best of my recollection, it was not my practice to use my personal email address for official matters, although I cannot rule out isolated emails.

- b. Can you affirmatively state that you did not use any non-government account to conduct official business during your time in the White House?**

RESPONSE: Please see my response to Question 56.a.

- c. Did Karl Rove or any other White House official ever consult with you regarding the use of any non-government email address?**

RESPONSE: At this time, I do not remember.

- d. When did you first learn that Mr. Rove was using a non-government email address for official business? What did you do when you learned this? When did you learn that emails on Mr. Rove's non-governmental accounts had been deleted? Had anyone advised Mr. Rove that these emails should be preserved and, if so, when was this conveyed to him?**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

- e. Did you play any role in the investigation of the use of non-government emails by White House officials? If so, please describe your role.**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

- f. On April 11, 2007, the White House acknowledged that emails to and from White House officials were lost or deleted between 2001 and 2007 because "White House policy did not give clear enough guidance" on the use of official email, rather than private, and that "the oversight of that [guidance] was not aggressive enough." (Dan Froomkin, *Countless White House E-Mails Deleted*, WASHINGTON POST (Apr. 12, 2007)). Please describe your role in developing and enforcing White House policy on the use of email.**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

57. In the aftermath of the attacks on September 11, 2001, you were closely involved in crafting the legislation related to the limitation of airlines' liability and the creation of a compensation fund for victims. Ultimately, the compensation fund model that was used paid victims' families an average of approximately \$1.8 million.

- a. At any point in the process, did you express opposition to providing 9/11 victims any form of additional compensation outside of the compensation they would normally be entitled to through already-existing programs like insurance and government benefits?**

RESPONSE: As I explained at my 2004 hearing, in the days after the September 11th attacks, I worked on the September 2001 legislation as a representative of the Bush administration. As I recall, there was bipartisan agreement that the airlines' liability needed to be addressed immediately because the airlines were potentially going to go bankrupt. Ultimately, the separate, important issue of compensation for the victims of the September 11th attacks became linked in the same bill. I recalled in 2004 that there were discussions about compensating each victim's family equally so as not to favor rich over poor. I also recall concern about the time it would take for victims and their families to receive compensation if there were not immediate payments. I also testified in 2004 that we considered various precedents for compensating victims, including the Public Safety Officers' Benefits Fund.

- b. At any point in the process, were you opposed to creating any form of a compensation fund for 9/11 victims?**

RESPONSE: Please see my answer to Question 57.a.

- c. Did you ever propose capping victims' compensation? Did you suggest capping it at \$250,000? \$400,000? \$500,000?**

RESPONSE: Please see my answer to Question 57.a.

- d. If so, were your proposals to cap victims' compensation due to legal concerns, policy concerns, or both? What were your specific concerns?**

RESPONSE: As I testified in 2004, there were discussions about compensating each victim's family equally due to a concern that a litigation model would mean unequal compensation, such that victims from a relatively poor family would receive a smaller amount in compensation. Consistent with what I believed to be the views of President Bush and OMB Director Mitch Daniels, I believe that I thought poor families and rich families should receive the same amount, and should receive payment immediately.

58. During your hearing, I asked you about the Bush White House's position that it was up to the Federal Energy Regulatory Commission ("FERC") to investigate and punish any misconduct by Enron that contributed to the California electricity crisis. You testified that FERC's role was not in your "area of expertise." Congressional investigations showed that Enron executives were focused on stacking FERC with appointees who they thought would be friendly regulators for the company.

When you were in the White House Counsel's office, you were involved in drafting the surveys that the Counsel's office sent to White House staff about their communications with Enron. One of the survey questions asked whether White House staff members had communications with Enron related to FERC or other government agencies. You argued, unsuccessfully, that this question should be narrowed. In particular, you argued in an April 23, 2002, email that any communications disclosed "should be issues-oriented so as not to include appointments."

- a. Were you aware at the time you made these arguments that President Bush had appointed a chairman of FERC and another FERC commissioner who had been recommended to him by Enron's Ken Lay?**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

- b. Why was it your view that Congress and the American people should not have information about contacts between the White House and Enron about appointments to the very entities that were responsible for preventing Enron's corporate misconduct?**

RESPONSE: I do not agree with the premise of the question.

59. You also distributed draft talking points in May 2002 which argued that it was "highly unusual" for Congress to ask questions about presidential appointments because "appointments are at the core of his constitutional power. The confirmation process is, in effect, the Senate's oversight on that process."

- a. Is it your view that congressional oversight of any presidential appointment ends when an appointee is confirmed?**

RESPONSE: That is not what that comment says.

- b. If congressional investigators, in your view, are not entitled to information about the appointments process, then who – if anyone – can investigate and hold the President accountable for corruption in that process?**

RESPONSE: Please see my answer to Question 59.a.

60. During your time on the D.C. Circuit, you have written 61 dissents. Out of all the active judges on the D.C. Circuit, you have the highest number of dissents per year of service on the court.

a. Have you ever dissented in a case in which the majority ruled against an environmental interest?

RESPONSE: As I explained at the hearing, I have ruled for environmental interests on many occasions. I apply the law impartially, without regard to the identity of the parties.

61. Do you believe that human activity is contributing to or causing climate change?

RESPONSE: As a judge, I base decisions on the law and factual evidence in the record. My opinions addressing regulations designed to mitigate the effects of climate change have stated, among other things, that “[t]he task of dealing with global warming is urgent and important at the national and international level.” *Center for Biological Diversity v. EPA*, 722 F.3d 401, 415 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

62. The same night you were announced as President Trump’s nominee for the Supreme Court, the White House circulated a fact-sheet about your judicial record. The document stated: “Judge Kavanaugh protects American businesses from illegal job-killing regulation”; “Judge Kavanaugh helped kill President Obama’s most destructive new environmental rules”; “Judge Kavanaugh has led the effort to rein in unaccountable independent agencies”; and Judge Kavanaugh has “overruled federal agency action 75 times.” (Lorraine Woellert, Politico.com, “Trump asks business groups for help pushing Kavanaugh confirmation” (July 9, 2018).)

a. Is there anything inaccurate about the White House’s assessment of your record? If so, please explain.

RESPONSE: As I stated at the hearing, I have ruled in favor of agencies on numerous occasions when the law and facts have dictated. I have also ruled against agencies when the law and facts have dictated. As I stated, “I decide cases based on the law. I am a pro-law judge.”

63. According to press accounts, you woke President Bush in the middle of the night to sign just-passed legislation that would allow a federal court to intervene in a family dispute over end-of-life care for Terri Schiavo. (New York Times, *After Signing Schiavo Law, Bush Says ‘It Is Wisest to Always Err on the Side of Life’*, Mar. 22, 2005))

a. What other involvement did you have in the Terri Schiavo matter? Did you provide any advice about the legislation?

RESPONSE: My work on this matter was in my capacity as Staff Secretary to President Bush. As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk on the way to the President. That applies to the President’s speeches, public

decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. Did you agree at the time that it was appropriate for the federal government to intervene? If so, why? What, if any, principles did you propose to limit the ability of the government to intervene in a personal family matter?**

RESPONSE: Please see my response to Question 63.a.

64. In 2007, you authored the opinion in *Doe ex rel. Tarlow v. District of Columbia*. That case was about whether it was constitutional to force individuals with intellectual disabilities to have medical procedures against their will. All that these individuals wanted was the right to have their wishes at least taken into consideration for major medical decisions.

- a. Does the existence of laws such as the Americans with Disabilities Act and the Individuals with Disabilities Education Act affect whether the rights of individuals with intellectual disabilities are rooted in history and tradition and implicit in the concept of ordered liberty?**

RESPONSE: The plaintiffs in *Tarlow* represented a narrow class of several intellectually disabled people who had “never had the mental capacity to make medical decisions for themselves” and who had “no guardian, family member, or other close relative, friend, or associate” available to provide or withhold consent for surgeries approved by two separate physicians. *Id.* at 377. The unanimous panel for which I wrote explained that allowing people who lack mental capacity to make important medical decisions “would cause erroneous medical decisions . . . with harmful or even deadly consequences to intellectually disabled persons.” *Id.* at 382. In part for that reason, no state applies the rule proposed by the plaintiffs in that case.

65. Only a small fraction of your White House record was produced to the Committee before your hearing. We have not seen close to six million pages of your total record, including documents from your years as Staff Secretary, which you described as the “most instructive” and “useful” to you as a judge. (Remarks to Inn of Court, May 17, 2010)

- a. **Is there anything in the documents that we have not seen that would illuminate your views on or involvement in interrogation, detention, rendition, or warrantless wiretapping?**
- b. **Is there anything in the documents that we have not seen that would illuminate your views on privacy rights?**
- c. **Is there anything in the documents that we have not seen that would show your involvement in issues related to the Enron scandal?**
- d. **Is there anything in the documents that we have not seen that would illuminate your views on the power of the President or the unitary executive theory?**
- e. **Is there anything in the documents that we have not seen that would illuminate your knowledge of or possible involvement in politicized hiring and firing of lawyers and applicants in the Department of Justice during the Bush Administration?**
- f. **Is there anything in the documents that we have not seen that would illuminate your knowledge of or possible involvement in the use by approximately 80 Bush White House aides of Republican National Committee email accounts to conduct official business?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. As I further stated during the hearing, I do not take a position regarding the release of documents, which I believe is an issue for the Senate, the Executive Branch, and President Bush. As a matter of nominee precedent, I am aware that neither Chief Justice Roberts', Justice Alito's, or Justice Kagan's documents from the Solicitor General's Office, nor Justice Scalia's and Justice Alito's documents from the Office of Legal Counsel, were turned over to the Committee during their confirmations.

66. We have several documents showing that, while you were in the White House Counsel's Office, you handled issues related to the Presidential Records Act, including one email in which a colleague referred to you as "Mr. Presidential Records." (Email from Robert Cobb to Brett Kavanaugh, *speechwriting & laptops* (Feb. 14, 2001))

- a. **Given your past experience with these issues, were you consulted about or in any way involved in the process through which records related to your nomination were produced to the Committee, including issues related to the Presidential Records Act?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents

related to my nomination. I cannot speak knowledgeably to the details of the document production.

- b. When did you become aware of the process to be used to provide your records?**

RESPONSE: Please see my response to Question 66.a.

- c. Did you ever communicate with Bill Burck or anyone else at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, about your nomination to the Supreme Court? If so, when, who was present, and what was discussed?**

RESPONSE: As I testified during the hearing, I saw Mr. Burck on the Saturday after my nomination at a social event. I saw another Quinn Emanuel partner, Chris Landau, at the swearing in of Judge Britt Grant to the United States Court of Appeals for the Eleventh Circuit.

- d. Did you ever communicate with Mr. Burck or anyone else at Quinn Emanuel about the process through which records related to your nomination were produced to the Committee, including issues related to the Presidential Records Act? If so, who, when, and what was discussed.**

RESPONSE: No.

- e. Did you ever communicate with anyone regarding Committee confidential designation for documents related to your record? If so, who, when, and what was discussed.**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

- f. Did you ever communicate with anyone regarding assertion of constitutional or executive privilege over your record? If so, who, when, and what was discussed.**

RESPONSE: Please see my response to Question 66.e.

- g. Did you ever communicate with Mr. Burck about your nomination to the Supreme Court or your confirmation hearings? If so, when, who was present, and what was discussed?**

RESPONSE: As I testified during the hearing, I saw Mr. Burck on the Saturday after my nomination at a social event.

67. Have you ever communicated with anyone about the potential assertion of executive privilege over documents dating from your tenure in either the White House Counsel's Office or as Staff Secretary? If so, when did those discussions occur, with whom, and what was discussed?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

68. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee. Include both those from within the Trump Administration and outside of the Trump Administration.

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. As I further noted, each of these meetings was substantive and provided me insight into the issues I could look forward to discussing at the hearing.

69. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see my response to Question 68.

70. At any point before or during your nomination hearing (September 4-7, 2018), did you review or discuss, or were you informed about, any of the documents from your tenure in the White House Counsel's Office that Bill Burck planned to produce or did produce to the Senate Judiciary Committee?

a. If so, which documents did you review or discuss? Please provide a list of Bates numbers of all documents that you reviewed, discussed, or received information about.

RESPONSE: I was informed that I might be asked about documents designated "committee confidential" in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions I was shown some documents that were designated "committee confidential."

b. How many of the documents you reviewed or discussed were designated Committee Confidential? Please provide a list of Bates numbers of all such documents designated Committee Confidential.

RESPONSE: Please see my response to Question 70.a.

- c. Who provided you with copies of these documents or otherwise informed you about the documents' contents?**

RESPONSE: Please see my response to Question 70.a.

- d. At any point during your hearing, were you given advice on how to address Senator's questions?**

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. As I further noted, each of these meetings was substantive and provided me insight into the issues I could look forward to discussing at the hearing. All of my answers were my own.

71. You were added to President Trump's second so-called "short list" of potential Supreme Court nominees on November 17, 2017.

- a. Did you ever discuss with Justice Anthony Kennedy whether you might be an acceptable replacement on the Court if he were to retire? If so, when, who was present, and what was discussed?**

RESPONSE: No.

72. At any point during the process that led to your nomination, did you have any discussions with anyone—including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups—about President Trump's position on loyalty? If so, please elaborate. Was there any communications about whether President Trump may pull your nomination if your answers displeased him?

RESPONSE: As I said at the hearing, I am an independent judge and am loyal to the Constitution. My answers to all questions posed by the Senators were my own.

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

RESPONSE: I drafted answers to these questions in conjunction with members of the Office of Legal Policy at the U.S. Department of Justice, and other attorneys from the Department of Justice, the White House Counsel's Office, as well as my former clerks. My answers to each question are my own.

**Senator Patrick Leahy (D-Vt.), Senate Judiciary Committee,
Questions for the Record
Hearing on the Nomination of The Honorable Brett Kavanaugh
to be an Associate Justice of the Supreme Court of the United States
September 10, 2018**

1. At your 2006 nomination hearing, you said that you “absolutely” believed President Bush’s statements that the United States “does not torture” and does not “condone torture.” At the time, I brought your attention to abuses that took place at Abu Ghraib. Senator Durbin reminded you that our government sanctioned techniques such as threatening detainees with dogs, forced nudity, and painful stress positions. Since then, the Senate Intelligence Committee’s 6,000 page report about Bush-era detention policies provided details about the CIA’s widespread use of waterboarding and other “enhanced interrogation techniques,” which of course is a euphemism for torture. **Knowing what you know now, do you still believe what you testified in 2006 — that the United States did not engage in the practice of torture during the George W. Bush administration?**

RESPONSE: To be clear, my 2006 testimony stated my belief in what President Bush had said. As I noted at the hearing last week, I was not read into the program involving the controversial enhanced interrogation techniques, nor did I craft the legal memos for that program.

2. Attached in Appendix I is a document that was obtained through a FOIA request. It shows that you, as Staff Secretary, were specifically looped in to review talking points covering the just-released and infamous Bybee torture memo. **What other emails relating to post 9-11 torture and detainee policies exist from your tenure as Staff Secretary?**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors. Once there was public disclosure of those previously secret memos, the President and White House responded in a number of ways, and I would have performed my usual Staff Secretary role.

3. Torture is as un-American as it is illegal. Thanks to the leadership of my late dear friend Senator John McCain, torture is explicitly banned by law. Under Justice Jackson’s *Youngstown* framework, a President’s power “is at its lowest ebb” when he acts contrary to the will of Congress. Nonetheless, candidate Trump repeatedly threatened to resurrect the practice of torture upon becoming President. **In your view, is there any circumstance in which the President could violate a statute passed by Congress and authorize the use of torture?**

RESPONSE: Under Justice Jackson’s *Youngstown* framework, a President’s power is very limited and at its nadir when the President acts contrary to the will of Congress. And as I noted in my 2006 hearing, the President has the responsibility to follow the laws against torture reflected in statutes passed by Congress.

4. When you testified before this Committee in 2006, you testified: “I was not involved and am not involved in the questions about the rules governing detention of combatants.” But in 2007, the *Washington Post* published a report indicating that you had been consulted on and offered an opinion regarding whether the Supreme Court would approve of American citizens being detained as enemy combatants without access to counsel.¹ **Is the *Washington Post* correct that, while you were in the Bush White House, you were consulted on such a policy matter regarding the detention of enemy combatants?**

RESPONSE: I answered this question at the hearing.

5. Presidents frequently invoke an expansive view of “national security” to justify sweeping, often seemingly unrelated executive actions, such as when President Trump has used national security to justify enacting tariffs or to ban transgender Americans from serving in the military. In both of those examples, actual studies carried out by the relevant executive agencies did not demonstrate any national security threat that could be rectified by the President’s action, which proceeded nonetheless. You have written in support of an expansive view of executive power many times in the past.
 - a. **Should the courts defer to the President on the definition of “national security” in the absence of a clear legal definition? What about in the case of a clear legal definition?**

RESPONSE: As I discussed at the hearing, national security is not a blank check for the President. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

- b. **When the President and the agencies legally charged with executing a particular law of the United States containing a national security exception are not in agreement on whether a national security need exists, or when they are in disagreement, can a clear national security justification be said to exist?**

RESPONSE: As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on hypotheticals or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

¹ http://voices.washingtonpost.com/chenev/chapters/pushing_the_envelope_on_presi/.

- c. **Is it necessary that a national security waiver be written into a law for the President to waive certain provisions on national security grounds?**

RESPONSE: Please see my response to Question 5.b.

6. During your 2006 hearing, I asked whether you had any knowledge of President Bush's post 9-11 torture and detainee policies. You testified that you were "not aware" of the "legal justifications or the policies relating to the treatment of detainees" until "2004, when there started to be news reports" on the subjects. Yet a 2007 news report indicated that in 2002, you were a key player in White House discussions about whether President Bush's detainee policies would pass muster before the Supreme Court. There are still thousands of your documents we have not reviewed – and thousands that may have been screened out of the partisan production we received – that could shed additional light upon what you knew at the time. At some point they will become public. **At any point in your tenure in the White House, were you aware of any aspects of President Bush's post 9-11 torture and detention policies before they became public through news reports?**

RESPONSE: As I said at the hearing, my 2006 testimony on this point was accurate and remains accurate.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers." **Do you agree that the Constitution provides Congress with its own war powers, and that Congress may exercise these powers to restrict the President – even in a time of war?**

RESPONSE: Please see my response to Question 5.a. I explained this issue in some depth at the hearing.

8. Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." **In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

RESPONSE: Please see my response to Question 5.a. I have explained my views on this issue in some depth at the hearing and in my writings.

9. You indicated in your hearing testimony that the Supreme Court's recent decision in *Carpenter v. United States* was a "game changer" regarding the intersection of technology and the Fourth Amendment. **In the wake of *Carpenter*, what is your view on the continued vitality (or lack thereof) of the Fourth Amendment's "third-party doctrine," as explained by the Court in *Smith v. Maryland*?**

RESPONSE: Questions involving the third-party doctrine are likely to come before me. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

10. At your hearing on September 6, 2018, I asked you the following question. You did not answer my specific question. Please do so now:

In your concurrence in *Klayman v. Obama*, you went out of your way to say that not only is mass surveillance of American's telephone metadata okay because it is not a search. You also said — with no support, and citing only the 9-11 Commission Report but no specific part of it — that even if it is a search, it is justified because the government demonstrated a “special need” to prevent terrorism. This was months after Senator Lee and I worked to pass the USA FREEDOM Act, which prohibited such collection.

The year before you issued your opinion, the Privacy and Civil Liberties Oversight Board (PCLOB) stated publicly that it could not identify "a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation." Others also found that the NSA's phone records program was not essential to thwarting terrorist attacks.²

- a. Why did you go *out of your way* to issue a concurrence stating that this program met a critical national security need, when it already was found to have made no difference in fighting terrorism? Why not simply join the majority opinion?**

RESPONSE: I answered this question at the hearing.

- b. Is it your view that merely making a reference to terrorism, even with respect to a program that was already found to have made no**

² “Based on the information provided to the Board, we have not identified a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack. And we believe that in only one instance over the past seven years has the program arguably contributed to the identification of an unknown terrorism suspect. In that case, moreover, the suspect was not involved in planning a terrorist attack and there is reason to believe that the FBI may have discovered him without the contribution of the NSA’s program.

Even in those instances where telephone records collected under Section 215 offered additional information about the contacts of a known terrorism suspect, in nearly all cases the benefits provided have been minimal — generally limited to corroborating information that was obtained independently by the FBI.” See [https://www.pclob.gov/library/215-Report on the Telephone Records Program.pdf](https://www.pclob.gov/library/215-Report%20on%20the%20Telephone%20Records%20Program.pdf).

concrete difference in fighting terrorism, is sufficient to justify an exception to the Fourth Amendment's warrant requirement?

RESPONSE: No.

- 11. At any point during your time in the White House Counsel's office, were you involved in obtaining or providing legal analysis as to the Fourth Amendment implications of any warrantless electronic surveillance program, whether actual or hypothetical?**

RESPONSE: As I stated during the hearing, I cannot rule out the possibility of my involvement in the broad range of issues stated in your question. In the wake of the terrorist attacks of September 11, 2001, it was "all hands on deck" on all fronts in the White House Counsel's office.

- 12. According to the 2009 Report on the President's Surveillance Program, prepared by the Inspectors General of the DOD, DOJ, CIA, NSA and ODNI, on September 17, 2001, John Yoo, who was then at the Office of Legal Counsel, wrote a memo to your supervisor, Timothy Flanigan, "evaluating the legality of a 'hypothetical' electronic surveillance program within the United States to monitor communications of potential terrorists." The memorandum was entitled, "Constitutional Standards on Random Electronic Surveillance for Counter-Terrorism Purposes." As of 2001, were you aware that Mr. Yoo had written such a memorandum to Mr. Flanigan?**

RESPONSE: I cannot specifically recall every memorandum that I may have seen while working for the White House Counsel's Office. As I explained in the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office.

- 13. According to the same 2009 Joint Inspector General Report, Attorney General Alberto Gonzales believed that that September 17, 2001 memo, along with another written by Mr. Yoo in October 2001, provided the legal authority for the electronic surveillance program that would be codenamed Stellar Wind. As of 2001, did you have any interactions with Mr. Yoo, Mr. Flanigan, or anyone else, about either the contents of or legal reasoning underlying either of these memoranda?**

RESPONSE: As I explained in the hearing, I testified accurately in 2006 that I did not learn about the Terrorist Surveillance Program, or TSP, until it was described in a New York Times article in December 2005. I had not been read into that program. As I understand it, the September 17, 2001, email does not refer to the TSP.

- 14. Did you have any conversations of any type whether via email, over the phone, in person or otherwise with Mr. Yoo between September 17, 2001 and October 4th 2001 regarding warrantless surveillance of phone and/or email conversations within the United States?**

RESPONSE: I cannot specifically recall every conversation that I may have had while

working for the White House Counsel's Office. As I explained in the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office.

15. Attached in Appendix II is a September 17, 2001 email you wrote to John Yoo, BCC'ing Mr. Flanigan, asking the following question: "Any results yet on the 4A [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?"

a. Would you agree that the question in your September 17, 2001 email is substantially similar to the one Mr. Yoo answered in his memorandum to Mr. Flanigan dated September 17, 2001?

RESPONSE: Please see my response to Question 13.

b. Other than to help evaluate the legality of a bulk collection electronic surveillance program, for what purpose would you have asked Mr. Yoo to provide a legal analysis of the Fourth Amendment implications of such a program?

RESPONSE: Please see my response to Question 13.

c. Given that the answer to your question to Mr. Yoo helped form the legal justification for the NSA's electronic surveillance program, is it still your position, as you testified in 2006, that you had neither "seen any documents relating to" the President's NSA warrantless wiretapping program nor "heard anything" about it prior to the public disclosure of the program in 2005?

RESPONSE: Please see my response to Question 13.

d. What response did you receive from Mr. Yoo, to your September 17, 2001 email?

RESPONSE: Please see my response to Question 13.

e. It is clear from the email you sent that you had discussed the topic of warrantless surveillance with Mr. Yoo prior to your email request. Please detail the conversations or interactions you had with Mr. Yoo regarding the subject of warrantless surveillance between September 11 and September 17, 2001.

RESPONSE: Please see my response to Question 13.

16. At your hearing on September 6, 2018, I asked you about your dissenting opinion in *U.S. v. Jones*, which I described as "more like an analysis we'd get

from the Chinese government than we'd get from James Madison.”

In response, you stated the following:

KAVANAUGH: I also went on in that opinion to say the attachment of the GPS device on the car was an invasion of the property right and that independently would be a Fourth Amendment problem. When the case went to the Supreme Court, the majority opinion for the Supreme Court followed that approach that I'd articulated in saying that it was a violation of the Fourth Amendment so the approach I'd articulated there formed the basis of saying it was actually unconstitutional.

Your response to me conveyed that you believed that “the attachment of the GPS device on the car was an invasion of the property right” and “was a violation of the Fourth Amendment.” However, your actual opinion merely asserted that this argument “poses an important question.” Your opinion specifically stated that you “do not yet know whether I agree with that conclusion,” and that it “requires fuller deliberation.” **Is it your testimony that you found in *U.S. v. Jones* that the attachment of the GPS device on the car constituted a violation of the Fourth Amendment?**

RESPONSE: My dissent in *Jones* stated that the D.C. Circuit should grant rehearing to consider “the defendant’s alternative submission” that the installation of a GPS device on his vehicle by police constituted a physical encroachment that would be considered a search under Fourth Amendment precedent. *United States v. Jones*, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from the denial of rehearing *en banc*). The Supreme Court subsequently granted certiorari to review the case. The defendant’s brief in the Supreme Court repeatedly cited my opinion, and the Court’s majority opinion ultimately adopted reasoning similar to the argument that I advanced in my dissent. *See United States v. Jones*, 565 U.S. 400, 403-13 (2012).

17. During your 2004 confirmation hearing, you were asked by Senator Kennedy about now-Judge William Pryor in the following exchange:

SENATOR KENNEDY: Let me, if I could, ask you about your role in the vetting process, and particularly with regard to William Pryor.

KAVANAUGH: That was not one of the people that was assigned to me. I am familiar generally with Mr. Pryor, but that was not one that I worked on personally . . . I was not involved in handling his nomination.

You added that aside from participating in a moot, you did not work on the nomination of Judge Pryor to the 11th Circuit Court of Appeals.

Yet the limited documents that we have been permitted to see from your time in the White House Counsel's Office suggest you indeed worked on his nomination personally, even if you were not the point person assigned to his nomination.

- a. Did you participate in the Pryor working group? If so, how many counsels were assigned to this working group?**

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nominations was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was primarily responsible for judicial nominations from certain states. Judge Pryor's nomination was not one of the nominations for which I was primarily assigned during my service in the White House Counsel's Office, as I noted in the exchange you provide above. Nonetheless, and as I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges, usually ten lawyers, participated in discussions and meetings concerning all of the President's judicial nominations." I do not have specific recollection of all of the circumstances surrounding Judge Pryor's nomination.

- b. What calls did you participate in related to the Pryor nomination?**

RESPONSE: Please see my response to Question 17.a.

- c. What was your role with respect to Judge Pryor's White House interview(s)?**

RESPONSE: Please see my response to Question 17.a.

- d. Did you ever personally interview Judge Pryor, including by participating in any group or joint interviews of Judge Pryor?**

RESPONSE: Please see my response to Question 17.a.

- e. Prior to recommending Judge Pryor for the nomination, were you aware that he had called *Roe v. Wade* "the worst abomination in the history of constitutional law?" Were you also aware that argued that a constitutional right to same sex intimacy would "logically extend" to activities like "necrophilia, bestiality, and pedophilia?"**

RESPONSE: Please see my response to Question 17.a.

- f. During your moot session with Judge Pryor, did you advise him on how to handle questions on his views on *Roe* and same-sex intimacy?**

RESPONSE: Please see my response to Question 17.a.

- g. Did you attend an "emergency umbrella meeting" to discuss Bill Pryor's hearing on 6/6/2003 at Baker & Hostetler?**

RESPONSE: Please see my response to Question 17.a.

18. Did you contact investigators to turn over documents you suspected may have been stolen by Manny Miranda that he had provided to you?

RESPONSE: During the hearing, I truthfully answered numerous questions regarding Mr. Miranda, and I refer you to those answers.

19. After the theft of confidential Democratic files from senators serving on the Senate Judiciary Committee became public in December 2003, what steps did you take to ensure you did not receive or benefit from stolen property?

RESPONSE: Please see my response to Question 18.

20. Did you contact and volunteer to be interviewed by any federal investigators in relation to the hacking of Democratic computer files?

RESPONSE: Please see my response to Question 18.

21. On how many occasions did Manny Miranda request to meet with you in person? On how many occasions did he suggest meeting you off-site (defined here as neither his nor your office)?

RESPONSE: Please see my response to Question 18.

22. On how many occasions did Mr. Miranda provide you with paper documents related to Democratic senators, either directly (i.e., hand to hand) or indirectly (e.g., through Don Willet)?

RESPONSE: Please see my response to Question 18.

23. Did you ever communicate with Manny Miranda while you served as White House Staff Secretary?

RESPONSE: Please see my response to Question 18.

24. In at least one email, you passed along inside information about Democrats from Mr. Miranda that you stated originated with "Democratic sources." Who were those sources?

RESPONSE: Please see my response to Question 18.

25. I asked you in written questions in 2004 whether you had ever heard of a Democratic mole. You never answered the question. Please do so now.

RESPONSE: Please see my response to Question 18.

26. You stated in your decision in *Heller II* that a gun restriction must not conflict with the

history and tradition of the Second Amendment.

- a. **Would you agree that our founding fathers almost certainly never envisioned 3-D printing technology that could be used to print plastic firearms at home with no expertise?**

RESPONSE: Courts regularly consider cases involving technologies that would have never been envisioned by the Founders. It is the job of judges to consider these technologies against the backdrop of the Constitution. For example, the Fourth Amendment applies to technologies that were not known at the Founding, including cars and modern communication devices. The regulation of 3-D printed firearms is at issue in the federal courts. As such, and as I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on such a case or issue. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case or issue.

- b. **Would you agree that, consistent with the history and tradition of the Second Amendment, such technology, which is only beginning to emerge now, could be regulated or even banned?**

RESPONSE: Please see my response to Question 26.a.

27. It has been mentioned many times that you have made it a point to hire women and minority law clerks. I think that's important and commendable. **Why do you believe it is appropriate for you to have an interest in your law clerk's race or sex when placing them on the government payroll, but a university cannot do the same for its admissions?**

RESPONSE: I am proud of my record of hiring the best to serve as my law clerks—including women and minorities—and of my efforts to promote diversity. The extent to which public universities may consider certain factors as admissions criteria is the subject of precedent and ongoing litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

28. In my view, and in my capacity as a Dodd-Frank conferee, the structure and independence of the Consumer Financial Protection Bureau (CFPB) is key in insulating decisions and actions from undue political influence. In your dissent in *PPH Corp. v. Consumer Financial Protection Bureau*, you held that the governing structure of the CFPB is unconstitutional and that could be remedied by removing the for-cause requirement allowing the President to fire the director. Congress created the CFPB to be a consumer watchdog and to fight on behalf of individual Americans who cannot by themselves afford to fight lengthy and costly legal battles. Too often, even if consumers were harmed or wronged by companies who broke the law and acted in bad faith, they do

not stand a chance against the company's scores of legal experts eager to prolong and appeal cases. The CFPB levels the playing field on behalf of these Americans and must have the authority and flexibility to advocate on their behalf.

a. Do you believe the for-cause provision in the governing structure of the CFPB is unconstitutional?

RESPONSE: As I explained at the hearing, I dissented in *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 164-200 (2018) (en banc), because, in my view, the structure of the Consumer Financial Protection Bureau unconstitutionally empowered a single director removable only for cause to exercise significant power over the U.S. economy—an agency structure that Congress had never previously employed. I have repeatedly recognized that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), permits Congress to create independent agencies with leaders removable only for cause. But as my opinion explained in detail, Congress has generally structured those agencies to have multiple leaders, rather than a single leader.

b. Do you believe the fear of losing one's job could inform whether a director chooses to pursue a particular course of action with respect to a company's violation of laws, especially if the president disagrees?

RESPONSE: A determination of that kind is for Congress to make in the first instance. As a judge, I enforce the requirements of the Constitution as construed by Supreme Court precedent.

c. How can Congress ensure the CFPB director can take on unpopular but legitimate cases?

RESPONSE: Please see my response to Question 28.b.

d. Do you believe independent agencies with multi-member governing bodies with term-limits are constitutional?

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on these issues,

e. Do you believe any other aspects of CFPB's structure are unconstitutional? If so, which aspects?

RESPONSE: Please see my response to Question 28.a above.

29. In your dissent in *U.S. Telecom v. FCC*, you asserted that Internet Service Providers (ISPs) have editorial discretion under the First Amendment to choose what content to

carry or not to carry. Were this view to become the law of the land, it would give ISPs unprecedented veto power over free speech online. This would be a real problem because 70 million Americans have only one choice of broadband provider. There is no competition; there are no alternatives. Tens of millions of American consumers would have no recourse but to see only what their ISPs allowed them to see online.

We have a president who is famously thin-skinned when it comes to news reports that are critical of him. And he has repeatedly threatened to punish media organizations he deems “fake news.” **If ISPs have editorial discretion to choose what Americans can see online, what would stop an ISP from cutting off access to legitimate news sites in an effort to gain favor with the President?**

RESPONSE: As I said at the hearing, under the Supreme Court’s decision in *Turner Broadcasting*, if a company exercising editorial discretion in the telecommunications arena has market power, then the government has broad authority to regulate. However, in *United States Telecom Association v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (en banc), the FCC did not attempt to demonstrate that internet service providers had market power. *Id.* at 434. Therefore, I found no basis to deem the net neutrality rule compliant with *Turner Broadcasting*.

30. Part of the justification you cite in your dissent in *U.S. Telecom v. FCC* is the dual role that some ISPs have as both cable and Internet providers. Specifically, your dissent states that:

“Indeed, some of the same entities that provide cable television service colloquially known as cable companies – provide Internet access over the very same wires. If those entities receive First Amendment protection when they transmit television stations and networks, they likewise receive First Amendment protection when they transmit Internet content. It would be entirely illogical to conclude otherwise.”

I would like to explore your conclusion further. In addition to ISPs that use cable wires to provide Internet access, there are ISPs that provide high speed Internet access over telephone lines, a service known as DSL.

- a. Would it be logical to conclude that providers of Internet access over telephone wires should receive the same level of editorial discretion as providers of traditional telephone service? If not, what are the material differences?**
- b. If providers of Internet access over telephone wires are entitled to editorial discretion, would it be logical to conclude that providers of traditional telephone service provided over the same wires should receive the same level of editorial discretion?**

- c. **Would it be logical to conclude that Internet access provided over telephone wires should be subject to the same regulatory scheme as traditional telephone service provided over the same wires?**

RESPONSE: The issues raised in your questions could well come before me in future litigation. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on these issues.

31. There are ISPs that also use the transmission of radio frequencies to provide Internet access to consumers. Many of these ISPs also use radio frequencies to provide voice service. In addition, radio frequencies are used to provide a wide array of other services.

- a. **Would it be logical to conclude that ISPs providing Internet access over radio frequency should receive the same editorial discretion as providers using these frequencies to provide voice service? If not, what are the material differences?**
- b. **If ISPs providing Internet access over radio frequency are entitled to editorial discretion, would it be logical to conclude that providers using these frequencies to provide voice service should receive the same level of editorial discretion?**
- c. **Would it be logical to conclude that Internet access provided over radio frequency should be subject to the same regulatory scheme as voice service provided over radio frequency?**
- d. **Would it be logical to conclude that ISPs providing Internet access over radio frequency should receive the same editorial discretion as the operator of a garage door opener, which also transmits using radio frequencies?**

RESPONSE: The issues raised in your questions could well come before me in future litigation. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on these issues.

32. Many who consider themselves constitutional originalists have been critical of Supreme Court decisions that recognized the right to privacy. The originalist argument is that privacy is not an enumerated right and therefore cases like *Roe* and *Griswold* were wrongly decided.

- a. **You have suggested that other Supreme Court precedent (*U.S. v. Nixon*) may have been wrongly decided.³ Do also you believe *Roe v. Wade* and *Planned Parenthood v. Casey* were wrongly decided?**

RESPONSE: This is not an accurate description of my view of *Nixon*. I have said repeatedly and publicly over many years that *Nixon* is one of the four greatest moments in Supreme Court history. *Roe* and *Casey* are important precedents of the Supreme Court entitled to respect under the law of precedent. *Casey* is precedent on precedent.

- b. **Do you believe the Constitution protects personal autonomy and privacy as a fundamental right?**

RESPONSE: Please see my response to Question 32.a.

33. In *Priests for Life v. Department of Health and Human Services*, you wrote in reference to the exercise of religion that, “when the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . the Government has substantially burdened.”

- a. **Do you believe that, under the Constitution, corporations should be treated as persons?**
- b. **Do you believe that non-governmental organizations, such as Priests for Life, should be treated as individuals when it comes to denying their workers access to affordable contraception?**
- c. **Do you believe that a boss’s private views trump the medical needs and health insurance choices of the boss’s employees?**

RESPONSE: The portion of *Priests for Life* you have quoted concerned the analysis required under the Religious Freedom Restoration Act, a federal statute passed by Congress. Under the Supreme Court’s precedent in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-74 (2014)—which I, as a lower-court judge, was bound to apply—the Religious Freedom Restoration Act’s protections apply to businesses as well as natural persons. The extent to which the business form affects the rights secured under the Constitution is the subject of ongoing litigation and is a matter that could come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

34. You have praised Justice Scalia’s jurisprudence in writings and speeches. In a

³ *Attorney Client Privilege, Does it Pertain to the Government?*, WASHINGTON LAWYER, January/February 1999.

2011 interview, Justice Scalia stated that the Equal Protection Clause does not extend to women or LGBT individuals.⁴

a. Do you agree with that view?

RESPONSE: As I stated at the hearing, the text and meaning of the Fourteenth Amendment requires equal protection under law for all Americans. Everyone is entitled to equal justice under law.

b. Does the Equal Protection Clause protect individuals on the basis of their gender or sexual orientation?

RESPONSE: Please see my response to Question 34.a.

c. Does the Constitution permit discrimination in certain instances?

RESPONSE: As a general matter, the Equal Protection Clause does not countenance invidious discrimination. The full contours of this prohibition are regularly the subject of cases and controversies brought before the D.C. Circuit and the Supreme Court. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

35. Justice Kennedy wrote in *Planned Parenthood v. Casey* that “At the heart of liberty is the right to define one’s own concept of existence.”

a. Do you agree with Justice Kennedy in this case?

RESPONSE: The passage cited above is the opening sentence in *Planned Parenthood v. Casey*. As I discussed at the hearing, it would be inconsistent with judicial independence to opine on cases or issues that could come before me. This means no forecasts or hints, as Justice Ginsburg said during her confirmation hearing, and no thumbs up or thumbs down on cases, as Justice Kagan said during her confirmation hearing.

b. Do you believe “the right to define one’s own concept of existence” means states cannot pass laws discriminating against LGBT Americans?

RESPONSE: Please see my response to Question 35.a.

⁴ *Scalia: Constitution Does not Protect Women Against Discrimination*, WASHINGTON POST, January 4, 2011, at <http://voices.washingtonpost.com/44/2011/01/scalia-constitution-does-not-p.html>.

36. In your dissent in *Seven-Sky v. Holder*, you wrote that, “the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional.” Your reasoning was that, “[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

a. How is this position consistent with the president’s constitutional obligation to “take care that the laws be faithfully executed”?

RESPONSE: As I explained at the hearing, in footnote 43 of my opinion in *Seven-Sky v. Holder*, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011), I was referring to the general concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), and applied to civil enforcement in *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985). As I further explained at the hearing, the limits of prosecutorial discretion are uncertain.

b. During your time in the Bush White House, did you ever draft, revise, edit, approve, or otherwise contribute to any signing statements reserving the president’s right not to enforce laws or part(s) of laws? If so, which ones?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of my work, my role was not to replace the policy or legal advisers, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

c. Can a president refuse to comply with a court order?

RESPONSE: As I said in the hearing, no one is above the law of the United States, including a President of the United States. As I also stated at the hearing, when the Supreme Court issues a ruling prohibiting the President from doing something or ordering the President to do something, the Supreme Court’s word is the final word, subject of course to a constitutional amendment or a subsequent overruling by the Court. *See Cooper v. Aaron*, 358 U.S. 1 (1958). In keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment any further on this question.

d. If a president refuses to comply with a court order, how should the courts respond?

RESPONSE: Please see my response to Question 36.c.

e. How can a court serve as a legitimate check on the powers of the executive branch if the president can disregard its rulings whenever the

president deems it to be necessary?

RESPONSE: Please see my response to Question 36.c.

37. In 2017, you became a member of the Board of Directors of the Washington Jesuit Academy, a parochial school in the District of Columbia that accepted vouchers from the D.C. voucher program. You indicated in the questionnaire you submitted to the Committee that you, “participate in meeting where the Board deals with various issues, including educational decisions.”

a. Due to your involvement as a board member of this school, will you recuse yourself from cases regarding the legality of school vouchers since the decision will have a direct impact on how the Washington Jesuit Academy functions as a school?

RESPONSE: I will consider that question as appropriate.

b. If confirmed, will you step down from the Board of Directors of the Washington Jesuit Academy to avoid the perception of there being a possible conflict of interest?

RESPONSE: I plan to step down from the Board, if I am confirmed.

c. Do you believe that taxpayer dollars should be given to private parochial schools, whereby tax payer dollars could be used to promote religious messages?

RESPONSE: This question calls upon me to offer my views as to a matter of public policy. As a sitting judge and nominee, it would be inappropriate for me to provide an answer.

d. Do you believe that institutions that receive federal education dollars should be required to follow the same civil rights protections as public schools?

RESPONSE: Please see my response to 37.c.

38. You said that “a judge must interpret statutes as written. And a judge must interpret the Constitution as written.” Given the varying and complicated constraints faced by agencies, cost-benefit analysis may vary by administration, mission area, desired outcome, and economic indicators, among other variables. Guidance for agencies on cost- benefit analysis provided by the Office of Management and Budget and internal guidance will also inform the structure and depth each analysis.

a. Do you believe it is appropriate for judges to interpret the varying methods of cost-benefit analysis and determine if they are sufficient or appropriate for any given regulation?

RESPONSE: If the statute requires or precludes cost-benefit analysis, the agency must follow that statute. If the statute gives the agency discretion, the agency must exercise discretion reasonably.

b. If so, what statute on cost-benefits analysis should the court interpret?

RESPONSE: In general, a court should apply the analysis required by the particular statute at issue in the case. As I explained at the hearing, Congress passes laws, and it is the job of judges to determine whether the Executive Branch has acted within the authority given by Congress.

c. Do you think the benefits of certain regulatory action, especially in the environmental space, are more difficult to measure than the costs? Does that make measuring them when engaging in a cost-benefit analysis any less important?

RESPONSE: The Supreme Court has determined that some statutory schemes, including in the environmental arena, require agencies to consider costs and benefits before deciding whether regulation is appropriate and necessary. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015).

39. You have criticized *Chevron* deference as being aggressive executive overreach and argued that courts should determine the best reading of the statute.

a. How will you make sure expertise is accounted for when considering complicated, scientific cases regarding the environment?

b. What role should experts in agencies play when interpreting statutes?

RESPONSE: As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

40. You have often argued that plaintiffs representing industry should have standing for economic damages incurred from environmental regulations. In some cases, for example *Grocery Manufacturers Assoc v. EPA*, you have claimed that a relatively low bar of economic harm qualifies as standing.

a. Will individuals and nongovernmental organizations receive the same treatment when you consider whether they have standing for damages?

RESPONSE: As I explained at the hearing, I am a pro-law judge. Part of being an independent, pro-law judge is ruling for the party that is right, no matter who that party is. In the specific context of your question, I apply standing principles in an evenhanded manner, regardless of the identity of the litigants.

- b. Often environmental regulations create significant economic benefits and value to human health, the clean energy economy, and environmental sustainability while some industries face challenges as a result of the regulations. **How do you address and balance these economic factors when determining standing?**

RESPONSE: I have applied an evenhanded and impartial approach to the wide variety of environmental cases that have come before me.

- c. As someone who has said “the task of dealing with global warming is urgent and important at the national and international level,” do you agree that the damage caused to individuals, corporations, and communities by climate change should be considered for standing on similar grounds to the economic hardship created by regulations that mitigate climate change?

RESPONSE: Please see my response to Question 40.b. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on legal issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

41. You have argued that the EPA does not have the authority to regulate greenhouse gases under the Clean Air Act despite statute giving EPA authority to regulate “any air pollutant.”

- a. Do you still believe that EPA cannot regulate greenhouse gases?

RESPONSE: As your question suggests, I addressed one aspect of this issue in *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *14-*23 (D.C. Cir. Dec. 20, 2012). The Supreme Court largely adopted my position in *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Beyond reference to those prior decisions, it would be improper for me as a sitting judge and a nominee to comment on legal issues that might come before me.

- b. If so, why are greenhouse gases excluded from this definition of “any air pollutant?”

RESPONSE: As I explained above and at the hearing, it would be improper for me as a sitting judge and a nominee to comment on legal issues that might come before me.

42. Chief Justice Roberts wrote in *King v. Burwell* that

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”

Do you agree with the Chief Justice? Will you adhere to that rule of

statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

RESPONSE: As discussed at the hearing, “it is critical that judges stick to the law as written, the text of the statute as passed by Congress and signed by the President.” I also believe, as discussed at the hearing, “footnote 9 of *Chevron* is very important in terms of using all the tools of statutory construction before you make a finding of ambiguity in the statutory term at issue.” In applying those tools, I agree with and respect the principles of statutory interpretation cited in the above passage of the Chief Justice’s opinion. It would not be appropriate for me in this context to opine on whether I agree with how those principles were applied by the Court in *King v. Burwell*.

- 43.** In *United States v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines were only advisory and could not mandate that a district court judge sentence a given defendant within a given range. Notwithstanding *Booker*, many Courts of Appeal, including the D.C. Circuit in cases like *United States v. Haibe*, have held that the guidelines “frame the discretion” of district court judges. This conception of the post- *Booker* advisory guidelines leads to sentence reversals in cases in which, for example, the defendant’s sentence is within even his own calculated range. **What is your view on the proper role of the advisory guidelines in evaluating a district court’s sentencing decisions?**

RESPONSE: The role of the advisory sentencing guidelines is a frequently litigated issue that could come before me. As I explained during the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

- 44.** President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.” **While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate for leaders to attack a judge’s integrity based on his ethnicity, or to question the legitimacy of a federal court?**

RESPONSE: As I stated during the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated during the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge – which is to decide cases, not to comment on current events as pundits.

- 45.** President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned*.” (Emphasis added.) **Is there any**

constitutional provision or Supreme Court precedent precluding judicial review of national security decisions of a President?

RESPONSE: I answered this question at the hearing. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

46. Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?

RESPONSE: The extent to which the First Amendment applies to non-citizens seeking entry into the United States is the subject of ongoing litigation and is a matter that could come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

47. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”⁵

RESPONSE: I cannot speak to Justice Scalia’s views. In my unanimous opinion in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.C. Cir. 2012), I noted that “[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history.” *Id.* at 32-33.

48. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?

RESPONSE: The Foreign Emoluments Clause of the Constitution states 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 Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

49. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s

⁵ https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-96_7648.pdf.

findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.” **When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

50. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?

RESPONSE: As I explained during the hearing, the Thirteenth, Fourteenth, and Fifteenth Amendments are vitally important constitutional Amendments, because they brought the promise of racial equality—which had been denied at the time of the original Constitution—into the text of the Constitution. Because the scope of Congress’s authority to enforce those Amendments is the subject of active litigation, it would be inappropriate for me to comment more specifically on this issue.

51. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.” Do you believe the Constitution protects that personal autonomy as a fundamental right?

RESPONSE: As I said in my opening statement, Justice Kennedy established a legacy of liberty for ourselves and our posterity. The Supreme Court has, as the portion of *Lawrence* you quote demonstrates, recognized certain areas of personal autonomy as fundamental to liberty. The full contours of this jurisprudence are regularly the subject of cases and controversies brought before the D.C. Circuit and the Supreme Court. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

52. As White House Staff Secretary at the time *Lawrence v. Texas* was decided, what was as your role within the Bush administration as part of its effort to push a constitutional amendment defining marriage as a union between and

man and a woman?

RESPONSE: As I testified in the hearing, while I was Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006—with the exception of a few covert matters—would have crossed my desk as well.

53. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of *stare decisis*. **In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

RESPONSE: As discussed at the hearing, the judicial power clause of Article III and Federalist 78 make clear that *stare decisis* is “part of the proper mode of constitutional interpretation.” I explained that “at the D.C. Circuit level or the court of appeals level, we follow vertical *stare decisis*, absolutely, and that means that we are not permitted to deviate from a Supreme Court precedent. With respect to [the] Supreme Court, or ... when I am on the D.C. Circuit and we are reconsidering en banc a prior precedent of our own, we can do that at times if the conditions for overruling a precedent are met”—a circumstance that “is rare.” If confirmed, I would respect the rules of *stare decisis* given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

54. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety. **How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.**

RESPONSE: I will follow the applicable rules and will consult with my colleagues as appropriate.

55. It is important for me to try to determine for any judicial nominee – and especially one to our Nation's highest court – whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*, 304 U.S. 144 (1938). In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” **Can you discuss the importance of the courts’**

responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

RESPONSE: Equal justice under law means that everyone who ends up in an American court is entitled to equal treatment, due process, and the equal protection of the laws.

56. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like the Iran-Contra Affair, warrantless spying on American citizens, and politically-motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest, we make sure that we exercise our own power properly. Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

RESPONSE: Yes.

57. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

RESPONSE: The Supreme Court has clarified the scope of congressional power under the Commerce Clause of Article I and Section 5 of the Fourteenth Amendment in cases including *United States v. Lopez*, 514 U.S. 549 (1995), *Gonzales v. Raich*, 545 U.S. 1 (2005), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Those cases are important precedents of the Supreme Court entitled to respect under the law of precedent, which I believe is essential to ensuring stability and predictability in the law.

58. As you know, in *Morrison v. Olson* the Supreme Court upheld the constitutionality of a law that allowed the Attorney General to recommend appointment of an independent counsel to investigate and prosecute certain high-ranking Government officials, including the President, for federal crimes. You have said that the case has been “effectively overruled,” but you would “put the final nail in.”⁶

a. What does it mean for a case to have been “effectively overruled”? Precedent has either been overruled or not.

RESPONSE: I have discussed this issue at length in my writings and at the hearing.

b. What other Supreme Court precedent, in your opinion, has been “effectively overruled”?

⁶ Federal Courts & Public Policy," American Enterprise Institute, Washington, D.C., March 31, 2016, <https://www.c-span.org/video/?c4740724/kavanaugh-final-nail>.

RESPONSE: Article III of the Constitution incorporates a system of precedent. As a judge, I have carefully adhered to precedent.

59. At your hearing last week, you and Senator Hirono had the following exchange:

SEN. HIRONO: Have you otherwise ever received sexually suggestive or explicit e-mails from Judge [Alex] Kozinski, even if you don't remember whether you were on this "Gag List" or not?

KAVANAUGH: So Senator, let me start with no woman should be subjected to sexual harassment in the workplace, and ... [sic]⁷

You avoided answering the question. **Please go through your files and emails, and definitively state whether you ever received sexually suggestive or explicit emails from Judge Kozinski, whether as part of his "Easy Rider Gag List" or otherwise.**

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.

60. Following up from the prior question, if you ever received sexually suggestive or explicit emails from Judge Kozinski, did you ever speak or otherwise communicate with him about the appropriateness of this conduct?

RESPONSE: Please see my response to Question 59.

61. Attached in Appendix III is an email that you received from a White House colleague on June 8, 2001 at 10:13 a.m., making a comment – on a government computer network – that is clearly inappropriate. **Did you ever speak or otherwise communicate with this colleague about the appropriateness of this conduct?**

RESPONSE: Aside from me, none of the senders or recipients of that email were employees of the White House, and no White House business was discussed. I was not the author of the inappropriate comment. The specific email referenced in this question was sent over 17 years ago.

62. What is the Eureka Club? When did you take part in activities or gatherings under that name or a substantially similar name? And what were the activities associated with these gatherings?

RESPONSE: A group of friends sometimes gathered for dinner. The scheduling emails for those dinners would sometimes be titled "Eureka."

63. Do you *personally* believe that Nazis, Nazi sympathizers, or white nationalists are "fine people"?

⁷ <http://www.cq.com/doc/congressionaltranscripts-5383496?8&search=6DCnZ3GR>.

RESPONSE: There is no place in American public life for vile ideologies of hate.

64. Have you ever ruled on a case involving a policy that, as an employee of the Bush administration, either you helped create or for which you provided legal or policy analysis? If so, please describe.

RESPONSE: I have recused from cases as appropriate. I have explained this issue in *Baker Hostetler v. Department of Commerce*, 471 F.3d 1355 (D.C. Cir. 2006).

65. Regarding judicial philosophy, do you believe it is important for a judge to approach his or her analysis in a given case with intellectual honesty? Why or why not? Stated differently, would it be appropriate for a judge to have a predetermined conclusion at the outset of a case?

RESPONSE: As discussed at the hearing, I believe “process protects you” as a judge. Rather than staking out a predetermined conclusion, the process of briefing, oral argument, and deliberation is critical to allow judges to engage in deliberate decisionmaking and to ensure confidence in the judiciary.

#

Appendix I

From: "Miers, Harriet"
To: "Kavanaugh, Brett M."
Subject: Fw: let me know when you get this...thx
Received(Date): Sat, 12 Jun 2004 18:10:14 -0500

Brett, fyi.

-----Original Message-----

From: Jim Wilkinson [P6/(b)(6)]
To: Miers, Harriet <Harriet_Miers@who.eop.gov>
Sent: Sat Jun 12 19:08:40 2004
Subject: let me know when you get this...thx

These were written by WH Counsel and NSC legal (approved by both)...they have also been approved by Wilkinson, Bartlett, Rove...Steve Hadley also wanted Harriet, Brett, and Andy to see them...I am on my cell at [P6/(b)(6)]
[P6/(b)(6)]...these are for use by Condi and Powell for tomorrow's Sunday shows...

Ã* The President believes we must do everything possible to protect the American people from terrorism. Gathering intelligence about the plans of terrorists is critical to defending America.

Ã* In all aspects of our nation's war on terror, including the conflict in Iraq, the President has insisted our government must comply with U.S. laws and treaty obligations.

Ã* He has repeatedly made clear that torture of detainees is not permitted under U.S. policy, and he has never considered the possibility of authorizing torture.

Ã* The abuses of Abu Ghraib are a violation of the President's policies â** not a result of them - and these violations are being investigated and will be punished. The President has been and remains firmly committed to our military's observance in Iraq of the Geneva conventions and our other international agreements.

Ã* To help ensure our government follows the law, the executive branch receives legal opinions. The Department of Justice in a legal analysis discussed the possibility that under some circumstances could be legally defensible. The lawyers were considering a situation in which the information gained from an interrogation

might prevent future attacks by foreign enemies. However, the President has never considered authorizing torture under any circumstances.

Ã* Interrogation techniques must be kept confidential so we do not give away information that would signal to our adversaries what they could anticipate if captured, allowing them to prepare for it and potentially counter it. As required by law, we brief the appropriate Congressional leadership on authorized interrogation techniques.

Ã* While our actions in the War on Terror are governed by rules, the terrorists do not respect any rules. They are an enemy that hides among civilian populations and seeks to inflict large-scale civilian casualties by surprise attack. We have an obligation to aggressively and lawfully interrogate captured detainees to obtain information that may help us prevent future attacks.

<<detainee message pts.doc>>

Appendix II

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Yoo, John C <John.C.Yoo@usdoj.gov>
BCC: timothy flanigan (timothy flanigan [WHO])
Sent: 9/17/2001 3:28:35 AM
Subject: : 4A issue

Begin Original ARMS Header #####
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 17-SEP-2001 07:28:35.00
SUBJECT: : 4A issue
TO: "Yoo, John C" <John.C.Yoo@usdoj.gov> ("Yoo, John C" <John.C.Yoo@usdoj.gov> [UNKNOWN])
READ: UNKNOWN
BCC: timothy flanigan (timothy flanigan [WHO])
READ: UNKNOWN
End Original ARMS Header

Any results yet on the 4A implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?

REV_00023540

Appendix III

Message

From: PRA 6 [UNKNOWN] (PRA 6)

Sent: 8/1/2001 12:40:54 AM

To: PRA 6

CC: PRA 6; Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) (PRA 6)

PRA 6

Subject: Re: reunion date

```
##### Begin Original ARMS Header #####
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:
CREATION DATE/TIME: 1-AUG-2001 00:40:54.00
SUBJECT: Re: revnion date
TO:
PRA 6
[ UNKNOWN ] )
READ: UNKNOWN
TO:
READ:
TO:
READ:
CC:
READ:
CC:
READ:
CC: Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )
READ: UNKNOWN
CC:
PRA 6
[ UNKNOWN ]
READ: UNKNOWN
PRA 6
[ UNKNOWN ] )
READ: UNKNOWN
##### End Original ARMS Header #####
```

PRA 6

Sept. 7-9 is fine, but I need to lock a date in this week. What is the old date that we have? Can we definitely select a date soon?

PRA 6

> [PRA 6]
> [PRA 6] wrote:
> Boys,
>
> My case that conflicted w/ our Sept. 7 to 9
> weekend is settling, and
> accordingly we can go back to those dates.
> I'll assume that nobody
> has locked in other plans they can't change
> unless you tell me
> differently (ASAP).
>
> sorry for the flip-flops on dates.
>
> your cruise director,
> [PRA 6]
>
> ps: [PRA 6] who we're
> calling [PRA 6] was born on
> [PRA 6] 8 pounds 6.5 oz. [PRA 6] and [PRA 6] are
> both doing well.
>

REV_00018951

>
> _____ Reply Separator
>
> Subject: Su Ching is booked
> Author: PRA 6
> Date: 6/8/01 10:13 PM
>
>
> Boys,
>
> Although you may be hoping that I've lined up a
> hostess for a
> rub-n-tug massage session, "Su Ching" actually
> is the sailboat (a
> Tayana 55) we've got for Friday, Sept. 7 to
> Sunday, Sept. 9 out of
> Annapolis. You can check out the boat at
>
>
>
> http://www.annapolisbaycharters.com/BayBareBoats/baybare_htm/suChing_b
>
> aybare.htm
>
> We've got the boat starting at 9 on Friday,
> although if we wanted, a
> couple of us could head to Annapolis on Thurs.
> afternoon, get an
> orientation on the boat, and buy some
> groceries. Whether that makes
> sense will depend on how early people want to
> get going on Friday.
> Because we can't leave Annapolis until the last
> person gets there, we
> should discuss at some point when on Friday
> people want to rendezvous
> in DC or Annapolis. (I'd think we could work
> it so that the non-DC
> people could get picked up at the airport by
> BK, PRA 6 for me, esp. if
> the New Yorkers take the same flight.)
>
> We could still shift the weekend one day, to
> Sept. 8 thru 10, if
> that's what people prefer, but so far I've
> heard a mild preference for
> 7 thru 9.
>
>
> Your cruise director,
> PRA 6
>
> _____ Reply Separator
>
> Subject: RE: Lake Place '01, Option 2
> Author: PRA 6 at
> PRA 6
> Date: 6/4/01 10:38 AM
>
>
> Preference for Maine (more scenic, I would think),
> but will happily defer to
>
> the majority. Very mild preference for 7-9 over
> 8-10.
>
>
> -----Original Message-----
> From: PRA 6
> PRA 6
> Sent: Friday, June 01, 2001 9:43 AM
> To: PRA 6
>
> PRA 6

REV_00018952

```

> > " : "brett.m.kavanaugh@who.eop.gov@inetgw" ;
> "
> > Cc: PRA 6
> > Subject: RE: Lake Place '01, Option 2
> >
> > Thanks for the responses. Two questions:
> >
> > 1. Do you prefer Sept. 7-9 (Fri. thru Sun.)
> > or Sept. 8-10 (Sat. thru
> >
> > Mon.)? Note that if we do 7-9, that makes
> > for a three-day work week,
> >
> > as Monday Sept. 3 is Labor Day.
> >
> > 2. PRA 6 are you ok w/ the
> > Annapolis roll?
> >
> > I'd like to lock in the boat soon, as I've
> > only found one that's the
> > big enough but doesn't require hiring a
> > captain.
> >
> >
> > _____ Reply Separator
> >
> > Subject: RE: Lake Place '01, Option 2
> > Author: PRA 6
> > PRA 6
> > Date: 6/1/01 8:37 AM
> >
> >
> > I agree that the Annapolis venue might be more
> > convenient. Either is fine
> >
> > with
> > me.
> >
> > PRA 6
> >
> > -----Original Message-----
> > From: PRA 6
> > PRA 6
> > Sent: Thursday, May 31, 2001 6:02 PM
> > To: PRA 6
> > PRA 6
> > brett.m.kavanaugh@who.eop.gov@inetgw; PRA 6
> > PRA 6
> > Cc: PRA 6
> > Subject: Lake Place '01, Option 2
> >
> >
> > Boys,
> >
> > Here's an alternative that I think could be
> > interesting: we could
> > charter a somewhat bigger boat, a Tayana 55,
> > out of Annapolis.
> >
> > The pluses: it's easier to get to Annapolis
> > than to Rockland, ME;
> > the
> > boat's a good bit bigger, so we could more
> > comfortably spend all
> > three
> > days cruising on it; and the weather in Sept.
> > is likely to be warmer
> > in MD than in ME.
> >
> > The minus: it costs money to rent, unlike

```

REV_00018953

```

> the one in ME. It would
> > work out to be about $2800 total for three
> days, including taxes,
> > fuel, and a dinghy (w/o food and booze). I'm
> guessing we'll get 6 or
>
> >
> > 7, so say something under $500 apiece.
> >
> > We could book it for Sept. 7-9 (Fri. thru
> Sun.) or for Sept. 8-10
> > (Sat. thru Mon.). I mention that weekend
> because it's the only
> > weekend nobody's said no to, plus the boat is
> available then. If
> > anyone wanted to come to DC the night before,
> you could either stay
> > w/
> > me or we could head to Annapolis and stay
> onboard.
> >
> > Let me know what you think. My own vote: as
> much as I like taking
> > the budget approach to any venture, I think
> the Annapolis roll could
> > be better, given that we'd have a much nicer
> boat and it would be
> > less
> > complicated logistically, as we wouldn't have
> to line up any rooms
> > ashore and it's easier to get to for all of
> us.
> >
> >
> >
>
=== message truncated ===

```

Do You Yahoo!?
 Make international calls for as low as \$.04/minute with Yahoo! Messenger
<http://phonecard.yahoo.com/>

REV_00018954

**Written Questions from Senator Richard J. Durbin to Judge Brett Kavanaugh
September 10, 2018**

For questions with subparts, please respond to each subpart separately.

1. You worked as White House Staff Secretary from July 2003 through May 2006. You have described this time as “formative” and “most instructive to your judging.” You have said in numerous speeches that your duties as Staff Secretary involved substantive policy work. You said you “participated in the process of putting legislation together,” “identif[ied] potential constitutional issues in legislation,” and “worked on drafting and revising executive orders.” In your 2006 hearing, you told then-Chairman Specter that you gave President Bush advice on signing statements, including “identifying potential constitutional issues in legislation.”

Beginning in 2004, I offered numerous amendments in the Senate to bar cruel, inhuman, or degrading treatment of detainees. Senator McCain picked up the banner and—over a veto threat from the Bush Administration—the Senate passed the McCain Torture Amendment in October 2005 by a 90-9 vote. On December 30, 2005, President Bush issued a signing statement claiming the authority to override the McCain Torture Amendment.

- a. **In my office I asked you about this signing statement and you said you remember seeing it and thinking that Senator McCain wouldn’t be happy. Why did you think Senator McCain wouldn’t be happy?**

RESPONSE: I believed that Senator McCain would not be happy with any perceived daylight between the President’s signing statement and the McCain Amendment.

- b. **Did you provide any comments or express any views, verbally or in writing, regarding the December 30, 2005 signing statement on the McCain Torture Amendment, including comments or views on “potential constitutional issues”?**

RESPONSE: As discussed at the hearing, I do not specifically remember any comments I made or the details of who within the government took what position, but I do recall that there was an internal debate and controversy about the signing statement. As Staff Secretary, my role was not to replace the legal or policy advisors, but rather to make sure that the President had the benefit of the views of advisors, even as any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk.

- c. **If so, what comments or views did you provide?**

RESPONSE: Please see my response to Question 1.b.

- d. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the December 30, 2005 signing statement?**

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

2.

- a. Did you provide any comments or express any views, either verbally or in writing, about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**

RESPONSE: Please see my response to Question 1.b.

- b. If so, what comments or views did you provide?**

RESPONSE: Please see my response to Question 1.b.

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**

RESPONSE: Please see my response to Question 1.d.

3. On October 18, 2004, then-OMB Director Josh Bolten and then-National Security Advisor Condoleezza Rice sent a letter stating the Administration's objection to an earlier version of the McCain Torture Amendment which was included as a provision in the 9/11 Commission Intelligence Reform legislation. The provision was removed because of the Administration's objections.

- a. Did you review or provide comments or views, either verbally or in writing, on this letter?**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other issues. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. If so, what comments or views did you provide?**

RESPONSE: Please see my response to Question 3.a.

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this letter?**

RESPONSE: Please see my response to Question 1.d.

4. On October 5, 2005, just prior to the Senate vote on the McCain Torture Amendment, then-White House spokesperson Scott McClellan issued a veto threat, saying the amendment “would limit the president’s ability as commander-in-chief to effectively carry out the war on terrorism.”

a. Were you involved in any discussions about this veto threat?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

b. Did you review the language of this veto threat and/or provide comments or views, either verbally or in writing, on the language?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this veto threat?

RESPONSE: Please see my response to Question 1.d.

5. Three Office of Legal Counsel memos issued in May 2005 by Steven Bradbury concluded that waterboarding and other abusive techniques do not constitute torture or cruel, inhuman or degrading treatment. You were not asked at your 2006 hearing about the Bradbury torture memos because their existence had not been publicly revealed yet. I asked you in my office if you were involved in any discussions on the Bradbury memos. You said that you did not remember discussions on the Bradbury memos but that you wouldn’t rule anything out.

a. Did you have any involvement with these Bradbury memos during your tenure as Staff Secretary?

RESPONSE: I was not involved in crafting those memos. My understanding is that the Bush Administration later withdrew those May 2005 memos.

- b. Did you participate in any discussions or review any documents regarding these Bradbury memos during your tenure as Staff Secretary?**

RESPONSE: Please see my response to Question 5.a above.

- c. Can you state with certainty that there are no documents in the National Archives regarding the Bradbury torture memos that you wrote, edited, reviewed, or approved while you were Staff Secretary?**

RESPONSE: Please see my response to Question 1.d.

6. The Committee has been denied access to any documents from the National Archives from your tenure as Staff Secretary, leaving a 35-month black hole in your record. Numerous issues you were involved with as Staff Secretary have not come before you as a judge. So we do not have any insight from your judicial record about your views are on those issues. **Do you believe the American people should, at minimum, be permitted to see documents from your Staff Secretary tenure regarding issues that have not come before you in any case since you were appointed to the D.C. Circuit?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. As I further stated during the hearing, I do not have a position regarding the release of documents, which I believe is an issue for the Senate, the Executive Branch, and President Bush.

7. Last week, in a response to a question from Senator Tillis about your record on LGBTQ issues, you noted that you have not been involved in any cases concerning LGBTQ issues on the D.C. Circuit. However, you have acknowledged that you worked on these issues during your service in the White House Counsel's Office and as Staff Secretary.

For example, we know from news reports that you met with a delegation of Log Cabin Republicans in 2003. You told Senator Tillis last week that you were there as a representative of the Bush White House and discussed judicial nominations and "other issues." But no documentation related to this meeting has been provided to the Committee from your White House records.

In fact, the only public document we've received through the Burck production process that touches on LGBTQ rights appears to be an email with a subject line reading "Gay marriage issues." However, the only email text included in the document was a reply from Alberto Gonzales to you, asking if you were interested in playing a round of golf at Andrews Air Force Base with Jim Haynes. The Committee did not receive any other emails from this chain.

Additionally, when we met in my office, you acknowledged that during your time as Staff Secretary, you “would have been involved in the process” related to President Bush’s endorsement of a constitutional amendment to ban same-sex marriage in 2004. You also said that you did “help implement” the President’s conclusion to support the amendment. The Committee has not received any documents related to your work and opinions on the amendment.

- a. During your time in the White House, did you express any views, either verbally or in writing, on whether or not same-sex marriage is a right guaranteed by the Constitution? If so, please describe the views you expressed.**

RESPONSE: At this point, I do not remember specifics. At that time, the Supreme Court had not yet ruled that same-sex marriage was a right in the Constitution. And most politicians of both political parties opposed (or at least did not support) legalizing same-sex marriage.

- b. Is it possible that there are documents containing your views on whether or not same-sex marriage is a right guaranteed by the Constitution in the National Archives?**

RESPONSE: Please see my response to Question 7.a.

- c. During your time in the White House, did you offer any advice or analysis, either verbally or in writing, related to President Bush’s 2004 endorsement of a constitutional amendment to ban same-sex marriage? If so, please describe the advice or analysis you offered.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other issues. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- d. Is it possible that there are documents containing your advice or analysis related to President Bush’s 2004 endorsement of a constitutional amendment to ban same-sex marriage in the National Archives?**

RESPONSE: Please see my response to Question 1.d.

- e. During your time in the White House, did you express any views, either verbally or in writing, on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans? If so, please describe the views you expressed.**

RESPONSE: Please see my response to Question 7.c.

- f. Is it possible that there are documents containing your views on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans in the National Archives?**

RESPONSE: Please see my response to Question 1.d.

- g. Is it possible that there are documents in the National Archives that contain your advice, analysis, or opinions on any other issues involving the rights of LGBTQ Americans?**

RESPONSE: Please see my response to Question 7.c.

8. You told me in my office that the Partial Birth Abortion Ban Act of 2003 would have come across your desk as Staff Secretary.

- a. While you were Staff Secretary, did you write, edit, review or approve any documents, emails, or speeches regarding this legislation? If so, please describe them.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other issues. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. You testified in 2006 that your work as Staff Secretary included "identifying potential constitutional issues in legislation." Did you provide comments or views regarding potential constitutional issues with this legislation?**

RESPONSE: Please see my response to Question 8.a. above.

- c. During your time in the White House, did you ever provide comments or views on the constitutionality of abortion or legislative restrictions on abortion?**

RESPONSE: Please see my response to Question 8.a. above.

- d. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the constitutionality of abortion or of legislation restricting abortion?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President

Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

9. While you were Staff Secretary:

- a. Did you write, edit, review or approve any documents, emails or speeches regarding the war in Iraq? If so, please describe all of your involvement in this issue.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. Did you provide any comments or views on the factual predicate or legal authorization for the war in Iraq? If so, please describe your comments or views.**

RESPONSE: Please see my response to Question 9.a.

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the factual predicate or legal authorization for the war in Iraq?**

RESPONSE: Please see my response to Question 1.d.

10. While you were Staff Secretary:

- a. Did you write, edit, review or approve any documents, emails, or speeches regarding the abuse of detainees at Abu Ghraib prison? If so, please describe all of your involvement in this issue.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. After the Abu Ghraib matter became public, the President and the White House responded in many ways. I would have performed my usual Staff Secretary responsibilities in connection with those responses.

- b. Did you ever provide comments or views, verbally or in writing, on the abuse of detainees at Abu Ghraib prison? If so, please describe these comments or views.**

RESPONSE: Please see my response to Question 10.a.

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the abuse of detainees at Abu Ghraib prison?**

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

11. When we met in my office you told me that it is already public record that President Bush consulted you on his choices for Supreme Court nominees. On July 9, *The New York Times* reported that in 2005 you participated in some of the sessions preparing Supreme Court nominee Harriet Miers for her confirmation process. (Peter Baker, “A *Conservative Court Push, Decades in the Making, With Effects for Decades to Come*,” July 9, 2018.) According to the *Times*, you were “[a]mong those who argued against her nomination from within the White House.” The *Times* said “Mr. Kavanaugh instead favored the selection of Justice Alito, then an appeals judge and a known and trusted figure within the conservative legal community.”

- a. Please describe all of your involvement in Harriet Miers’ Supreme Court nomination.**
- b. Did you participate in sessions to help prepare Ms. Miers for her confirmation process? If so, please describe each session in which you participated.**
- c. Did you write, edit, review or approve any documents, emails, or speeches regarding the nomination of Ms. Miers to the Supreme Court? If so, please describe them.**
- d. Did you ever provide comments or views, verbally or in writing, raising concerns about Ms. Miers’ nomination, advocating for then-Judge Samuel Alito’s nomination, or comparing Ms. Miers to then-Judge Alito? If so, please describe your comments or views.**
- e. What were your concerns about Ms. Miers’ nomination?**
- f. Is it possible that there are documents containing your comments or views raising concerns about Ms. Miers’ nomination, advocating for then-Judge Samuel Alito’s nomination, or comparing Ms. Miers to then-Judge Samuel Alito in the National Archives?**

- g. Did you favor nominating then-Judge Alito over Ms. Miers?**
- h. Were you involved in editing, writing or reviewing Ms. Miers' October 27, 2005 statement announcing her decision to withdraw her nomination or President Bush's statement that same day announcing his acceptance of her withdrawal? If so, please describe your involvement in detail.**

RESPONSE: At the time of Harriet Miers's Supreme Court nomination, I was serving as Staff Secretary. Because I was Staff Secretary, speeches and documents for the President related to that nomination would have crossed my desk. Ms. Miers was and is a distinguished attorney and wonderful friend and person. She was an excellent White House official for President Bush.

12. Please describe the full extent of your involvement in each of these litigation matters while you were working in the White House, including whether you participated in any discussions or wrote, edited, reviewed or approved any documents, emails or speeches regarding these matters:

- a. The Supreme Court's *Roper v. Simmons* decision and associated lower court litigation.**

RESPONSE: During my tenure with the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy. Moreover, while I served as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. During my tenure in the Counsel's Office, I worked on matters within the scope of my general duties as outlined by Judge Gonzales or other relevant officials.

- b. The Supreme Court's *U.S. v. Booker* decision and associated lower court litigation.**

RESPONSE: Please see my response to Question 12.a.

- c. The Supreme Court's *Hamdi v. Rumsfeld* decision and associated lower court litigation.**

RESPONSE: I do not recall the full extent of my involvement in every litigation matter as to which I may have been involved while I was working at the White House. As I discussed in an exchange with Senator Lee at the hearing, I expressed my thoughts at a staff meeting, when the *Hamdi* litigation was public, on what I thought would be Justice Kennedy's likely views regarding indefinite detention of American citizens without affording them access to counsel. Please also see my response to Question 12.a.

- d. The Supreme Court's *Rasul v. Bush* decision and associated lower court litigation.**

RESPONSE: Please see my response to Question 12.a.

- e. Is it possible that there are documents containing your comments or views on these litigation matters in the National Archives?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

13.

- a. Please describe the full extent of your involvement in questions about warrantless surveillance of Americans while you were working in the White House.**

RESPONSE: As I explained in the hearing, in the wake of September 11th, it was “all hands on deck” in the White House and in the White House Counsel’s Office. While I do not have specific recollections, I cannot rule out having discussed warrantless surveillance generally in the wake of the attacks. I believe everyone was discussing actions to protect America from attack. As I further explained during the hearing, my testimony in 2006 was accurate regarding the fact that I did not know about the Terrorist Surveillance Program, or TSP, until it became public in December 2005.

- b. Can you state with certainty that there are no documents in the National Archives that contain your comments, views, or correspondence about warrantless surveillance?**

RESPONSE: Please see my response to Question 1.d.

14. On May 10, 2006, you responded to a written question I sent you about your legal experience. Your response discussed policy issues you worked on as Staff Secretary. You said:

The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President has also made a variety of public decisions and policy proposals related to those subjects that also have come through the Staff Secretary’s office for review and clearance.

- a. What specific energy policy matters did you work on while you were Staff Secretary?**

RESPONSE: As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

b. What specific labor policy matters did you work on while you were Staff Secretary?

RESPONSE: Please see my response to Question 14.a.

c. What specific communications policy matters did you work on while you were Staff Secretary?

RESPONSE: Please see my response to Question 14.a.

d. What specific environmental policy matters did you work on while you were Staff Secretary?

RESPONSE: Please see my response to Question 14.a.

e. Is it possible that there are documents containing your work product, comments or views on these policy issues in the National Archives?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

15. If there are documents in the National Archives that contain your comments or views about the matters discussed in questions 1 through 14, do you agree that the American people should be allowed to review any such documents prior to a Senate vote on your nomination?

RESPONSE: See my answer to Question 6.

16. On May 10, 2006 you submitted written responses to written questions that Senator Feingold and I sent you for your D.C. Circuit confirmation hearing. You provided the following commitment to me in response to one of my written questions: "If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*." Will you make this same commitment now, as you seek confirmation to the Supreme Court?

RESPONSE: Those cases are precedents of the Supreme Court entitled to the respect due under the law of precedent. As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.

17. Do you agree with President Trump’s statement to Bloomberg News on August 30 that Special Counsel Mueller’s investigation is “an illegal investigation”?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

18. Should a president comply with a grand jury subpoena?

RESPONSE: As I stated during the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that could come before me or to comment on current events or political controversies.

19. Your 2009 Minnesota Law Review article represents a dramatic evolution of your views on presidential investigations since your days working for Independent Counsel Ken Starr.

How often do your views evolve, and are there other contexts where your views have evolved since earlier in your career?

RESPONSE: At every stage of my career in public service, I have tried to reflect on my experiences, learn from them, and—where appropriate—propose reforms that would benefit the nation in the future. My views have evolved in response to new experiences and new facts, especially the attacks of September 11, 2001, and the war that has been waged by the United States since then to protect the American people.

20. What does the Constitution say on the question of whether a sitting president can be indicted?

RESPONSE: As I stated in the hearing, I have not taken a position on that question in the past, and it would be inappropriate for me to take a position on that question now because it could come before me in litigation. As I stated at the hearing, the Department of Justice for the last 45 years has taken the consistent position through Republican and Democratic administrations that a sitting President may not be indicted while in office. Unless and until the Department of Justice changes its position, the issue presumably will not reach the Court.

21. Can members of the President’s immediate family be indicted?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on hypotheticals.

22. Last year you gave a speech at the American Enterprise Institute about Chief Justice Rehnquist, whom you described as a “judicial hero.” You said during the question-and-

answer session that: “[O]ne of the things people recognized about Rehnquist was he played the long game. He saw where he wanted the law to go, and he was willing to make incremental steps to try to convince his colleagues so he could get five justices to that position.”

- a. Is it appropriate for a Supreme Court Justice to play the long game to move the law where the Justice wants it to go?**

RESPONSE: I think most Justices think about the future when they decide cases in the present. As I explained at the hearing, judges decide specific “cases and controversies” as Article III of the Constitution requires. The person with the “best arguments on the law and the precedent” – not on policy – “is the person who will win . . . with me.”

- b. Is a Supreme Court Justice serving as a neutral umpire if the Justice sees where he or she wants the law to go and is willing to make incremental steps to try to convince his or her colleagues to get to that position?**

RESPONSE: See my answer to Question 22.a.

- c. Is it judicial activism for a Supreme Court Justice to see where he or she wants the law to go and make incremental steps to try to convince his colleagues to get to that position?**

RESPONSE: See my answer to Question 22.a.

- d. Have you ever seen where you wanted the law to go and made incremental steps to get your colleagues to that position? If so, please provide examples.**

RESPONSE: See my answer to Question 22.a.

- e. When discussing Chief Justice Rehnquist’s dissent in *Roe v. Wade*, you said in your speech that he was “stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” In your view, which rights fall into this “general tide of freewheeling judicial creation”?**

RESPONSE: As discussed at the hearing, the Constitution protects unenumerated rights. In describing Chief Justice Rehnquist’s important contributions to the law in *Washington v. Glucksberg*, 521 U.S. 702 (1997), I agreed with Justice Kagan that *Glucksberg* provides the test that “the Supreme Court has relied on for forward-looking future recognition of unenumerated rights.” As Justice Kagan said in her hearing, “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure – makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear

signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” It is important to note that *Glucksberg* cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

23. You gave a speech on February 1, 2018, to the Heritage Foundation in which you criticized the use of canons of statutory interpretation when judges find text to be ambiguous. You noted that because Chief Justice Roberts in *NFIB v. Sebelius* found the Affordable Care Act’s individual mandate to be ambiguous, he applied the constitutional avoidance canon to uphold the ACA as a tax. You said in your speech, “a case of that magnitude should not turn on such a question.”

You repeatedly told the Committee that it is inappropriate for you to opine on matters that could come before you. However, you felt perfectly comfortable signaling to President Trump that you disagreed with Chief Justice Roberts, even though more challenges to the Affordable Care Act are pending.

- a. Why do you believe Chief Justice Roberts was wrong to apply the constitutional avoidance canon in upholding the Affordable Care Act’s constitutionality in *NFIB v. Sebelius*?**

RESPONSE: In the above-quoted observation, I was discussing the general problem of ambiguity as a trigger for certain canons of statutory interpretation, not the merits of *NFIB v. Sebelius*.

- b. Why was it appropriate for you to express this opinion in your speech to the Heritage Foundation in February?**

RESPONSE: See my answer to Question 23.a.

- c. More challenges to the constitutionality of the Affordable Care Act are likely to come before the Supreme Court soon. How can we trust you to approach these cases with an open mind when you’ve already made clear your opposition to applying the constitutional avoidance canon in cases of this magnitude?**

RESPONSE: See my answer to Question 23.a. Moreover, as I explained at the hearing, the person with “the best arguments on the law and the precedent . . . is the person who will win . . . with me.”

24. **According to your originalist understanding of the Constitution, does the Second Amendment provide for a fundamental right to self-defense outside of the home? To be clear, I am asking what your understanding is of the original meaning of the Constitution on this matter.**

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on

issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

25. As we discussed at your hearing, when President Trump announced your nomination at the White House, the first thing you said in your statement was: “Mr. President, thank you. Throughout this process, I have witnessed firsthand your appreciation for the vital role of the judiciary.”

Prior to your making this statement, were you aware that:

- a. **President Trump had claimed that there should be no judges and no due process for asylum seekers at the border?**
- b. **President Trump had criticized a federal judge for jailing Paul Manafort for witness tampering?**
- c. **President Trump had repeatedly criticized federal judges who ruled against him in litigation over his travel ban?**
- d. **President Trump had made racist comments about a federal judge’s Mexican heritage?**
- e. **In 2017 then-Judge Gorsuch called President Trump’s treatment of federal judges “demoralizing”?**

RESPONSE: As I stated during the hearing, my statement was based on my firsthand experience with President Trump and the discussion of the judiciary he had with me during my interview.

26. **How do you square your statement about President Trump’s “appreciation for the vital role of the judiciary” with President Trump’s routine disparagement of the role of the federal judiciary?**

RESPONSE: Please see my response to Question 25. Additionally, as I stated during the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated during the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge – which is to decide cases, not to comment on current events as pundits.

27. In the *White Stallion* case you claimed that the word “appropriate” required consideration of industry costs because “that’s just common sense and sound government practice.” **How can someone who claims to be a textualist use their subjective view of “common sense and sound government practice” to define a word?**

RESPONSE: My position in *White Stallion* was vindicated by a unanimous 9-0 vote on that question in the Supreme Court. My position was that consideration of costs was required by the EPA’s statutory obligation to decide whether it was “‘appropriate’ . . . to impose significant new air quality regulations on the Nation’s electric utilities.” My opinion underscored that “consideration of costs is a central and well-established part of the regulatory decisionmaking process” that has been embraced by Justice Breyer, Justice Kagan, Professor Cass Sunstein, and others.

28.

- a. While you were working in the White House, did you ever express a view that particular Supreme Court precedents ought to be overturned?**

RESPONSE: I do not recall any specific conversations in which I expressed such a view, although it is of course possible that I would have at some point discussed cases such as *Dred Scott*, *Korematsu* and *Buck v. Bell*—which have been widely criticized—among others. In any event, as discussed at the hearing, the judicial power clause of Article III and Federalist 78 make clear that respect for precedent is “part of the proper mode of constitutional interpretation.” If confirmed, I would commit to respecting all the rules of stare decisis given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

- b. If so, when and to whom did you express these views and regarding which precedents did you express them?**

RESPONSE: See my answer to Question 28.a.

- c. Did you ever debate whether Supreme Court nominees who you were vetting (John Roberts, Harriet Miers, Samuel Alito) might seek to overrule precedents? Is it possible that there are documents in the National Archives that might reflect this?**

RESPONSE: I was Staff Secretary when these nominations were considered. Speeches and documents for the President related to those nominations would have crossed my desk. President Bush made clear what he wanted in Supreme Court nominees, and he made the decisions.

- 29. Are children seeking asylum entitled to a hearing, due process, and legal representation? Or is President Trump correct that sending children fleeing persecution back to their home countries without a hearing before a judge is the appropriate outcome?**

RESPONSE: Questions regarding the application of asylum law are the subject of ongoing litigation and may come before me. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a

particular way. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

30. In a 2010 speech, you said that while you were working as Staff Secretary, “I saw regulatory agencies screw up. I saw how they might try to avoid congressional mandates. I saw the relationship between independent agencies and executive agencies and the President and White House and OMB.” **What specifically did you see as Staff Secretary that shaped your views on independent agencies? Are there documents in the National Archives regarding what you saw that shaped your views?**

RESPONSE: As I explained at the hearing, from July 2003 to May 2006, every issue that went to the President’s desk from July 2003 to May 2006, with a few covert exceptions, would have crossed my desk on the way. Please also see my answer to Question 1.d.

31. Business and labor both seem to agree that if you are confirmed to the Supreme Court, you would tilt the Court even further in a pro-business direction.

The Chamber of Commerce has urged your swift confirmation. The White House said, “Judge Kavanaugh protects American businesses from illegal job-killing regulation.” Shortly after your nomination, the employer-side law firm Fisher Phillips put out a legal alert saying, “If confirmed, will Justice Kavanaugh be kind to employers? The answer: you may rely on it.”

AFL-CIO Richard Trumka said about you, “Judge Kavanaugh routinely rules against working families, regularly rejects employees’ right to receive employer-provided health care, too often sides with employers in denying employees relief from discrimination in the workplace and promotes overturning well-established U.S. Supreme Court precedent.”

You have a track record of favoring corporations in cases involving safe working conditions, unions, worker privacy, and consumer protections. There may be outlier cases in your record, which is to be expected given you have taken part in over 2,700 cases. But both business and labor think you’re a safe bet to be sympathetic to the positions of businesses over workers.

a. Are you proud of your pro-business reputation?

RESPONSE: I disagree with that characterization of my record. I rule for the party who has the best argument on the merits. That includes workers in some cases, businesses in others; coal miners in some cases, environmentalists in others; unions in some cases, employers in others. I am not a pro-business or an anti-business judge. I am a pro-law judge.

b. How do you square your pro-business reputation with the claim that you are an originalist and textualist who is a neutral umpire, not a judicial activist?

RESPONSE: Please see my response to Question 31.a.

32. Do you agree that nominees who claim to be textualists and originalists should be able to explain the textual meaning and originalist understanding of constitutional provisions in response to confirmation hearing questions?

RESPONSE: I have aimed to explain my own approach to textualism and originalism to the best of my ability. As I explained at the hearing, I heed the original public meaning of the Constitution or constitutional textualism, by which I mean the approach of “pay[ing] attention to the words of the Constitution.” As Justice Kagan has said, we are all originalists now and we are all textualists now. At all times, I also play close attention to any applicable precedent, as precedent itself is rooted in the Constitution.

33. 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.”

a. What does the text of this clause mean, and what was the Framers’ originalist understanding of it?

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

b. Even though there is current litigation about the Emoluments Clause, do you agree that such litigation should not preclude a nominee from explaining the text and original understanding of the Clause, which have not changed since the Founders’ time?

RESPONSE: As this question notes, there is pending litigation in federal courts on this issue. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me, including by offering any preview by engaging in any interpretation of the text at issue. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

34.

a. Did Judge Kozinski ever send you emails to your White House email address?

RESPONSE: Yes.

b. Did Judge Kozinski ever send you emails with sexually inappropriate jokes or pictures?

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.

c. Do any of the 102,000 pages of documents over which Mr. Bill Burck has attempted to claim “constitutional privilege” contain correspondence between you and Judge Kozinski?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

d. Have you referred any clerks to Judge Kozinski or advised any individuals to apply for clerkships with Judge Kozinski? If so, how many and when?

RESPONSE: In my capacity as a law professor, it is possible that I talked to students who had applied or were interested in applying to clerk for Judge Kozinski, and assisted them.

35. Should judges who engage in the kind of sexually harassing behavior that Judge Kozinski allegedly engaged in resign?

RESPONSE: Following the allegations against Judge Kozinski, he resigned from the bench. I fully support Chief Justice Roberts’ call for “a careful evaluation of whether [the federal judiciary’s] standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.”

36. The Supreme Court established the exclusionary rule more than a century ago in the 1914 *Weeks* decision. In 1961, in the landmark case *Mapp v. Ohio*, the Court held that the exclusionary rule applies to the states. The Court said, “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments.” It is no exaggeration to say that the 4th Amendment rights of all Americans would be endangered without the exclusionary rule because if there is no consequence for an illegal search, there is no deterrent to violating the 4th Amendment.

But in a 2017 speech at the American Enterprise Institute, you praised Justice Rehnquist’s opposition to the exclusionary rule and his call to overrule *Mapp v. Ohio*. While you did not explicitly call for eliminating the exclusionary rule, your speech makes clear that you approved of Justice Rehnquist, who, in your words, “righted the ship of constitutional jurisprudence.”

Was it appropriate for you, as a lower court judge, to show support for overruling *Mapp v. Ohio* – a landmark Supreme Court precedent for more than half a century?

RESPONSE: This question does not accurately characterize my speech.

37. On July 22, 2013, in the case *Abdal Razak Ali v. Obama*, a Guantanamo detainee seeking habeas relief filed a motion asking you to recuse yourself, stating: “Judge Kavanaugh has created the appearance of impropriety with respect to the adjudication of issues concerning Guantanamo detainees (and in particular, issues which bear directly on Petitioner’s present circumstances) because of his prior government employment as a legal advisor in the White House which may have direct bearing on the circumstances of this case.” This recusal motion was denied the next day, in a one sentence order stating: “Upon consideration of appellant’s motion for recusal pursuant to 28 U.S.C. § 455(a), it is ordered that the motion be denied.”

a. Question 14 in your Senate Judiciary Questionnaire asked you to “Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte.” You were then asked to identify each such case, and for each case provide “your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.” Why did you fail to include the *Abdal Razak Ali v. Obama* recusal motion in your answer to question 14 of your Questionnaire?

RESPONSE: The information set forth in response to Question 14 of my Senate Judiciary Questionnaire was provided by the Clerk’s Office for the United States Court of Appeals for the D.C. Circuit from the court’s records. They did an excellent job in trying as best they could to capture all relevant cases. Their search apparently did not turn up the motion in the *Ali* case.

b. Have you omitted any other motions to recuse you on any other case from your Senate Judiciary Questionnaire?

RESPONSE: Not to my knowledge.

c. Why did you decline to recuse yourself in this case?

RESPONSE: Recusal was not necessary or appropriate.

38. You were also asked in Question 14(b) of your Senate Judiciary Questionnaire to state: “Whether you will follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court. If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.”

You chose to simply ignore that question, so I will ask again now.

- a. Do you believe Supreme Court Justices are governed by disqualification standards in 28 United States Code, Section 455?**

RESPONSE: I will follow the relevant rules, and I will consult as appropriate with my colleagues.

- b. Do you believe Supreme Court Justices are governed by disqualification standards in the Code of Conduct for United States Judges?**

RESPONSE: Please see my response to Question 38.a.

- c. Will you follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court? If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.**

RESPONSE: Please see my response to Question 38.a.

39. In 2003, I introduced S. 1709, the SAFE Act, bipartisan legislation to reform the Patriot Act, particularly the controversial Section 215. On January 28, 2004, then-Attorney General John Ashcroft sent a letter to then-Senate Judiciary Committee Chairman Orrin Hatch stating, "If S.1709 is presented to the President in its current form, the President's senior advisers will recommend that it be vetoed."

- a. Please describe your involvement in this veto threat.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. Is it possible that there are documents containing your comments or views on this veto threat in the National Archives or in the possession of other federal agencies?**

RESPONSE: Please see my response to Question 1.d.

40. In 2005, when the Patriot Act was up for reauthorization, I negotiated with then-Senate Judiciary Committee Chairman Arlen Specter a new standard for Section 215 orders to protect innocent Americans while giving the government broad authority to obtain information connected to suspected terrorists or spies. The Republican-controlled Senate

approved this reform on a unanimous vote, but it was removed in conference due to the Bush Administration's objections.

a. Please describe with specificity your involvement in the Patriot Act reauthorization.

RESPONSE: In 2005, I was serving in the White House as Staff Secretary. As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

b. Is it possible that there are documents containing your comments or views on Patriot Act reauthorization in the National Archives?

RESPONSE: Please see my response to Question 1.d.

- c.** In the 2015 D.C. Circuit case *Klayman v. Obama*, several U.S. citizens filed a lawsuit alleging that the Section 215 program, which was being used for the NSA's bulk collection of innocent Americans' telephone data, was illegal. The program was enjoined by the district court. Some of the plaintiffs were denied standing to sue, and they filed a petition for the D.C. Circuit to re-hear the case en banc. The D.C. Circuit denied the petition in a one-sentence order.

You felt compelled to write a lengthy concurrence arguing that the NSA program was constitutional, even though that question was not before the court. You argued that the bulk collection of telephone data served a "critically important special need – preventing terrorist attacks on the United States." This was despite a Privacy and Civil Liberties Oversight Board report that said: "we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation."

Why did you feel the need to go out of your way to write this concurrence?

RESPONSE: I answered this question at the hearing.

41. On April 13, 2016 you took part in a panel discussion at Marquette Law School. You discussed a proposal you worked on in the Bush White House for judicial nominees to get a vote within 180 days of their nomination. You said, "I'm a little biased on this because I helped work on it."

It is perhaps understandable that a person would be biased in support of a proposal that he or she worked on. However, if a sitting judge admits to even a little bias regarding matters the judge worked on before becoming a judge, it raises concerns about the judge's impartiality

on such matters. This further demonstrates the need to disclose your full White House record.

In order to alleviate concerns about such bias, please provide a list of all proposals you helped work on while you were at the Bush White House.

RESPONSE: My comment reflected the fact that I still agreed with that proposal and had spent considerable time reflecting on it. As I explained at the hearing, I worked on a wide variety of issues during my time in the Bush White House. As Staff Secretary from July 2003 to May 2006, any issue that reached the President's desk from July 2003 to May 2006—with the exception of a few covert matters—would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of my substantive work, my role was not to replace the President's policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. During my time working in the White House Counsel's Office, I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims' compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House. This list is not exhaustive.

42. Prior to your hearing, were you shown any documents that had been designated by Chairman Grassley as "committee confidential" (a designation to which Committee Democrats never agreed)? If so, please identify each specific document you were shown and the date on which you were shown it.

RESPONSE: Yes. I was informed that I might be asked about such documents in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions, I was shown some documents that were designated "committee confidential."

43. How many times in 2018 did you communicate with Bill Burck or with a person acting on Burck's behalf for purposes of producing documents for your confirmation process? Please list the dates, participants, and contents of each such communication.

RESPONSE: I do not recall meeting with Mr. Burck or with a person acting on his behalf for the purposes of producing documents for this process. As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

44. Which Senators helped you prepare for your Supreme Court confirmation hearing by participating with you in moots or other practice sessions?

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. As I further noted, each of these meetings were substantive and provided me insight into the issues I could look forward to discussing in the hearing.

45. You cited the so-called “Ginsburg Rule” multiple times during your hearing to explain why you insisted on limiting your substantive answers to our questions. However, at her nomination hearing, Justice Ginsburg answered many questions with candor.

For example, in response to a question about abortion rights, Justice Ginsburg said this:

But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

And in response to a question on the Equal Rights Amendment, Justice Ginsburg responded with the following:

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and of all the States to stand up and say we know what that history was in the 19th century; we want to make a clarion announcement that women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th Amendment was passed, I think that is the case.

a. Do you think that those responses were improper under judicial canons?

RESPONSE: As I explained at the hearing, I believe Justice Ginsburg answered as she did because she had previously written about these subjects.

b. If the first response was not improper, do you agree with Justice Ginsburg’s statement that the decision of whether or not to bear a child is a decision that a woman must make for herself?

RESPONSE: Consistent with the approach taken by the Justices currently sitting on the Supreme Court, I am not able to answer questions designed to elicit hints, forecasts, or previews of my approach to a particular case. To do so would violate my duty to be an independent judge

and would send the wrong message to future litigants as well as to the American people in general.

- c. If the second responses was not improper, do you agree with Justice Ginsburg's statement that the Equal Rights Amendment should be added to the U.S. Constitution?**

RESPONSE: It would be a violation of judicial independence for me to opine on political matters in this context.

46. As a judge on the D.C. Circuit, you are bound to follow the Code of Conduct for United States Judges. As you know, the Code is made up of a number of canons. These canons include upholding the integrity and independence of the Judiciary; avoiding impropriety and the appearance of impropriety in all activities; performing the duties of the office fairly, impartially, and diligently; engaging in extrajudicial activities that are consistent with the obligations of judicial office; and refraining from political activity.

The Supreme Court has refused to formally adopt the Code of Conduct for United States Judges or promulgate its own ethics code.

According to Chief Justice Roberts' 2011 annual year-end report, in 1991, the Supreme Court justices did adopt "an internal resolution in which they agreed to follow the Judicial Conference regulations [on gifts and outside income] as a matter of internal practice." While this was an encouraging step, the lack of transparency and enforcement is troubling.

- a. Will you commit that, if confirmed to the Supreme Court, you will continue to follow the Code of Conduct for United States Judges?**

RESPONSE: If confirmed, I would commit to giving a careful consideration to the practice of the Supreme Court on these questions and to consulting with my colleagues about these issues.

- b. Do you believe that the Supreme Court should adopt an official code of conduct?**

RESPONSE: Please see my response to Question 46.a.

47. In 2014, Justice Kennedy testified to Congress that "solitary confinement literally drives men mad." He raised the issue again in a powerful concurring opinion in the 2015 *Davis v. Ayala* case, which involved an inmate who had been on California's death row for 25 years. He noted the following:

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price.

He went on to note that “the judiciary may be required... to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”

What is your reaction to Justice Kennedy’s statements about solitary confinement?

RESPONSE: As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case/issue. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on Justice Kennedy’s concurrence in *Davis v. Ayala*.

48. In the 2012 *South Carolina v. United States* case, you were on a three-judge panel considering a preclearance challenge to a new, expanded South Carolina voter ID law. As you know, prior to 2013, preclearance was the process that the Department of Justice used to review changes to voting laws in certain jurisdictions with a history of voting discrimination.

You wrote the opinion, holding that the law was not in violation of the Voting Rights Act (VRA) and that South Carolina could move forward with implementation after the 2012 election.

In your opinion, you noted that “many states—particularly in the wake of the voting system problems exposed during the 2000 elections—have enacted stronger voter ID laws.” However, we’ve also seen that many of these voter ID laws have a concerning, and often discriminatory, impact on voters.

For example, a 2016 analysis of data from the annual Cooperative Congressional Election Study found the following: “The patterns are stark. Where strict identification laws are instituted, racial and ethnic minority turnout significantly declines.” They found that among Latino voters, “turnout is 7.1 percentage points lower in general elections and 5.3 percentage points lower in primaries in strict ID states than it is in other states.”

What is your response to the evidence that strict identification laws harm minority voters?

RESPONSE: I am not familiar with the study you have cited. In keeping with nominee precedent, it would be improper for me as a sitting judge to comment on cases or issues that might come before me, or to opine on a case without thoroughly reviewing the record. In the *South Carolina* case, my unanimous opinion—joined in full by Judge Kollar-Kotelly and Judge Bates—blocked implementation of South Carolina’s law for the 2012 election precisely in order to avoid harming the “disproportionately African-American” voters who lacked qualifying photo IDs at the time. The opinion emphasized that “proper and smooth functioning of the reasonable

impediment provision [of the law] would be vital to avoid unlawful racially discriminatory effects on African-American voters” going forward, and called the Voting Rights Act of 1965 “among the most significant and effective pieces of legislation in American history.”

49. Your colleagues on the panel in the *South Carolina v. United States* case issued a concurrence that discussed the “vital function” that the preclearance process played in this case. The concurrence went on to note the following:

Without the review process... [the law] certainly would have been more restrictive.... The Section 5 [preclearance] process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the law] demonstrates the continuing utility of Section 5 of the Voting Rights act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.

Unfortunately, the Supreme Court gutted the VRA in the 2013 *Shelby County v. Holder* case by striking down the formula that determined which jurisdictions were subject to Section 5 preclearance. However, they did not find the preclearance provision itself to be unconstitutional.

Why did you refrain from joining this concurrence?

RESPONSE: As I noted above, I wrote the opinion for the Court, which resolved all issues before the panel. Although Judge Kollar-Kotelly and Judges Bates opted to make additional points, they called my opinion “excellent” and joined it in full.

50. **Was President Trump correct in stating that three to five million people voted illegally in the 2016 election?**

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

51. In *Doe ex rel. Tarlow v. District of Columbia*, you examined the circumstances under which the D.C. Department of Disability Services could approve elective surgeries for a patient with intellectual disabilities who has been found to lack the mental capacity to make healthcare decisions. You held that the Department need not consider the known wishes of a patient, but rather could make a decision in the best interests of the patient.

The Bazelon Center for Mental Health Law has noted that your opinion “raises serious concerns about [your] views on the rights and abilities of people with disabilities to determine the course of their own lives.” The Center went on to note that the opinion “is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual’s wishes even if the individual is not legally competent to make the decision.”

Why did you decide that the perspectives and wishes of the individuals in this case could be completely ignored by the D.C. government?

RESPONSE: The plaintiffs in *Tarlow* represented a narrow class of several intellectually disabled people who had “never had the mental capacity to make medical decisions for themselves” and who had “no guardian, family member, or other close relative, friend, or associate” available to provide or withhold consent for surgeries approved by two separate physicians. *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 377 (D.C. Cir. 2007). The unanimous panel for which I wrote explained that allowing people who lack mental capacity to make important medical decisions “would cause erroneous medical decisions ... with harmful or even deadly consequences to intellectually disabled persons.” *Id.* at 382. In part for that reason, no state applies the rule proposed by the plaintiffs in that case.

52. When we met in my office, we talked about the 2011 *Seven-Sky* case, in which you dissented from a decision upholding the Affordable Care Act. In a footnote, you criticized the ACA and argued that, “Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

This is a truly breathtaking claim of presidential power. I think you recognize that because you told me in our meeting that you “could have been clearer” and “explained it better” in the later *Aiken County* case.

But if you had been writing for the majority in *Seven-Sky*, your opinion would be binding law in the DC Circuit and President Trump would have a free pass to ignore laws that he doesn’t like. For someone like you who claims to be a textualist to be so careless with his words is concerning.

a. Do you understand the consequences of using your words so loosely?

RESPONSE: As I explained at the hearing, in my *Seven Sky* opinion, I was referring to the general concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Richard Nixon*, 418 U.S. 683 (1974), and extended to civil enforcement in *Heckler v. Chaney*, 470 U.S. 821 (1985). As I further explained at the hearing, and as I explained in my speech at Marquette in 2015, the limits of prosecutorial discretion are uncertain.

b. Do you stand by your *Seven-Sky* dissent?

RESPONSE: My dissent in *Seven-Sky* expressed no opinion on the merits of the constitutional challenge to the Affordable Care Act, but instead concluded that the court lacked jurisdiction over the suit under the Anti-Injunction Act. The Supreme Court’s decision in *NFIB* is a precedent of the Supreme Court on the merits of that case and is entitled to the respect due under the law of precedent.

53. Last Thursday, when questioned by Senator Leahy about the stolen material you received from Manny Miranda, you said that you “obviously recall the emails—or have seen the emails.”

- a. Were you referring to having recently seen emails that were given to the Committee through the Bill Burck production process?**

RESPONSE: I assume I was referring to emails referenced by Senator Leahy. And I believe Senator Leahy gave me copies of those emails at the hearing. I may also have previously seen emails that were produced to the Committee. Please see my answer to Question 42.

- b. After you were nominated by President Trump, did you receive or review any of the emails or documents that were given to the Committee through the Bill Burck production process? Please describe any instances in which you received or reviewed these emails or documents, other than those instances in which Committee members shared emails or documents with you during their question rounds at the hearing.**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

54. Last Wednesday, Senator Booker asked you about an email you sent in which you wrote “the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple—and grapple now—with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.”

- a. During your time in the White House, did you ever provide views, verbally or in writing, on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities?**

RESPONSE: The email states that I “generally favor effective security measures that are race-neutral.”

- b. Is it possible that there are documents (in addition to the email referenced here) containing your views on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities in the National Archives?**

RESPONSE: As I explained during the hearing, I was not involved in the processing or production of documents, and I did not participate in any of the decisions made about those documents. Accordingly, I have no personal knowledge as to the contents of the documents in the National Archives.

**Nomination of Judge Brett Kavanaugh, of Maryland, to be an Associate Justice of
the United States Supreme Court Questions for the Record
Questions for Judge
Kavanaugh**

Submitted September 10, 2018

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. In an exchange with Senator Graham during your hearing before the Committee, you explained, “[t]he Nixon holding said that, in the context of the specific regulations there, that a criminal trial subpoena to the president for information -- in that case, the tapes -- could be enforced, notwithstanding the executive privilege that was recognized in that case, as rooted in Article II of the Constitution.”

- a. What are the “specific regulations” to which you referred when discussing *United States v. Nixon*?

RESPONSE: My response referred to the special-counsel regulations discussed extensively in the *Nixon* decision. See *United States v. Nixon*, 418 U.S. 683, 694-95 & nn.8-9 (1974).

- b. Is it your view that the “specific regulations” referenced in (a) were dispositive to the overall holding of the case?

RESPONSE: The opinion in *United States v. Nixon* speaks for itself on this question.

2. On at least five occasions when referencing the *Nixon* precedent during the hearings, you made a point of noting that the subpoena at issue in that case was a criminal trial subpoena.

- a. What role did the fact that the subpoena in *Nixon* originated from a district court, rather than a grand jury, play in the Court’s analysis?

RESPONSE: The opinion in *United States v. Nixon* speaks for itself on this question.

- b. Was the fact that the subpoena was a trial subpoena dispositive to the Court’s holding that the constitutionally protected executive privilege was not absolute and that the President had to respond thereto?

RESPONSE: Please see my response to Question 2.a.

- c. Does *Nixon* control with respect to questions relating to subpoenas of the president issued by a grand jury?

RESPONSE: Please see my response to Question 2.a.

- d. Does *Nixon* control with respect to cases involving congressional subpoenas to the president?

RESPONSE: Please see my response to Question 2.a.

- e. Does *Nixon* control with respect to cases involving administrative subpoenas to the president?

RESPONSE: Please see my response to Question 2.a.

- f. Does *Nixon* control with respect to cases involving subpoenas to the president issued in state trial proceedings?

RESPONSE: Please see my response to Question 2.a.

- g. Does *Nixon* control with respect to cases involving subpoenas to the president issued by state officials?

RESPONSE: Please see my response to Question 2.a.

- h. Does *Nixon* control with respect to cases involving subpoenas to the president issued by state grand juries?

RESPONSE: Please see my response to Question 2.a.

- i. As you know, the *Nixon* case involved a subpoena for tape recordings. Does the precedent apply to cases involving subpoenas for presidential testimony as well as documentary evidence in the president's possession, custody, and control?

RESPONSE: Please see my response to Question 2.a.

- 3. During your hearing and in our private meeting, you stated unequivocally that you had never taken a position on the constitutional question whether a sitting president can be indicted. But as a member of a panel at a 1998 Georgetown Law Review event you were asked "How many of you believe as a matter of law that a sitting president cannot be indicted during the term of office?" You promptly raised your hand. When I asked you to reconcile this seeming conflict, you said: "[t]here's been Department of Justice law," referring to the Office of Legal Counsel's (OLC) opinion, authored by now-judge Randy Moss, that a sitting president cannot be indicted. You also said the OLC opinion is encompassed "within the general concept of law."

- a. Are you aware of any court decisions that refer to OLC opinions or guidance as "law"?

RESPONSE: OLC exercises the Attorney General's authority under the Judiciary Act of

1789 to provide the President and executive agencies with advice on questions of law that are important to the functioning of the federal government. As explained at the hearing, OLC opinions are encompassed within the concept of “law” and are binding on the executive branch. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to otherwise comment on issues that might come before me.

b. What weight do courts afford OLC opinions and guidance?

RESPONSE: Please see my response to Question 3.a.

c. Do OLC opinions serve as binding precedent for courts? Are they binding on the D.C. Circuit Court of Appeals? On the Supreme Court?

RESPONSE: Please see my response to Question 3.a.

d. Is the executive branch bound to follow OLC opinions?

RESPONSE: Please see my response to Question 3.a.

e. What are the legal repercussions for the executive branch contravening an OLC opinion?

RESPONSE: Please see my response to Question 3.a.

f. Does a person adversely affected by an executive action in violation of an OLC opinion have a legal cause of action?

RESPONSE: Please see my response to Question 3.a.

g. What authority does the Attorney General have to decree “law”?

RESPONSE: Please see my response to Question 3.a.

h. Do OLC opinions go through the notice-and-comment rulemaking process prescribed by the Administrative Procedures Act?

RESPONSE: Please see my response to Question 3.a.

i. Besides the Randy Moss OLC opinion that you repeatedly mentioned during your testimony, is there any statutory or regulatory authority governing whether a president can be indicted?

RESPONSE: Please see my response to Question 3.a.

j. As a judge on the DC Circuit, have you ever cited an OLC opinion as

binding law? Have you ever cited the Randy Moss OLC opinion as such?

RESPONSE: Please see my response to Question 3.a.

- k. You have been a prolific legal writer and speaker, including on the separation of powers and executive power. Can you point to any citations in your spoken or written works that describe OLC opinions as “law”?

RESPONSE: Please see my response to Question 3.a.

- l. At our private meeting, you agreed with my assessment that, as a general rule, OLC opinions, as the views of the executive branch, take positions advancing the broadest defensible view of executive power. Could you explain your understanding of why this is the case?

RESPONSE: Please see my response to Question 3.a.

4. In your discussion of *Sea World of Florida, LLC v. Perez* with Senator Feinstein, you noted that state tort law provides protection for workers in workplaces in which the Department of Labor is unable to issue safety protections. Specifically, you said, “And I made clear that of course state tort law -- as the NFL has experienced with the concussion issue -- state tort law always exists as a way to ensure or help ensure safety in things like the SeaWorld show.”
 - a. How do state tort law and our civil justice system, in general, help promote workplace safety?

RESPONSE: In general, state tort law and our civil justice system can provide an opportunity for people who are harmed by the actions or negligence of others to recover damages. The tort system thereby helps deter negligent actions and encourages or requires reasonable safety measures. Of course, state tort law is often augmented by state or federal regulation. It was the scope of federal regulation that was at issue in the *SeaWorld* case.

- b. Do state tort law and our civil justice system play a role in promoting public health and safety in other areas, like consumer protection and environmental protections? If so, how?

RESPONSE: Yes. Please see my response to Question 4.a.

- c. Does the fact that state and federal court proceedings are public play a role in promoting public health and safety? If so, how? Does the prevalence of binding pre-dispute arbitration clauses in employment and consumer contracts limit the ability to seek redress in state and federal courts? If so, how?

RESPONSE: Please see my response to Question 4.a. As to arbitration, cases are currently pending in the courts that involve the scope of arbitration clauses. In keeping with nominee

precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

- d. Does the fact that many arbitration proceedings occur behind closed doors undermine courts' roles in promoting public health and safety?

RESPONSE: Please see my response to Question 4.c.

- e. The Seventh Amendment ensures the right to a jury "in suits at common law."
 - i. What role does the jury play in our constitutional system?

RESPONSE: The jury plays a significant role in our constitutional system. In addition to the Seventh Amendment guarantee of a jury "in suits at common law," Article III of the Constitution also promises that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and the Sixth Amendment likewise guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The jury safeguards life, liberty, and property.

- ii. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of arbitration clauses?

RESPONSE: In keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on the applicability of the Seventh Amendment to the enforceability of arbitration clauses.

- 5. Do you agree with Justice Gorsuch that personal attacks on federal judges from officials in the other branches of government are "demoralizing"?

RESPONSE: As I stated at the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated during the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge, which is to decide cases, not to comment on current events as pundits.

- 6. Under current law, what rights does Congress have to documents, materials,

and testimony *vis-à-vis* claims of executive privilege?

RESPONSE: That question could be the subject of litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me.

7. In response to my questioning regarding your interactions with the media during the Starr investigation, you said, “I spoke to the reporters at the direction and authorization of Judge Starr.”

- a. During the Starr investigation, did you ever speak with members of the press or other authors about the investigation without explicit direction from Judge Starr or your superiors?

RESPONSE: As I said at the hearing, I spoke to the reporters at the direction or authorization of Judge Starr and consistent with the law.

- i. If so, do you release the reporters in these instances from any confidentiality obligations related to these conversations?

RESPONSE: No. It would be inappropriate in this context to disregard that foundational privilege and protection for the press.

- b. In your testimony, you said you would let me know whether you are willing to release the reporters from their confidentiality obligations if Judge Starr allows the reporters to disclose the conversations. Whether or not Judge Starr may have a role in releasing reporters from obligations of source-protection confidentiality related to his investigation of the Clintons, are you personally willing to release reporters of any such obligations, separate and apart from whatever obligations Judge Starr may claim?

RESPONSE: Please see my response to Question 7.a.

- c. Were you ever an off-the-record source to the press or other authors? If so, were all these conversations at the explicit direction of Judge Starr?

RESPONSE: Please see my response to Question 7.a.

- d. Did you ever provide non-public information regarding the investigation to reporters off the record?

RESPONSE: Please see my response to Question 7.a.

- e. Did you ever provide information on non-public matters relating to the grand jury, including but not limited to the identity of past or planned witnesses and/or

the nature or content of their testimony, to reporters off the record?

RESPONSE: Please see my response to Question 7.a.

- f. During or since your nomination hearing, have you been in touch with Judge Starr regarding reporters or source-protection confidentiality obligations from that investigation? If so, please explain fully the content of and reason for those communications.

RESPONSE: No.

- 8. In your testimony, you stated you had ruled for environmental interests in “many cases.” Please list all of the cases in which you ruled for environmental interests on substantive rather than procedural grounds.

RESPONSE: In response to Question 13.b and 13.c in the Senate questionnaire, I provided a list of citations to all opinions I have written, and all cases I have participated in as a member of the panel. There are over 2,000 cases and approximately 11,000 pages of decisions.

A few representative examples in which I ruled for environmental interests include: *National Association of Manufacturers v. EPA*, 750 F.3d 921 (D.C. Cir. 2014) (upholding the EPA’s decision to tighten the primary National Ambient Air Quality Standards for fine particulate matter); *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (ruling in favor of the Natural Resource Defense Council, the Sierra Club, and other environmental groups in holding that the EPA exceeded its authority when it decided to create an affirmative defense for emitters to use to avoid liability); *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013) (vacating the EPA’s decision to defer regulation of “biogenic” carbon dioxide); *American Trucking Association v. EPA*, 600 F.3d 624 (D.C. Cir. 2010) (upholding the EPA’s decision to authorize a California rule imposing emissions limits from non-road engines).

- a. Did you rule for environmental interest(s) on substantive ground(s) in *Americans for Clean Energy v. Environmental Protection Agency*, 864 F.3d 691 (D.C. Cir. 2017)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Various organizations, companies, and interest groups petitioned for review of EPA’s final rule setting renewable fuel requirements for transportation fuel markets under the Clean Air Act. I authored the unanimous decision, joined by Judge Brown and Judge Millett. We agreed that statute forecloses EPA’s reading of the “inadequate domestic supply” waiver provision. Thus, we granted the petition for review of the 2015 Final Rule, vacated EPA’s decision in the Rule to reduce the total renewable fuel volume requirements for 2016 through use of the “inadequate domestic supply” waiver authority, and ordered remand.

- b. Did you rule for environmental interest(s) on substantive ground(s) in *Center for Biological Diversity v. EPA*, 722 F.3d 401, 2013 WL 3481511 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Environmental groups petitioned for review of an administrative action of the EPA, which deferred regulation of “biogenic” carbon dioxide for period of three years. Judge Tatel authored the decision that vacated the EPA’s deferral rule. I authored a concurring opinion and agreed that the EPA had no statutory basis for exempting biogenic carbon dioxide.

- c. Did you rule for environmental interest(s) on substantive ground(s) in *Coal. for Responsible Regulation Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I did not participate in this panel decision. Chief Judge Sentelle, Judge Rogers, and Judge Tatel issued a *per curiam* decision dismissing the petitions for lack of jurisdiction. I dissented from the denial of rehearing *en banc*. See *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *14 (D.C. Cir. Dec. 20, 2012). The Supreme Court largely adopted my position in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

- d. Did you rule for environmental interest(s) on substantive ground(s) in *Communities for a Better Environment v. EPA*, 748 F.3d 333 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the unanimous decision, joined by Judges Brown and Williams. We concluded that the EPA acted reasonably in retaining the same primary standards for carbon monoxide, and that petitioners lacked Article III standing to challenge the EPA’s decision not to set a secondary standard for carbon monoxide.

- e. Did you rule for environmental interest(s) on substantive ground(s) in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the majority decision, joined by Judge Griffith, and Judge Rogers dissented. The court concluded that the EPA had exceeded its statutory authority when it adopted an air pollution rule that imposed massive uniform emissions reductions on upwind states regardless of how much pollution individual states contributed.

- f. Did you rule for environmental interest(s) on substantive ground(s) in *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015)? If so, please

identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the unanimous decision, joined by Judges Rogers and Griffith. We granted the petitions to the extent that some states brought as-applied challenges to the EPA's emissions budgets, and we remanded without vacatur to the EPA for it to reconsider those budgets. We rejected all other arguments raised by the states.

- g. Did you rule for environmental interest(s) on substantive ground(s) in *Energy Future Coalition v. EPA*, 793 F.3d 141 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Biofuel producers petitioned for review of the EPA's final action, arguing that the EPA's test fuel regulation was arbitrary and capricious. I authored the unanimous decision, joined by Judges Tatel and Pillard. We upheld the EPA's fuel regulation.

- h. Did you rule for environmental interest(s) on substantive ground(s) in *Grocery Mfrs. Ass'n v. EPA*, 704 F.3d 1005 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored an opinion dissenting from the denial of rehearing en banc. I disagreed with the panel's decision to throw out the suit on standing grounds. The Supreme Court favorably cited my *Grocery Manufacturers* opinion in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014).

- i. Did you rule for environmental interest(s) on substantive ground(s) in *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Brown authored the majority opinion, joined by Judge Sentelle. They concluded that the EPA's interpretation of its "spent material" regulation was not arbitrary and capricious. I dissented because I would have rejected the EPA's interpretation of its regulations.

- j. Did you rule for environmental interest(s) on substantive ground(s) in *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: As that case may still be pending in the courts, I am unable to comment on it.

- k. Did you rule for environmental interest(s) on substantive ground(s) in *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Pillard authored the majority decision, joined by Judge Rogers. They denied a petition for review of the EPA's rule setting first-time-ever limits on the emission of air pollutants during the production of polyvinyl chloride (PVC). I dissented in part because I would have stayed the wastewater limits of the rule – something the EPA itself did not oppose.

- l. Did you rule for environmental interest(s) on substantive ground(s) in *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710 (D.C. Cir. 2016)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Henderson wrote the majority opinion, joined by Judge Srinivasan. They concluded that the EPA did not violate the law when it withdrew certain disposal areas from a permit. I dissented because the EPA revoked a Clean Water Act permit without considering the costs of doing so, including the costs to coal miners and affected communities, which I determined violated established administrative law principles.

- m. Did you rule for environmental interest(s) on substantive ground(s) in *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the unanimous opinion, joined by Judges Srinivasan and Edwards. We concluded that the emissions-related provisions of the EPA's rule were permissible but that the EPA exceeded its statutory authority when it created an affirmative defense for private civil law suits.

- n. Did you rule for environmental interest(s) on substantive ground(s) in *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Griffith authored the majority decision, joined by Judge Sentelle. They vacated an EPA rule that prevented state and local authorities from supplementing monitoring requirements. I agreed with the majority opinion about bedrock principles of statutory interpretation but dissented because the relevant statutory language supported the EPA's rule.

- o. Did you rule for environmental interest(s) on substantive ground(s) in *Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Rogers authored the majority decision, joined by Judge Tatel. They concluded that the petitioners lacked Article III standing to challenge the rules, so they dismissed the petitions for lack of jurisdiction. I dissented. In my view, the states had standing and the EPA did not have authority to regulate emissions of greenhouse gases in Texas and Wyoming.

- p. Did you rule for environmental interest(s) on substantive ground(s) in *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled?

RESPONSE: Along with Chief Judge Garland and Judge Rogers, I partially joined the *per curiam* opinion that denied petitions challenging emission standards for a number of listed hazardous air pollutants emitted by coal- and oil-fired electric utility steam generating units. I dissented in part because the EPA failed to consider costs. By a 9-0 vote on this point, the Supreme Court subsequently agreed with me that the EPA must consider costs under this statutory scheme. *See Michigan v. EPA*, 135 S. Ct. 2699 (2015).

9. Does a foreign national living in the United States have a First Amendment right to make expenditures on issue advertisements?

RESPONSE: My opinions have not squarely addressed this question, and the question could potentially come before me in future litigation. Therefore, as I discussed at the hearing and in keeping with nominee precedent, I cannot answer the question. In *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), I wrote an opinion for a unanimous three-judge district court rejecting a First Amendment challenge to a federal statute by “foreign citizens who temporarily live and work in the United States” who sought “to contribute to candidates and political parties and to make express-advocacy expenditures.” *Id.* at 282–83. The challengers in *Bluman* did not seek to make contributions to organizations that make expenditures on issue ads. The opinion made clear that the court’s “holding does not address” whether “Congress might bar” foreign nationals living temporarily in the United States “from issue advocacy and speaking out on issues of public policy.” *Id.* at 284, 292. The Supreme Court unanimously affirmed the decision. *See Bluman v. FEC*, 565 U.S. 1104 (2012).

- a. Do foreign nationals living in the United States have a First Amendment right to make contributions to organizations that make expenditures on issue ads?

RESPONSE: Please see my response to Question 9.

10. You referenced during your testimony that you had overlapped with former FBI Director Robert Mueller during your time in the George W. Bush investigation. What is your opinion of Robert Mueller’s character and work ethic? Do you believe that the investigation he is currently overseeing as Special Counsel is a “witch hunt?”

RESPONSE: As I stated during the hearing, one of the central principles of judicial

independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

11. Are there any debts, creditors, or related items that you did not disclose on your FBI disclosures?

RESPONSE: I have truthfully provided financial information in conjunction with this nomination process and my service in the judicial and executive branches. Since I graduated from law school in 1990, I have worked in public service for 25 of those 28 years. For most of her years of paid employment, my wife likewise has been a federal, state, or local government worker.

During that time, I have filed regular financial disclosure reports as required by law. The Federal Government's required financial disclosure reports list broad ranges for one's assets and debt as of one day or period in time.

At this time, my wife and I have no debts other than our home mortgage. We have the following assets:

- (1) A house minus the mortgage;
- (2) Two Federal Government Thrift Savings Plan retirement accounts (largely accessible to us beginning in 2024), as well as a Texas employees' retirement account;
- (3) A bank account;
- (4) A car that we own and a car that we lease; and
- (5) Ordinary personal furniture, clothing, and belongings.

Since our marriage in 2004, we have not owned stocks, bonds, mutual funds, or other similar financial investments outside of our retirement accounts.

Our annual income includes my income as a federal judge, my income from teaching law each year, and now also my wife's income from being Town Manager of Section 5 of Chevy Chase, Maryland. Our annual income and financial worth substantially increased in the last few years as a result of a significant annual salary increase for federal judges; a substantial back pay award in the wake of class litigation over pay for the Federal Judiciary; and my wife's return to the paid workforce following the many years that she took off from paid work in order to stay with and care for our daughters. The back pay award was excluded from disclosure on my previous financial disclosure report based on the Filing Instructions for Judicial Officers and Employees, which excludes income from the Federal Government. We have not received financial gifts other than from our family which are excluded from disclosure in judicial financial disclosure reports. Nor have we received other kinds of gifts from anyone outside of our family, apart from ordinary non-reportable gifts related to, for example, birthdays, Christmas, or personal hospitality. On the 2018 financial disclosure report, I correctly listed "exempt" for gifts and reimbursements because those are the explicit instructions in the 2018 Filing Instructions for Judicial Officers and Employees.

At this time, we have no debts other than our home mortgage. Over the years, we carried some personal debt. That debt was not close to the top of the ranges listed on the

financial disclosure reports. Over the years, we have sunk a decent amount of money into our home for sometimes unanticipated repairs and improvements. As many homeowners probably appreciate, the list sometimes seems to never end, and for us it has included over the years: replacing the heating and air conditioning system and air conditioning units, replacing the water heater, painting and repairing the full exterior of the house, painting the interior of the house, replacing the porch flooring on the front and side porches with composite wood, gutter repairs, roof repairs, new refrigerator, new oven, ceiling leaks, ongoing flooding in the basement, waterproofing the basement, mold removal in the basement, drainage work because of excess water outside the house that was running into the neighbor's property, fence repair, and so on. Maintaining a house, especially an old house like ours, can be expensive. I have not had gambling debts or participated in "fantasy" leagues.

The Thrift Savings Plan loan that appears on certain disclosure reports was a Federal Government loan to help with the down payment on our house in 2006. That government loan program is available for federal government workers to help with the purchase of their first house. In our case, that loan was paid back primarily by regular deductions from my paycheck, in the same way that taxes and insurance premiums are deducted from my paycheck. That loan has been paid off in full.

I am a huge sports fan. When the Nationals came to D.C. in 2005, I purchased four season tickets in my name every season from 2005 through 2017. I also purchased playoff packages for the four years that the Nationals made the playoffs (2012, 2014, 2016 and 2017.) I have attended all 11 Nationals' home playoff games in their history. (We are 3-8 in those games.) I have attended a couple of hundred regular season games. As is typical with baseball season tickets, I had a group of old friends who would split games with me. We would usually divide the tickets in a "ticket draft" at my house. Everyone in the group paid me for their tickets based on the cost of the tickets, to the dollar. No one overpaid or underpaid me for tickets. No loans were given in either direction.

My wife and I spend money on our daughters and sports, including as members of the Chevy Chase Club, which we joined in recent years. We paid the full price of the club's entry fee, and we pay regular dues in the same amount that other members pay. We did not and do not receive any discounts. The club is a minute's drive from our house, and there is an outdoor ice hockey rink and a very good youth ice hockey program. We joined primarily because of the ice hockey program that my younger daughter participates in, as well as because of the gym.

Finally, it bears repeating that financial disclosure reports are not meant to provide one's overall net worth or overall financial situation. They are meant to identify conflicts of interest. Therefore, they are not good tools for assessing one's net worth or financial situation. Here, by providing all of this additional information, I hope that I have helped the Committee.

12. On your 2015 Financial Disclosure Report dated May 13, 2016,¹ you reported between

¹ <https://fixthecourt.com/2018/07/bmk-fd-all>

\$15,001 - \$80,000 in debt accrued over two credit cards (Chase, Bank of America), and one loan (Thrift Savings Plan). On your 2016 Financial Disclosure Report dated May 5, 2017, you reported having between \$60,004 and \$200,000 in debt accrued over three credit cards (Chase, Bank of America, USSA) and a loan (Thrift Savings Plan). White House Spokesman Raj Shah told the Washington Post that you “built up the debt by buying Washington Nationals season tickets for playoff games for [yourself] and a ‘handful’ of friends.” Shah said some of the debts were also for home improvements.²

- a. What was the total dollar amount of your liabilities in 2015 and 2016, respectively?

RESPONSE: Please see my response to Question 11.

- b. What explains the meaningful increase in your liabilities between 2015 and 2016?

RESPONSE: Please see my response to Question 11.

- c. Was Mr. Shah’s characterization of the sources of your debt wholly accurate? If not, please correct any inaccuracies or omissions.

RESPONSE: Please see my response to Question 11.

- d. Did you tell the White House that you built up the debt by buying Washington Nationals season tickets for playoff games for yourself and a “handful” of friends?

RESPONSE: Please see my response to Question 11.

- e. For how many seasons have you purchased Washington Nationals season tickets?

RESPONSE: Please see my response to Question 11.

- f. How many tickets did you purchase each year? What was the overall cost and cost per ticket?

RESPONSE: Please see my response to Question 11.

² https://www.washingtonpost.com/investigations/supreme-court-nominee-brett-kavanaugh-piled-up-credit-card-debt-by-purchasing-nationals-tickets-white-house-says/2018/07/11/8e3ad7d6-8460-11e8-9e80-403a221946a7_story.html?utm_term=.cc28ff7d0f05

- g. Please identify the individuals for whom you purchased baseball tickets.

RESPONSE: Please see my response to Question 11.

- h. For each individual listed in the previous question, what financial arrangement, if any, was agreed to with respect to your purchase and their reimbursement of the cost of the baseball tickets?

RESPONSE: Please see my response to Question 11.

- i. Did you purchase any baseball tickets for friends in lieu of paying them back for personal debts? If yes, please specify the source and amount of each debt.

RESPONSE: Please see my response to Question 11.

- j. For each of 2015 and 2016, what percentage of your credit card debt would you attribute to home improvements? Please also explain what home improvements were undertaken and when.

RESPONSE: Please see my response to Question 11.

- k. For each of 2015 and 2016, what percentage of the credit card and TSP debt would you attribute to the purchase of baseball tickets?

RESPONSE: Please see my response to Question 11.

- l. Besides baseball season tickets and home improvements, did you have any other sources of personal or household debt from 2015 through 2018? If so, please specify.

RESPONSE: Please see my response to Question 11.

- m. Did you have any creditors, private or otherwise, not listed in your Financial Disclosure Reports?

RESPONSE: Please see my response to Question 11.

13. On your Financial Disclosure Report dated July 15, 2018, you do not report any liabilities. As noted above, the prior year, on your 2016 Financial Disclosure Report dated May 5, 2017, you reported between \$60,004 and \$200,000 in debt accrued over three credit cards and a TSP loan. Your annual disclosures indicate that the TSP loan maintained a balance between \$15,001 and \$50,000 for at least 12 years. With respect

to your debt for baseball tickets, White House spokesman Raj Shah told *The Washington Post* that your friends reimbursed you for their share of the baseball tickets and that you have since stopped purchasing the season tickets.

- a. For each debt listed in your 2015 and 2016 Financial Disclosure Reports, (i.e., each credit card and the TSP loan listed in your 2015 and 2016 Financial Disclosure Reports), please identify the date on which the debt was paid and the source of the funds for repayment.

RESPONSE: Please see my response to Question 11.

- b. For the individuals for whom you purchased baseball tickets, please specify the name of each individual, when each repaid you for his/her tickets, the amount that each repaid, and whether any other individual or entity paid any part of the debt that you attribute to the purchase of baseball tickets.

RESPONSE: Please see my response to Question 11.

- c. Beyond the money reimbursed by your friends for baseball tickets, how did you pay off your remaining debt? From what source did this money come?

RESPONSE: Please see my response to Question 11.

14. On your Financial Disclosure Report dated July 15, 2018 in Section V. Gifts, you did not check the box for no reportable gifts, you simply wrote "Exempt."

- a. Does this response indicate that you received a gift(s) but considered that gift(s) exempt from the reporting requirements?

RESPONSE: Please see my response to Question 11.

- b. For each gift (if any) you believe is exempt from reporting, please provide a description of the gift, the approximate value, date received, the donor, and the reason you believe the gift was exempt from reporting requirements.

RESPONSE: Please see my response to Question 11.

15. On your Financial Disclosure Report dated July 15, 2018, you did not list any reimbursements. Instead you simply wrote "Exempt."

- a. Does this response indicate that you received reimbursement(s) but considered that reimbursement(s) exempt from the reporting requirements?

RESPONSE: Please see my response to Question 11.

- b. For each reimbursement you believe is exempt from reporting, please provide a description of the costs incurred, reasons for the costs, the date and amount of any reimbursements that you received for these costs, and the reason you believe the reimbursement was exempt from reporting requirements.

RESPONSE: Please see my response to Question 11.

- 16. In 2014, federal judges received a lump sum equal to the amount of their delayed cost of living adjustments. For you, this was estimated at \$150,000. This amount does not appear to be reported anywhere in your financial disclosures. Please explain this discrepancy.

RESPONSE: Please see my response to Question 11.

- 17. Your Bank of America accounts appear to have greatly increased in value between 2008 and 2009. Your Financial Disclosure Report dated May 15, 2009 reflected a value in the range of \$15,001 - \$50,000. Your Financial Disclosure Report dated May 14, 2010 reflected a value in the range of \$100,001 - \$250,000. You did not report any increase in Non-Investment Income, nor did you report any gifts during this period. Please explain the source of the funds that accounts for the difference reflected in these accounts between your 2008 and 2009 Financial Disclosure Reports.

RESPONSE: Please see my response to Question 11.

- 18. In 2006, you purchased your primary residence in Chevy Chase, MD for \$1,225,000, however, the value of assets reportedly maintained in your "Bank of America Accounts" in the years before, during, and after this purchase never decreased, indicating that funds used to pay the down payment and secure this home did not come from these accounts.

- a. Did you receive financial assistance in order to purchase this home? And if so, was the assistance provided in the form of a gift or a personal loan?

RESPONSE: Please see my response to Question 11.

- b. If you received financial assistance, please provide details surrounding how this assistance was provided, including the amount(s) of the assistance, date(s) on which the assistance was provided, and the individual(s) who provided this assistance.

RESPONSE: Please see my response to Question 11.

- c. Was this financial assistance disclosed on your income tax returns, financial disclosure forms, or any other reporting document?

RESPONSE: Please see my response to Question 11.

19. You have disclosed in your responses to the Senate Judiciary Questionnaire that you are currently a member of the Chevy Chase Club. It has been reported that the initiation fee to join this club is \$92,000 and annual dues total more than \$9,000.

- a. How much was the initiation fee required for you to join the Chevy Chase Club? What are the annual dues to maintain membership and is this the amount that you pay?

RESPONSE: Please see my response to Question 11.

- b. Did you receive any financial assistance or beneficial reduction in the rate to pay the initiation or annual fees? If so, please describe the circumstances.

RESPONSE: Please see my response to Question 11.

- c. If you received financial assistance, please disclose the amount of the assistance, the terms, the dates the assistance was provided, and the individual(s) or entity that provided the assistance.

RESPONSE: Please see my response to Question 11.

- d. To the extent such assistance or rate reduction could be deemed a “gift,” was it reflected on your income tax returns, financial disclosure forms, or any other reporting document?

RESPONSE: Please see my response to Question 11.

20. To date, you have not disclosed that you or your wife own any listed or unlisted securities, including but not limited to stocks, bonds, mutual funds or other investment products outside of those included in your retirement accounts. Is that accurate?

RESPONSE: Please see my response to Question 11.

21. Have you ever received a Form W-2G reporting gambling earnings? If so, please list dates and amounts.

RESPONSE: No. Please see my response to Question 11.

22. Have you ever reported a gambling loss to the IRS? If so, please list the dates and amounts.

RESPONSE: No. Please see my response to Question 11.

23. Bill Burck produced to the committee a document from your tenure in the White House Counsel's Office that references a "game of dice." After a reunion with friends in September 2001, you emailed: "Apologies to all for missing Friday (good excuse), and growing aggressive after blowing still another game of dice (don't recall). Reminders to everyone to be very, very vigilant w/r/t confidentiality on all issues and all fronts, including with spouses."

- a. Since 2000, have you participated in any form of gambling or game of chance or skill with monetary stakes, including but not limited to poker, dice, golf, sports betting, blackjack, and craps? If yes, please list the dates, participants, location/venue, and amounts won/lost.

RESPONSE: No. Please see my response to Question 11. The game of dice referred to in that email was not a game with monetary stakes.

- b. Do you play in a regular or periodic poker game? If yes, please list the dates, participants, location/venue, and amounts won/lost.

RESPONSE: Like many Americans, I have occasionally played poker or other games with friends and colleagues. I do not document the details of those casual games.

- c. Have you ever gambled or accrued gambling debt in the State of New Jersey?

RESPONSE: I recall occasionally visiting casinos in New Jersey when I was in school or in my 20s. I recall I played low-stakes blackjack. I have not accrued gambling debt.

- d. Have you ever had debt discharged by a creditor for losses incurred in the State of New Jersey?

RESPONSE: No.

- e. Have you ever sought treatment for a gambling addiction?

RESPONSE: No.

- f. In the email quoted above, please explain what "issues" and "fronts" you wanted your friends to be "very, very vigilant" about "w/r/t/ confidentiality, including with spouses."

RESPONSE: I was referring to my upcoming first date with my now-wife, Ashley, which was scheduled to take place that evening (September 10, 2001). Over the course of the preceding weekend, I had discussed Ashley at some length with my longtime friends. In the email, I was asking my friends not to share my interest in and upcoming date with Ashley with their

spouses.

24. Is lying under oath an impeachable offense for an Article III judge?

RESPONSE: That would be a question for the House and the Senate in the first instance, and it could potentially be the subject of litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me to discuss this issue.

25. Your *PHH v. CFPB* opinion said, “In order to maintain control over the exercise of executive power and take care that the laws are faithfully executed, the President must be able to supervise and direct those subordinate executive officers.”

a. Is it true that the Constitution says nothing explicit about presidential removal power?

RESPONSE: The Supreme Court has held that the “executive power” conferred by Article II of the Constitution includes “a power to oversee executive officers through removal.” *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (internal quotation marks and citation omitted).

b. If Article II contemplated complete presidential control over all administration, why does Article II explicitly allow Congress to appoint inferior officers of the United States?

RESPONSE: The Supreme Court has explained the scope of and limitations on presidential control over the Executive Branch in numerous precedents, including (among others) *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010), *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and *Myers v. United States*, 272 U.S. 52 (1926).

c. Is it notable that Congress has long provided for the judicial appointment of prosecutors, including prosecutors to fill certain vacancies in the position of U.S. Attorney?

RESPONSE: Please see my response to Question 25.b above.

26. The justices of the U.S. Supreme Court are the only federal judges not bound by the Code of Conduct for U.S. Judges, which sets rules for when judges must recuse themselves from hearing cases.

a. Do you think the Supreme Court should adopt the Code of Conduct?

RESPONSE: If confirmed, I would commit to careful consideration of the practice of the Supreme Court on this question.

b. What standard would you use as a justice to resolve your own recusal issues?

RESPONSE: Please see my answer to 26.a.

- c. Supreme Court justices rarely divulge their reasons for deciding whether or not to recuse from a given case. Do you agree with that practice, or do you believe that the justices should make clear their rationales in this context?

RESPONSE: Please see my answer to 26.a.

27. In 1992, in his dissent in *Planned Parenthood v. Casey* (1992), Chief Justice Rehnquist wrote: “We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”

- a. What do you understand Rehnquist to have meant by the “traditional approach to *stare decisis* in constitutional cases”?

RESPONSE: The opinion of the three-justice plurality in *Planned Parenthood v. Casey* is the controlling precedent of the Supreme Court, not the dissent. As I explained at the hearing, moreover, *Casey* specifically analyzed the *stare decisis* factors at great length in reaffirming *Roe* and is itself a precedent on precedent.

- b. Do you agree with Justice Rehnquist that it would have been within the traditional approach to *stare decisis* to overrule the opinion in *Roe*?

RESPONSE: Please see my response to Question 27.a.

28. The Supreme Court upheld the essential holding of *Roe* two years ago in its most recent decision on abortion, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In *Whole Woman’s Health*, the Court demonstrated that the undue burden test is a robust check on legislatures that requires courts to examine whether abortion restrictions have benefits that outweigh the burdens they impose and to strike them down if they do not.³ The decision explicitly holds that the test is a form of heightened scrutiny. Proper application of the test requires courts evaluate whether an abortion restriction furthers a valid state interest based on the court’s independent examination of credible evidence set forward in the case. When a law’s burdens outweigh its benefits, it is unconstitutional.

- a. In your view, what is the standard for evaluating whether a restriction violates a woman’s constitutional right to terminate a pregnancy?

³ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016).

RESPONSE: *Whole Woman's Health* reaffirmed the undue burden standard set forth in *Casey*. *Whole Woman's Health*, like *Casey*, is a precedent of the Supreme Court entitled to respect under the law of precedent.

29. In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), you wrote a dissent arguing that all agency actions related to security clearances should be immune from judicial review – even in cases when claims involve evidence of clear racial bias.

- a. Are there other categories of cases in the area of national security that you believe should be judicially unreviewable? If so, what are they?

RESPONSE: My opinion speaks for itself.

30. In October 2017, the Department of Justice instructed its attorneys that Title VII's prohibition against sex-based discrimination in hiring or employment practices does not protect transgender workers. Several federal courts, however, have ruled that transgender employees are protected under Title VII.

- a. Do you believe that transgender individuals should be considered a protected class?

RESPONSE: It is my understanding that this issue is currently the subject of litigation in federal courts. As I discussed at the hearing, and in keeping with the nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case or issue.

- b. If not, how does being transgender differ from recognized protected classes like gender or race?

RESPONSE: Please see my response to Question 30.a.

- c. What criteria should be used to determine new suspect classifications in equal protection?

RESPONSE: Please see my response to Question 30.a.

31. The National Labor Relations Act (NLRA) sets forth as the public policy of the

United States the support of collective bargaining rights of employees in their unions with their employers.

- a. Do you believe the long-standing precedents protecting exclusive representation should survive?

RESPONSE: As a sitting judge, I am bound to follow Supreme Court decisions subject to the rules of precedent. In keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on the extent to which more recent developments in Supreme Court case law might affect pre-existing Supreme Court precedents on exclusive representation.

- b. Do you believe that the mission of the NLRA to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy, is constitutional?

RESPONSE: Please see my response to Question 31.a.

32. Where in the Constitution's text does it state that corporations should be treated the same as people in terms of equal protection, due process, or first amendment legal protections? Does a strict constructionist view of the Constitution permit such treatment?

RESPONSE: The Supreme Court has long held that the term "person" in the Equal Protection Clause encompasses corporations. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886). It has also made clear that a corporation is a "person" under the Due Process Clause, holding in cases like *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165, 176 (1893), that a corporation cannot be deprived of property without due process. The Court has also long held that the First Amendment protects "speech" – not speakers – and that "speech does not lose First Amendment protection "simply because its source is a corporation." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). As discussed at the hearing, "I try to apply all the provisions of the Constitution and all the precedents of the Supreme Court without picking or choosing." Judicial independence prevents me from "giv[ing] a thumbs up or thumbs down" to precedents based on personal views.

33. Many states, including Florida, have enacted laws concerning the possession or ownership of firearms by people with mental illness. Does the 2nd Amendment provide any basis for restriction of ownership or possession of firearms by people with a history of mental illness? If so, what is that basis?

RESPONSE: As I stated during the hearings, and as the Supreme Court held in *District of Columbia v. Heller*, traditional regulations on firearms are constitutionally permissible under *Heller*. During the hearing, I specifically noted that prohibiting the mentally ill from possessing firearms is a traditional, constitutionally permissible regulation, along with, but not limited to, felon-in-possession laws, bans on possession in schools or government buildings, and concealed carry laws, all of which were listed by the Supreme Court in *Heller*.

34. Judge Easterbrook wrote: “relying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity.”

- a. What are your views of Judge Easterbrook's critique of the “common use test”?
- b. Is there ever an instance where you would consider public safety justifications when evaluating a constitutional challenge to a gun safety law?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue. I would also add that the decisions of the United States Supreme Court, including *District of Columbia v. Heller* and its constituent test, constitute binding precedent and are entitled to all the respect due under the law of precedent.

35. Which regulations did you work on during your time as Staff Secretary from 2003-2006?

RESPONSE: As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the President's policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

36. Please answer the following questions regarding your work in the Bush White House, if you answer yes, please describe your role.

- a. Did you work on, provide advice on, or otherwise have involvement in legislation to limit abortion procedures?

RESPONSE: As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors. During my tenure in the Counsel's Office, I worked on matters within the scope of my general duties as outlined by Judge Gonzales or other relevant officials.

- b. Did you work on, provide advice on, or otherwise have involvement in hate crimes legislation or the administration's position on pending legislation to expand federal hate crimes laws?

RESPONSE: Please see my response to Question 36.a.

- c. Did you work on, provide advice on, or otherwise have involvement in litigation designed to undermine or limit the holding in *Roe v. Wade*?

RESPONSE: Please see my response to Question 36.a.

- d. Did you work on, provide advice on, or otherwise have involvement in the Bush administration's position on a proposed constitutional amendment defining marriage as between one man and one woman?

RESPONSE: Please see my response to Question 36.a.

- e. Did you have any involvement in the Bush administration's use of taxpayer dollars to fund columnists to promote a proposed constitutional amendment defining marriage as between one man and one woman?

RESPONSE: Please see my response to Question 36.a.

- f. Did you work on, provide advice on, or otherwise have involvement in the issue of so-called "enhanced interrogation measures"?

RESPONSE: As I explained during the hearing, I did not craft the policies regarding enhanced interrogation techniques or the OLC memos justifying them. The Intelligence Committee's report and the report by the Department of Justice's Office of Professional Responsibility confirm that I had no such involvement.

- g. Did you participate in any discussions or edits to documents related to so-called "enhanced interrogation measures" or torture or the applicability of the Geneva Convention?

RESPONSE: Please see my response to Question 36.f. Once these specific matters were publicly disclosed in 2004, please see my response to Question 36.a.

- h. Did you work on, provide advice on, or otherwise have any involvement in the issue of the detention of enemy combatants, at Guantanamo Bay or elsewhere?

RESPONSE: Please see my response to Question 36.a.

- i. Did you have any awareness of the abuses at Abu Ghraib, or similar occurrences elsewhere, before they became public knowledge?

RESPONSE: I was not aware of the abuses at Abu Ghraib before they became public, to the best of my memory. Please see my response to Question 36.a.

- j. Did you work on, provide advice on, or otherwise have involvement in leaking the identity of then-CIA agent Valerie Plame, or the subsequent coverup? Did you have any awareness of these events before they became public knowledge?

RESPONSE: If I understand the first question correctly, the answer is no. On the second question, I am not sure what is encompassed by “these events.” Please see my response to Question 36.a.

- k. Did you work on, provide advice on, or otherwise have involvement in the drafting and passage of the Patriot Act?

RESPONSE: I believe I did.

- l. Did you work on, provide advice on, or otherwise have involvement in the post-9/11 domestic surveillance programs, including the NSA warrantless wiretapping and bulk phone records that came to light in December 2005? Were you aware of these programs before they became public knowledge?

RESPONSE: As I explained at the hearing last week, I testified accurately in 2006 that I did not learn about the secret Terrorist Surveillance Program, or TSP, until I read about it in a *New York Times* article in December 2005. I was not read into that program. As I further explained during my hearing, while I do not have specific recollection, I cannot rule out having discussed warrantless surveillance generally in the wake of September 11th.

- m. Did you work on, provide advice on, or otherwise have involvement in proposals to block grant Medicaid?

RESPONSE: Please see my response to Question 36.a.

- n. Did you work on, provide advice on, or otherwise have involvement in discussion

about the privatization of social security?

RESPONSE: Please see my response to Question 36.a.

- o. Did you work on, provide advice on, or otherwise have involvement in any international climate change or control policies, including the Kyoto Protocol?

RESPONSE: Please see my response to Question 36.a.

- p. Did you work on, provide advice on, or otherwise have involvement in the enactment of Executive Order 13233, which limited public access to the records of former Presidents?

RESPONSE: Yes.

- q. Did you work on, provide advice on, or otherwise have involvement in the federal government's response to Hurricane Katrina?

RESPONSE: Please see my response to Question 36.a.

- r. Were you aware of corrupt activities surrounding lobbyist Jack Abramoff before they became public knowledge? Did you ever take a meeting with him?

RESPONSE: I do not believe I have ever met Mr. Abramoff.

- s. Did you work on, provide advice on, or otherwise have involvement in the decision to allow the assault weapons ban to expire? What other matters did you work on related to firearms? Were you involved in any way in speeches or other documents or meetings related to the *Heller* case?

RESPONSE: Please see my response to Question 36.a.

- t. Did you work on, provide advice on, or otherwise have involvement in efforts to limit race-based or gender-based affirmative action through legislative, executive, or judicial action?

RESPONSE: As I explained during the hearing, I provided legal advice and opinions about how certain federal contracting programs would fit within the Supreme Court's existing precedent regarding affirmative action. Please also see answer to 36.a.

- u. Did you work on or provide any advice the Bush administration's amicus briefs in the 2003 University of Michigan equal opportunity in higher education cases *Grutter* and *Gratz* in which the administration took the position that race-conscious considerations were unconstitutional?

RESPONSE: I had some involvement in those amicus briefs during my time in the White House Counsel's Office. The White House Counsel's Office was seeking to implement the President's directives.

- v. Did you work on or provide any advice on the Bush administration's amicus brief in the 2006 *Parents Involved in Community Schools* case in which the administration intervened on behalf of white parents to oppose the limited use of race to help diversify public schools in Seattle and Louisville?

RESPONSE: Please see my response to Question 36.a.

- w. Did you work on any other cases, policies, or matters that aimed to restrict the use of race-conscious criteria in any federal, state, or local contracting, employment, or educational programs?

RESPONSE: Please see my response to Question 36.a.

- x. Did you work on any cases, policies, or matters in which you advanced the argument that native Hawaiians or other indigenous people were not entitled to the same legal and constitutional protections as Native Americans?

RESPONSE: Please see my response to Question 36.a.

- y. Did you work on any cases, policies, or matters in which you advanced arguments consistent with your statement in a 1999 press interview that within the next 10-20 years courts would declare "we are all one race in the eyes of government"?

RESPONSE: Please see my response to Question 36.a.

- z. Did you work on, provide advice on, or otherwise have involvement in the U.S. Attorney firings that were the subject of a September 2008 Department of Justice OIG report?

RESPONSE: I left the White House in May 2006 to become a judge. The firings occurred in December 2006. Beyond that, please see my response to Question 36.a.

- aa. Did you work on, provide advice on, or otherwise have involvement in the systems of politicized hiring at the Department of Justice that were the subject of three DOJ OIG reports in June and July of 2008?

RESPONSE: Please see my response to Question 36.a.

- bb. Did you work on, provide advice on, receive any documents or communications

about, or otherwise have involvement in issues pertaining to Purdue Pharmaceuticals, Giuliani Partners, or the Oxycontin investigation?

RESPONSE: Please see my response to Question 36.a.

Senate Judiciary Committee
“The Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the
United States”
Questions for the Record
September 10, 2018
Senator Amy Klobuchar

Independent Judiciary

You referred to our independent judiciary as “the crown jewel of our constitutional republic.”

- What three opinions would you name that best demonstrate your independence as a judge?

RESPONSE: *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (vacating the military commission conviction of Salim Hamdan, Osama bin Laden’s driver, for providing material support for terrorism); *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (rejecting a challenge brought by the RNC to limits on political-party fundraising); *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (en banc) (dissenting to argue that a convicted bank robber could not face a mandatory 30-year sentence because the government failed to prove that he had the requisite *mens rea*—i.e., criminal intent).

Precedent

During your testimony, you referenced “precedent,” “precedent on precedent,” “entrenched precedent,” and cases like *Brown v. Board of Education*, which you acknowledged as “settled law.”

- What Supreme Court precedents from the last three decades – if any – would you consider to be settled law?

RESPONSE: As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary. With respect to more recent cases from the Supreme Court and their significance—as I discussed at the hearing and in keeping with nominee precedent—it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

Executive Power

I asked you about the view that you expressed in *Seven-Sky v. Holder* that the President can decline to enforce a law regulating private individuals, even if a court has found it to be constitutional.

- Can the President ever decline to enforce a law – even if a court has found it to be constitutional – outside of the context of prosecutorial discretion?

RESPONSE: As I said at the hearing, it would be inappropriate for me to respond to hypothetical questions. Footnote 43 of my opinion in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) refers to the concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974). The Supreme Court in *Nixon* said that the executive branch has the “exclusive authority and absolute discretion to decide whether to prosecute a case.” In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court said this principle applies to civil enforcement as well. The limits of prosecutorial discretion are uncertain.

- Article II, Section 3 of the Constitution, says that the President “shall take care that the laws be faithfully executed.” If a President does not faithfully execute a law – outside of the context of prosecutorial discretion – can a person seek to enforce that provision of the Constitution in court?

RESPONSE: See my response to the previous question. Beyond that, whether the Take Care Clause of Article II, Section 3 provides an independent cause of action for private individuals is the subject of pending litigation in the federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

Constitutional Avoidance

Justice Brandeis said in his 1936 opinion in *Ashwander v. Tennessee Valley Authority*: “The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”

- You have said that the Court should “consider jettisoning” the canon of constitutional avoidance. Have you consistently used the canon of constitutional avoidance as a judge on the D.C. Circuit, and would you describe yourself as a jurist who decides cases on the narrowest possible grounds?

RESPONSE: I explained at the hearing that I made the quoted observation in the context of an article discussing “the problem of ambiguity as a trigger for certain canons of statutory interpretation.” As a judge, I have consistently applied constitutional avoidance where appropriate. See, e.g., *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

Administrative Law

We also discussed your views on executive agencies, including your writings on the deference that should be given to agency interpretations of statutes and your record on overruling agency actions. Although you responded that you have also upheld agency actions in administrative law cases, you have ruled against agencies in an overwhelming majority of cases involving areas such as environmental law.

- Do you believe your record suggests that you are skeptical of agency actions to implement health and safety protections, and if not, why not?

RESPONSE: As I explained at the hearing, my record shows that I have ruled both for and against agency actions in the areas you describe. In each case, I have followed the law.

In the hearing, you replied to Senator Lee that the non-delegation doctrine holds that “at some point, Congress can go too far in how much power it delegates to an executive or independent agency.” But the Court has not applied this doctrine since 1935.

- Do you believe that the non-delegation doctrine is still good law?

RESPONSE: On March 5, 2018, the Supreme Court granted a petition for a writ of certiorari in *Gundy v. United States* (No. 17-6086). The question presented is: Whether the federal Sex Offender Registration and Notification Act’s delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine. Because this case is pending before the Supreme Court, I cannot provide my views of the nondelegation doctrine.

Campaign Finance

In a March 2002 email from your previous work in the White House that was provided to the Committee, you discussed your views on campaign finance laws.

- Is it still your view that limits on contributions to candidates have “some constitutional problems”?

RESPONSE: As a judge, I apply Supreme Court precedent governing the constitutionality of limitations on campaign contributions. The Supreme Court has explained the constitutional analysis that applies to such limitations in *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent precedents. As I explained at the hearing, the Supreme Court has struck down limitations on campaign contributions as unconstitutional in several cases subsequent to my 2002 email, including *Randall v. Sorrell*, 548 U.S. 230 (2006), and *McCutcheon v. FEC*, 572 U.S. 185 (2014). Each of these cases is a precedent of the Supreme Court entitled to the respect due under the law of precedent.

Antitrust

During the hearing, you said that you “don’t get to pick and choose” which Supreme Court precedents to follow. But your dissent in the 2008 *Whole Foods* case cited none of the relevant Supreme Court precedent and only cited three federal cases, discussing just one at significant length. In contrast, the majority applied the Supreme Court’s decisions in *Brown Shoe*, *Philadelphia National Bank*, and other relevant binding precedent in reaching their conclusions.

- Why did you choose not to apply these Supreme Court precedents in your dissent?

RESPONSE: In *Whole Foods*, as in all cases, I sought to faithfully apply binding Supreme Court and D.C. Circuit precedent. The fact-specific question in *Whole Foods* was how to define the relevant market. In particular, did Whole Foods compete with traditional grocery stores? After an extensive hearing, the district court—Judge Paul Friedman, an appointee of President Clinton—concluded yes. I agreed based on my analysis of the record. My opinion relied on “basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1059 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing, *inter alia*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *State Oil Co. v. Khan*, 522 U.S. 3 (1997)). I therefore followed the most recent and binding Supreme Court precedents applicable to the question presented in the case.

- How was your decision not to apply *Brown Shoe* and *Philadelphia National Bank* in the *Whole Foods* case consistent with your claim that you follow all Supreme Court precedent?

RESPONSE: Please see my answer to Question 9.

During the hearing, you said that in the 1970s, the Supreme Court “moved away from the analysis” in *Brown Shoe* and *Philadelphia National Bank*.

- Does that mean that you do not consider these cases binding Supreme Court precedent?

RESPONSE: As I said at the hearing, the Supreme Court instructed us in subsequent antitrust cases, beginning in the 1970s, to examine the effects on competition, which *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) did not do in the same way. As I explained in my opinion in *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), the Supreme Court’s landmark decisions in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), together with other modern antitrust jurisprudence, marked a shift in antitrust analysis toward a focus “on the effects on the consumers of the product or service” of the merging parties and away from the “strict anti-merger approach that the Court had employed in the 1960s in cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).” *Anthem*, 855 F.3d at 376 (Kavanaugh, J., dissenting).

- *Brown Shoe* and *Philadelphia National Bank* have been consistently cited and applied by the courts since the late 1970s, and they remain important legal tools for enforcers challenging anticompetitive mergers to this day. Are other circuits and federal judges mistaken in continuing to apply these precedents?

RESPONSE: As I explained in my responses to the three previous questions, lower-court judges must apply the most recent and binding Supreme Court precedent. In the fact-specific circumstances presented to me in *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) and *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), I concluded that I was required to apply the principles of 1970s decisions like *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

Affirmative Action

I asked you about an email in which you said you thought that a federal program to encourage the participation of minority- and women-owned businesses in transportation contracting was unconstitutional. You responded that your arguments were rooted in the precedent established by *Crosen v. City of Richmond*. In *Crosen*, the Court held that the government could not institute “rigid” racial quotas in the awarding of contracts without “direct evidence of race discrimination.” However, the program that was discussed in your email did not involve quotas.

- Is it your view that *Crosen* should be extended to prohibit any preferences in federal contracting for minority-owned businesses?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

- Do you think that using race as a factor in federal contracting is consistent with the Fourteenth Amendment?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

**Nomination of Judge Brett Kavanaugh
to be Associate Justice of the United States Supreme Court Questions for the Record**

Submitted September 10, 2018

QUESTIONS FROM SENATOR COONS

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

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

RESPONSE: As I discussed at the hearing, the Constitution protects unenumerated rights, and I agree with Justice Kagan that *Washington v. Glucksberg*, 521 U.S. 702 (1997), provides the primary test that the Supreme Court has relied on for forward-looking future recognition of unenumerated rights. I will seek to follow and apply the law and precedents as faithfully as I am able.

b. You indicated that you would consider whether the right is deeply rooted in this nation's history and tradition. What types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

RESPONSE: Please see my response to Question 1.a.

c. Would you consider whether the right has previously been recognized by Supreme Court or a court of appeals?

RESPONSE: Please see my response to Question 1.a.

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

RESPONSE: Please see my response to Question 1.a.

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*).

RESPONSE: Please see my response to Question 1.a.

f. What other factors would you consider?

RESPONSE: Please see my response to Question 1.a.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across

race and gender, or does it only require racial equality?

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?

RESPONSE: As I stated at the hearing, the text, history, and tradition of the Fourteenth Amendment require equal protection under law for all Americans. No matter who you are, no matter where you come from, no matter your gender, everyone is entitled to equal justice under law. I would follow the Supreme Court's precedents subject to the rules of stare decisis.

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?

RESPONSE: Please see my response to Question 2.a.

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

RESPONSE: As I stated at the hearing, the text, history, and tradition of the Fourteenth Amendment require equal protection under law for all Americans. Justice Kennedy wrote in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans as inferior in dignity and worth are over. In any case concerning the Fourteenth Amendment's application to gay and lesbian couples, I would consider the briefs and arguments of the parties, the record, and the precedent of the Supreme Court. In keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

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

RESPONSE: Please see my response to Question 2.c.

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

RESPONSE: The Supreme Court so held in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). At the hearing, I stated that I agreed with Chief Justice Roberts and Justice Alito about those cases.

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

RESPONSE: The Supreme Court held as much in *Roe v. Wade*.

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

RESPONSE: The Supreme Court held as much in *Lawrence v. Texas*.

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

RESPONSE: Please see my response to Question 3 above.

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

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

RESPONSE: This answer to this question depends on the nature of the case before a court. There is no one-size-fits-all answer. I of course would consider relevant evidence on relevant issues.

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

RESPONSE: Please see my response to Question 4.a.

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

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

RESPONSE: Yes. As I discussed at the hearing, *Brown* “lived up to the text of the Equal Protection Clause” and was dictated by the text of the Fourteenth Amendment.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited September 9, 2018).

RESPONSE: The problem of ambiguity in constitutional and statutory text is one with which every judge must grapple. In my experience, careful attention to text, history, structure, tradition, and precedent is useful in seeking to clarify ambiguous constitutional and statutory provisions.

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?

RESPONSE: As I explained at the hearing, I believe the original public meaning of the Constitution—as informed by history, and tradition, and precedent—is an important consideration in constitutional interpretation. As Justice Kagan has said, we are all originalists now, and we are all textualists now.

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

RESPONSE: Please see my response to Question 5.c.

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

RESPONSE: Please see my response to Question 5.c

6. You have been highly critical of *Morrison v. Olson*, 487 U.S. 654 (1988), on both policy and constitutional grounds.

a. Which provisions of the independent counsel statute at issue in that case caused you to call the law a “constitutional travesty,” and why did you object to those provisions so strongly?

b. Why did you single out *Morrison* as a case you would overrule?

c. Please explain why you believe the independent counsel statute should have been struck down.

d. Do you think the for-cause removal provision of the independent counsel statute was unconstitutional?

e. Do you believe that the Constitution requires the President to be able to remove any Executive Branch official at will?

RESPONSE: I have discussed these issues at length at the hearing and in my writings. I have nothing to add here.

7. You repeatedly turned to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in response to my questions about *Morrison v. Olson*. You said that *Humphrey's Executor* was “an important precedent of the Supreme Court that [you] have applied many times and reaffirmed.” Do you believe that *Humphrey's Executor* was correctly decided?

RESPONSE: As I explained at the hearing, *Humphrey's Executor* is a precedent of the Supreme Court entitled to respect under the law of precedent.

8. In a 2017 speech at the American Enterprise Institute, you praised Chief Justice Rehnquist's approach to substantive due process cases, both in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and more generally.

a. Do you agree that Justice Rehnquist's approach in substantive due process cases focused on whether asserted constitutional rights were deeply rooted in history and tradition?

RESPONSE: I agree with Justice Kagan that Chief Justice Rehnquist's decision in *Washington v. Glucksberg* provides the primary test that the Supreme Court has relied on for forward-looking future recognition of unenumerated rights.

b. Do you believe that this is the sole test for determining whether a right should be protected under the Fourteenth Amendment's Due Process Clause?

RESPONSE: Please see my response to Question 8.a.

c. Which substantive due process rights that are currently protected under Supreme Court precedent can be justified using Justice Rehnquist's approach in *Glucksberg*? Please put stare decisis aside in answering this question.

RESPONSE: Please see my response to Question 8.a.

d. Which substantive due process rights that are currently protected under Supreme Court precedent cannot be justified using Justice Rehnquist's approach in *Glucksberg*? Please put stare decisis aside in answering this question.

RESPONSE: Please see my response to Question 8.a.

9. During my last round of questions with you, I asked you about Chief Judge Rehnquist's approach to identifying liberty interests protected by the Fourteenth Amendment's Due Process clause in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the so-called *Glucksberg* test. During that round of questioning, and in response to the questions of other Senators, you seemed to suggest that this test is the exclusive governing test according to Supreme Court precedent. You further seemed to suggest that this approach had been endorsed by Justice Kagan during her confirmation hearing and by Justice Kennedy, given that he joined the majority in *Glucksberg*. However, Justice Kennedy wrote in the majority opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), which Justice Kagan joined: “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry

and the rights of gays and lesbians. *See Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566-567.”

a. Do you agree that the Supreme Court declined to apply the *Glucksberg* test in critical substantive due process decisions subsequent to *Glucksberg* that were written by Justice Kennedy, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)?

RESPONSE: The decision of the Court in *Lawrence v. Texas* does not cite *Glucksberg*. In *Obergefell*, the Court noted that the approach utilized by *Glucksberg* was not utilized in certain cases including *Loving v. Virginia*, 388 U.S. 1 (1967), *Turner v. Safley*, 482 U.S. 78 (1987), and *Zablocki v. Redhail*, 434 U.S. 374 (1978). In her 2010 confirmation hearing, Justice Kagan stated that “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” And, in her response to Questions for the Record, Justice Kagan stated that the *Glucksberg* test “would be the starting point for any consideration of a due process liberty claim.”

b. Given the approach to substantive due process in these two recent cases, why did you repeatedly suggest that the *Glucksberg* test is the appropriate, or only, approach to deciding substantive due process?

RESPONSE: As Justice Kagan stated in her confirmation hearing, “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” And, in her response to Questions for the Record, Justice Kagan stated that the *Glucksberg* test “would be the starting point for any consideration of a due process liberty claim.”

c. *Obergefell* explicitly rejected that the *Glucksberg* test was the sole test for identifying liberty interests protected by the Due Process Clause. The Court stated that the *Glucksberg* “approach may have been appropriate for the asserted right there involved (physician-assisted suicide),” but “it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.” In light of this statement, do you agree that it is inaccurate to characterize *Glucksberg* as the governing test for assessing liberty interests under substantive due process? Why or why not?

RESPONSE: Please see my response to Question 9.b

d. Why did you not refer to any of these more recent cases when discussing substantive due

process?

RESPONSE: *Glucksberg* is a governing test for assessing liberty interests in cases where substantive due process rights are asserted. The Supreme Court has not overruled *Glucksberg*, and it is entitled to all the respect due under the law of precedent.

e. Do you believe these more recent substantive due process cases (*Lawrence*, *Obergefell*) were correctly decided?

RESPONSE: As a sitting judge, I am bound to follow all Supreme Court decisions subject to the rules of precedent. As Justice Kagan said at her confirmation hearing, it would be inappropriate to offer a thumbs up or thumbs down on particular precedents like these.

10. Recent Supreme Court cases addressing capital punishment under the Eighth Amendment and the privacy of same-sex intimacy under the Fourteenth Amendment have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record, as well as relevant U.S. case law and practices. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Do you agree that foreign court decisions and foreign practices of democratic countries that follow the rule of law are appropriate to consider and cite in opinions interpreting the Constitution?

RESPONSE: I agree with Justice Sotomayor’s answer to written questions submitted by members of this Committee during her confirmation process. In response to a question submitted by then-Senator Sessions, Justice Sotomayor wrote, “American courts should not ‘use’ foreign law in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas however, does not constitute ‘using’ those decisions to decide cases.” In response to a question submitted by Senator Grassley, Justice Sotomayor wrote, “[f]oreign law should not be used as binding precedent or legal authority to interpret the United States Constitution. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas.”

11. Chief Justice Warren wrote that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This doctrinal standard explicitly calls on the Court not to limit its Eighth Amendment analysis to the meaning of “cruel and unusual punishments” when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Applying *Trop*’s evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.

a. In your view, what is meant by the Eighth Amendment’s prohibition against “cruel and unusual punishments”?

b. Does the phrase “cruel and unusual punishments” have the same meaning from the Eighth Amendment’s ratification in 1791 until now, or has our understanding changed?

c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes “cruel and unusual punishments”?

d. If it were permissible at the time of the Founding to execute eight-year-old children, would a commitment to originalism as the exclusive theory of constitutional interpretation mean that it would be similarly permissible to execute eight-year-old children today?

RESPONSE: The meaning of “cruel and unusual punishments” under the Eighth Amendment is the subject of ongoing litigation and is likely to come before me in some form. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

12. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures.

a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?

RESPONSE: If confirmed, I would give careful consideration to the practice of the Supreme Court regarding these questions, and I would consult with my colleagues regarding these issues.

b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?

RESPONSE: Please see my response to Question 12.a.

c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

RESPONSE: Please see my response to Question 12.a.

13. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. Please describe every pro bono matter you worked on over the course of your career.

RESPONSE: As a lawyer in private practice, I represented several clients pro bono, most notably the Adat Shalom synagogue and Elian Gonzalez’s American relatives.

I represented pro bono Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland before Judge Andre Davis. The district court decided

the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the county. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for a stay in the Supreme Court of the United States, and petition for a writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing en banc, stay application, and petition for a writ of certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference that should be accorded to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing en banc, arguing, in essence, that the court's original decision granting an injunction pending appeal had analyzed the issues correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing en banc. The Gonzalez family then filed an application for stay and petition for a writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

In 2000, I briefly represented pro bono a criminal defendant on appeal to the Fourth Circuit. The defendant had been convicted of conspiracy to harbor an alien and harboring an alien. I filed an appearance in the Fourth Circuit on behalf of the defendant but withdrew from the case before any briefs were filed. I withdrew because I had taken a new job at the White House in January 2001.

I also filed pro bono amicus briefs in several significant Supreme Court cases involving religious liberty. In *Santa Fe Independent School District v. Doe*, I filed an amicus brief on behalf of Congressmen Steve Largent and J.C. Watts in support of the petitioner, arguing that because the school policy at issue did not require or even encourage the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind (or prevent the student from doing so), the policy was neutral toward religion and religious speech and therefore did not violate the Establishment Clause. In *Good News Club v. Milford Central School*, I filed an amicus brief on

behalf of Sally Campbell in support of the petitioners, arguing that the discriminatory policy enacted by the school district targeted religious speech for a distinctive burden and was therefore unconstitutional. In *Rice v. Cayetano*, I filed an amicus brief on behalf of the Center for Equal Opportunity, the New York Civil Rights Coalition, and two professors in support of petitioners, arguing that an explicit racial classification that restricted the right to vote in statewide elections for state officials was unconstitutional.

The majority of my legal career has been spent in public service in a variety of capacities. Many of these positions, including particularly my service on the D.C. Circuit, have limited my opportunities to engage in traditional pro bono legal work. Nonetheless, I have sought—and will continue to seek—other avenues by which I can live up to the professional obligation of an attorney to help the less fortunate.

Since my youth, I have devoted significant time to helping the disadvantaged. My goal has always been to be, in the words of my high school’s motto, a “man for others.” In high school, I served meals at soup kitchens and tutored intellectually disabled children at the Rockville public library. In college, I tutored children at Roberto Clemente Middle School. In law school, I participated at times in the Green Haven Prison Project, which involved visiting and discussing issues with inmates at a New York prison.

As a judge, I have tutored at J.O. Wilson School and the Washington Jesuit Academy. I now serve as a director of the Washington Jesuit Academy. For the last several years, I have regularly served meals to the homeless at Catholic Charities in D.C. And I participated in community work on occasion, such as participating in an all-day playground build in Washington, D.C.

14. The U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from civil actions involving claims “arising under . . . any Act of Congress relating to patents.” 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. As a judge on the U.S. Court of Appeals for the D.C. Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to come before you.

a. Please describe any legal instruction (including at law school and afterwards) you have had in patent law.

RESPONSE: In preparing to hear and decide cases involving issues of intellectual property law (including those discussed below at Question 14.c.), I carefully read the parties’ briefs, review relevant precedents, and familiarize myself with fundamental principles of intellectual property law.

b. Please describe any legal instruction (including at law school and afterwards) you have had in other areas of intellectual property law.

RESPONSE: Please see my response to Question 14.a.

c. Please describe any experience you have had working on intellectual property issues since graduating law school.

RESPONSE: Several of the cases that I have decided as a judge have implicated intellectual property issues. In *FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264 (D.C. Cir. 2018), I wrote an opinion resolving an attorney-client privilege dispute arising from an FTC investigation into a reverse-payment settlement between a drug patent holder and a generic competitor. In *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 795 (D.C. Cir. 2011), I wrote an opinion addressing a dispute over the renewal of certain trademarks. And I have written several opinion reviewing decisions of the Copyright Royalty Board. See, e.g., *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132 (D.C. Cir. 2015); *Recording Industry Association of America, Inc. v. Librarian of Congress*, 608 F.3d 861 (D.C. Cir. 2010).

d. Please list any speeches or public presentations in which you have discussed intellectual property law.

RESPONSE: A list of my public speeches and presentations appears in response to Question 12.d. of my Senate Judiciary Questionnaire. Although I do not believe that any of these speeches or presentations focused on intellectual property law, the topic may have arisen in the course of my discussions.

15. Are patents property rights?

RESPONSE: The Supreme Court recently discussed this issue in *Oil States Energy Services v. Greene's Energy Group*, 138 S. Ct. 1365 (2018). Questions related to the issue could come before me in future litigation. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would therefore be improper for me as a sitting judge and a nominee to comment on further on this issue.

16. Are federal copyrights property rights?

RESPONSE: Questions related to this issue could come before me in future litigation. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would therefore be improper for me as a sitting judge and a nominee to comment on further on this issue.

17. Please describe the sources and methods you believe a judge should use in order to determine whether a claimed invention in a patent is an abstract idea that is not patent eligible.

RESPONSE: The Supreme Court has addressed this principle in a number of precedents, including recently in *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). If I were called upon to resolve a case in this area, I would consider relevant statutes, judicial precedent, the briefs and arguments of the parties and amici, and all other relevant authority bearing on the topic.

18. Do you believe it is unduly burdensome for an individual inventor in possession of an issued U.S. patent to prevent infringement by a large corporation? Why or why not? If yes, what steps should be taken to make enforcement easier?

RESPONSE: As I stated at the hearing, members of the judiciary must faithfully apply the laws passed by Congress. Judicial independence requires that nominees refrain from opining on matters of policy. In keeping with those principles and the nominee precedent of prior nominees, I therefore cannot provide my views on this issue.

19. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. “Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to ‘provide nationwide uniformity in patent law.’” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97– 312, p. 20 (1981)).

a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?

RESPONSE: As a D.C. Circuit Judge, I have not had the opportunity to consider in detail questions concerning the Supreme Court’s review of Federal Circuit decisions. If confirmed to the Supreme Court, I would consider all applicable statutes, judicial precedents, and other legal authority in this area, as well as the arguments of parties and *amici*, and the views of my colleagues.

b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?

RESPONSE: Please see my response to Question 19.a.

c. Resolving circuit splits is often viewed as one of the Supreme Court’s core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

RESPONSE: Please see my response to Question 19.a.

20. During your nomination hearing, you referred to the “reliance interest” that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?

RESPONSE: As I discussed at the hearing, reliance interests are among the factors the Supreme Court considers in applying the law of precedent. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.

21. How frequently do you communicate with Judge Kozinski? If the frequency of your

communications has changed over time, please provide estimates for different time periods.

RESPONSE: I was asked and answered questions regarding the frequency of my communications with Judge Kozinski at the confirmation hearing.

a. At least 15 women have accused Judge Kozinski of sexual harassment. Do you believe that Judge Kozinski treated women inappropriately?

RESPONSE: As I said at the hearing, I have no reason to doubt the claims of these women.

b. During the entire course of your relationship with Judge Kozinski, did you ever witness him engaging in inappropriate behavior? Please explain any such incident(s).

RESPONSE: Judge Kozinski was known to be a tough boss, but I did not witness him engaging in inappropriate behavior of a sexual nature.

c. Did you ever see Judge Kozinski mistreat a law clerk or law clerk candidate? Please explain any such incident(s).

RESPONSE: Over the course of my relationship with Judge Kozinski, I never saw him sexually harass a law clerk or law clerk candidate.

d. Did Judge Kozinski ever use demeaning language when discussing women?

RESPONSE: I do not remember hearing Judge Kozinski use demeaning language of a sexual nature when discussing women.

e. Did anyone ever raise concerns with you about Judge Kozinski's behavior? Who? When?

RESPONSE: To the best of my memory, no one ever raised concerns with me regarding inappropriate behavior of a sexual nature on the part of Judge Kozinski. Judge Kozinski worked in a small courthouse in Pasadena with ten other judges, numerous law clerks, and court employees. Apparently, none of them knew of any misconduct, or they presumably would have reported it.

f. Did your clerkship spot with Judge Kozinski become available when another student resigned or was fired from his clerkship with Judge Kozinski? If so, please explain your understanding of the circumstances around the former clerk's departure.

RESPONSE: Yes. I replaced another male clerk. I am not aware of the precise circumstances surrounding the former clerk's departure.

g. It has been reported that Judge Kozinski had a sexually explicit email list, called the Easy Rider Gag List. Did you ever receive an email from this list? If it is necessary to refresh your recollection, please review your email accounts before answering this question.

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge

Kozinski.

h. Have you conducted a search of your email accounts and/or correspondence with Judge Kozinski in an effort to provide an accurate response to the preceding question? If not, why not?

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.

i. Judge Kozinski also had a personal website with explicit postings. When did you first become aware of Judge Kozinski's personal website?

RESPONSE: I believe that I first became aware of this website when news of the website broke publicly in news outlets, which led to the 2008-2009 judicial misconduct investigation.

j. At any time, did you provide information related to an inquiry regarding Judge Kozinski's behavior?

RESPONSE: No.

22. Which cases, theories, or legal issues were you asked about during the judicial selection process for the D.C. Circuit and for the Supreme Court (including conversations with the White House or outside advisors)? Please provide a comprehensive response.

RESPONSE: In my Senate Judiciary Questionnaires filed in 2004 and 2018 and at my hearings, I have explained my selection process. I made no commitments to anyone on matters that might come before me.

23. President Trump published an initial list of names from which he would select future Supreme Court nominees in May 2016. You were not on that initial list. Between that time and November 2017, when you were added to the list, what actions, if any, did you take to have your name added?

a. Did you speak to anybody about being added to the list? If yes, please list with whom you spoke and what you discussed.

RESPONSE: I understand that many people thought I should be considered and said as much.

b. Did you agree to give any speeches in order to be added to the list?

RESPONSE: No.

c. Did you select the subject matter of your speeches in order to be added to the list?

RESPONSE: No.

d. Did the possibility of being added to the list impact your decisions in any cases before you?

RESPONSE: No.

24. In my office, you confirmed that the Third Circuit decided *Planned Parenthood v. Casey*, 947 F.2d 682 (1991), while you were clerking for Judge Stapleton. Did you work on this case? Please seek permission to answer this question if necessary.

RESPONSE: I am not at liberty to discuss the internal deliberations of the Third Circuit while I was clerking.

25. In the speech you gave on the night your Supreme Court nomination was announced, you said that “[n]o president has ever consulted more widely, or talked with more people from more backgrounds, to seek input about a Supreme Court nomination.”

a. Who wrote that line of your speech?

RESPONSE: As I said at my confirmation hearing, those were my own words.

b. How do you know that this is a true statement?

RESPONSE: I addressed this question at the hearing.

c. Did you do any research to verify those assertions?

RESPONSE: Yes.

d. When did you first meet Leonard Leo, and how frequently do you communicate with him?

RESPONSE: As I stated in my testimony before the Committee, I have known Leonard Leo for more than 25 years. I have communicated with Mr. Leo from time to time.

26. On what legal or other basis did you advise Ken Starr that he should demand a public apology from President Clinton as one condition of giving him “breaks” in questioning him?

RESPONSE: I do not recall the basis for that statement.

27. You told me that you drafted the “grounds” section of the Starr report, which contained perjury allegations. Has your interpretation of what constitutes perjury changed since you drafted the Starr report?

RESPONSE: Any question about potential grounds for impeachment would be a question for the House and the Senate in the first instance, and such a question could arise in litigation before me. As I stated at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to discuss such an issue.

28. If a judge provides intentionally false testimony to Congress on an issue of significance, is impeachment the appropriate remedy?

RESPONSE: That is a question for the House and the Senate.

29. In my office, we spoke about how important it is for the President of the United States to be truthful in everything he says.

a. Please explain why it is so important for the President to be truthful.

RESPONSE: I believe I explained that in our discussion.

b. Does President Trump tell the truth?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political issues.

c. Has President Trump made any statements that you would condemn?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political issues.

d. You recounted an episode in the White House where President Bush was criticized for a statement that was, in your words, “literally true but misleading in context.” Please review the transcript of your hearing and identify any statements that you made that were literally true but misleading in context.

RESPONSE: I have told the truth, to the best of my memory.

30. In a March 27, 2001 email that you wrote while serving in the White House Counsel’s Office, you referred to your “ideal of how a unitary executive should work.” Please explain your ideal of how a unitary executive should work.

RESPONSE: That email referred to and reinforced the specific procedures in place at the time that generally defined the Solicitor General’s role in determining the legal position of the United States.

31. Why did you testify during your hearing that you have “never taken a position on the constitutionality of indicting or investigating a sitting President” when, in the *American Spectator* in 1999, you described as “constitutionally dubious” the “transfer of investigative responsibility” from Congress to a criminal prosecutor?

RESPONSE: As I explained at the hearing, I have never taken a position on the constitutionality of indicting the president while in office. In a 2009 Minnesota Law Review article, I made a series of legislative proposals for Congress to consider. As to the constitutional question, however, I have made clear that if a constitutional question came to me, I would have an open mind. I have repeatedly referred to the constitutional question of whether a sitting President can be indicted as an open question. Specifically, in my 1998 Georgetown Law Journal article, I stated that “[w]hether the Constitution *allows* indictment of a sitting President is debatable.” In my 2009

Minnesota Law Review article, I stated that “a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office.”

32. During your hearing, Sen. Whitehouse asked you if the President must comply with a grand jury subpoena.

a. Does the President have to comply with a grand jury subpoena?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

b. If your answer is anything other than “yes,” do you believe this question is not controlled by the holding in *United States v. Nixon*, 418 U.S. 683 (1974)?

RESPONSE: Please see my response to Question 32.a. above.

c. Please identify any case law where a federal court has distinguished between a trial court subpoena and a grand jury subpoena.

RESPONSE: Please see my response to Question 32.a. above.

33. At your hearing, you testified that your past criticism of *United States v. Nixon*, 418 U.S. 683 (1974), was taken out of context. Here is what you said at the roundtable where you discussed *United States v. Nixon*:

— “Maybe *Nixon* was wrongly decided.”

— “*Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. . . . And the Court said, ‘We’re going to take away that right.’ Maybe the tension of the time led to an erroneous decision.”

— “There should be more focus on the merits of *Nixon* than there has been.”

— “Should *United States v. Nixon* be overruled[?] . . . [M]aybe so.”

You made many statements critical of *Nixon*, and you articulated a rationale in support of your criticisms – specifically, the theory of the unitary executive that Justice Scalia articulated in his dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), which you have cited approvingly many times as a sitting judge. Given all of your statements, reproduced above, why did you assert that your criticism of *Nixon* was taken out of context?

RESPONSE: As I said at the hearing, *United States v. Nixon* is one of the four greatest decisions in the history of the Supreme Court. I have said that repeatedly and publicly for many years.

34. During the hearing, I stated, “[At] Georgetown, [on] a panel in 1998 you wrote it makes no sense at all to have an independent counsel investigate the President, if the President were a sole subject of investigation, nobody should investigate that. Is that your view, if there is evidence that what President committed crime no one should investigate it?” You replied, “That’s not what I said, Senator.” In a recording of that panel, at approximately the one- hour-and-20-minute mark, you state, “If the president were the sole subject of a criminal investigation. I would say, no one should be investigating that. That should be turned over immediately to the Congress. Most criminal investigations involve multiple subjects however, so the criminal investigation goes forward. But if it ever gets to a point where the president is the sole subject, the Congress needs to take the lead.” Independent Counsel Structure & Function, February 19, 1998, available at <https://www.c-span.org/video/?101055-1/independent-counsel-structure-function>.

a. Please explain your testimony during the hearing and why you denied stating this.

RESPONSE: My writings and testimony speak for themselves. In your question, you said “nobody.” But in my panel remarks, I said, “Congress.”

b. Please answer the question whether it remains your view that if the President is the sole subject of an investigation, no prosecutor or law enforcement officials should investigate it.

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me

35. Please explain how your testimony that you have not opined on the constitutionality of indicting a President is consistent with your prior writings that “the Constitution itself seems to dictate” that criminal prosecution occur only after the President has left office.

RESPONSE: Please see my response to Question 31.

36. You characterized your approach in *Garza v. Hargan*, 874 F. 3d 735 (D.C. Cir. 2017), as simply trying in good faith to apply Supreme Court precedent. Yet your approach in that case appears to be inconsistent with Supreme Court precedent in at least two ways.

a. How is your approach consistent with *Bellotti v. Baird*, 443 U.S. 622 (1977), given that J.D. had already obtained a judicial bypass in state court and had met all of the requirements under state law to have an abortion?

RESPONSE: My dissent in *Garza* sought to faithfully apply the most closely analogous Supreme Court precedent. I explained this in detail at the hearing.

b. Why did you not apply the Court’s holding in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which requires a reviewing court to balance the burden imposed by an abortion restriction (such as an additional required delay) against the benefit of the restriction?

RESPONSE: I carefully applied the undue burden standard, as I have explained at length.

c. What does it say about your view about a woman’s right to make her own decisions about her health care when you required J.D. to wait at least another 11 days to have an abortion, when federal officials had already delayed her access to reproductive services almost seven weeks?

RESPONSE: I answered this question at the hearing.

d. Given that federal officials had already made J.D. wait almost seven weeks to obtain an abortion, why did you characterize J.D.’s constitutional claim as seeking a right to “abortion on demand”?

RESPONSE: As I stated at the hearing, Chief Justice Burger used the phrase “abortion on demand” in his concurrence in *Roe v. Wade*.

e. Under what circumstances do you believe a women’s right to choose to have an abortion is not “abortion on demand”?

RESPONSE: Please see my response to Question 36.d.

f. In your view, is there any point at which delaying a minor’s right to abortion services becomes an undue burden on that right?

RESPONSE: It would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

37. Please respond to Judge Millett’s concern that the interpretation of the law in your dissent in *Garza v. Hargan* 874 F. 3d 735 (D.C. Cir. 2017), “would require a troubling and dramatic rewriting of Supreme Court precedent to make the sufficiency of someone’s ‘network’ an added factor in delaying the exercise of reproductive choice even after compliance with all state-mandated procedures.”

RESPONSE: At the hearing, I explained at length how my dissent in *Garza* applied Supreme Court precedent.

38. In your dissent in *Priests for Life v. Department of Health and Human Services*, 772 F.3d 229 (2014), you wrote that “when the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . the Government has substantially burdened” the exercise of religion. Did you intend to include any action, irrespective of how burdensome it is to take that action?

RESPONSE: As I wrote in my dissent from denial of rehearing in the *Priests for Life* case, there was no dispute that the plaintiffs in that case would be subject to huge financial penalties for adhering to their religious beliefs and refusing to submit the form. In keeping with the Supreme Court’s precedent in *Hobby Lobby v. Burwell*, my dissenting opinion argued that the imposition of

financial penalties for refusing to take an action contrary to one's sincere religious belief was a substantial burden. I also emphasized, however, that the Government had a compelling interest under Supreme Court precedent in facilitating access to contraceptives. The case therefore turned on whether the Government had less restrictive means to ensure that the women employees had access to contraception at the same cost.

39. The Supreme Court has not recognized a constitutional right to health care protected under the liberty provision of the Due Process Clause. However, Congress passed the Affordable Care Act, which protects health care access regardless of preexisting conditions. Is it constitutional for Congress to prohibit insurers from denying individuals coverage based on preexisting conditions?

RESPONSE: As I explained in *Seven-Sky v. Holder*, 661 F.3d 1, 52 (D.C. Cir. 2011), “[t]he elected Branches designed [the Affordable Care Act] to help provide all Americans with access to affordable health insurance and quality health care, vital policy objectives.” I further noted that “[c]ourts must afford great respect to that legislative effort and should be wary of upending it.” *Id.* at 53. Nevertheless, as I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment further on a matter that may come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

40. In your 2011 dissent in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), you explained that you would have struck down D.C.’s firearms registration requirements, concluding that “[r]egistration of all lawfully possessed guns . . . has not traditionally been required in the United States and even today remains highly unusual.” Please cite any other circuit court decisions that have interpreted the Supreme Court’s *Heller* decision in this way.

RESPONSE: In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), I strictly and carefully followed the Supreme Court precedent as set forth in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

41. Does the government have a compelling interest in eradicating discrimination against racial minorities, women, or LGBT individuals sufficient to justify denial of federal funding to schools that discriminate against any such individuals based on sincerely held religious beliefs?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

42. Why did you author a concurrence in *Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir. 2015)?

RESPONSE: I answered this question at the hearing.

43. In your concurrence to the denial of rehearing en banc in *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), you opined that courts have no role in interpreting an ambiguous statute with reference to international law unless Congress makes a clear statement that they must do so. Has the Supreme Court ever agreed with this view?

RESPONSE: My concurrence in *Al-Bihani v. Obama* explained that “[i]nternational-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President’s authority under the” 2001 Authorization for Use of Military Force. 619 F.3d 1, 9 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc). As I explained in the opinion, I reached this conclusion in reliance on the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* and Justice Jackson’s opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which I noted “reinforces the traditional roles of Congress, the President, and the Judiciary in national-security-related matters.

44. In *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), you joined the majority’s opinion extending sovereign immunity to private military contractors sued in conjunction with abuses at Abu Ghraib. Chief Judge Garland’s dissent noted that the majority lacked any statutory or judicial authority for extending sovereign immunity to private military contractors. Please respond to this critique.

RESPONSE: The opinion speaks for itself.

45. Why did you decline to join the analysis in the concurrence in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), which recognized the importance of the Voting Rights Act of 1965?

RESPONSE: I wrote the opinion for the court, which resolved all issues before the panel. My opinion called the Voting Rights Act of 1965 “among the most significant and effective pieces of legislation in American history.” Although Judge Kollar-Kotelly and Judge Bates opted to make additional points, they called my opinion “excellent” and joined it in full.

46. In *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), when you explicitly stated that the Court’s decision did not apply to certain types of speech by foreign nationals related to U.S. elections, did you anticipate that foreign entities would cite these limitations in future litigation?

RESPONSE: My decision for the three-judge district court in *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), resolved the challenge brought by the litigants in that case. My opinion for a unanimous panel rejected a First Amendment challenge to a federal statute by “foreign citizens who temporarily live and work in the United States” who sought “to contribute to candidates and political parties and to make express-advocacy expenditures.” *Id.* at 282-83. The challengers in *Bluman* did not seek to make contributions to organizations that make expenditures on issue ads. The opinion made clear that the court’s “holding does not address” whether “Congress might bar” foreign nationals living temporarily in the United States “from issue advocacy and speaking out on issues of public policy.” *Id.* at 284, 292. The Supreme Court unanimously affirmed the decision. *See Bluman v. FEC*, 565 U.S. 1104 (2012).

47. In *United States Telecom Association v. Federal Communications Commission*, 855 F.3d 381 (D.C. Cir. 2017), you dissented from the D.C. Circuit’s decision to deny rehearing en banc. In your dissent, you noted that the First Amendment offers broad editorial discretion to Internet Service Providers. However, the only party that raised a First Amendment argument would never have been bound by the FCC’s net neutrality rule because the provision did not apply to a broadband provider unless it held itself out as a neutral, indiscriminate conduit to any Internet content of a subscriber’s own choosing. Why did you find it appropriate to address a point that was not necessary to resolve the case?

RESPONSE: As I discussed at the hearing, and as you recognize, the First Amendment issue was raised by a party in briefs in the case. I thought it was important to explain Supreme Court precedent—*Turner Broadcasting*—that seemed on point and was raised in the case.

48. Did you ever meet with law enforcement, volunteer information, provide documents, or cooperate in any way with the investigation into Manuel Miranda’s theft of documents from Senate Judiciary Committee Democrats in any way?

a. If not, why did you decline to come forward to offer to assist the investigation, given your frequent communications with Manuel Miranda regarding judicial nominations and the likelihood that he shared stolen information with you?

b. Were your documents searched for information relevant to the investigation? If not, why not?

RESPONSE: During the hearing, I truthfully answered numerous questions regarding Mr. Miranda, and I refer you to those answers.

49. Have you had any communications with William Burck since your nomination was announced?

RESPONSE: I saw Mr. Burck at a social event on the Saturday after my nomination.

a. Did you have any involvement in the document production being overseen by William Burck in relation to this hearing?

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

b. If you did have involvement in the document production being overseen by William Burck, please describe your role.

RESPONSE: Please see my answer to Question 49.a.

c. Were there others involved in the document review process being overseen by William

Burck? If yes, who were they and what was their role?

RESPONSE: Please see my answer to Question 49.a.

50. Are you aware of who paid for the in the document production being overseen by William Burck? If yes, who paid for it? What was the approximate amount of the expense?

RESPONSE: Please see my answer to Question 49.a.

51. Did you see any of the documents from the document production being overseen by William Burck prior to their release by the Senate Judiciary Committee? If yes, what documents did you see? If yes, were any of the documents that you saw designated “Committee Confidential” when you viewed them?

RESPONSE: As I stated in my testimony before the Committee, I was not involved in the document review process. In the course of preparing for the hearing, I spoke to a number of people and reviewed a number of documents. I cannot recall the specific number of documents that I reviewed; however, I am advised that it was a small subset of documents produced to the Senate. The vast majority of those documents were publicly produced. I was informed that I might be asked about documents designated “committee confidential” in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions I was shown some documents that were designated “committee confidential.”

52. As Staff Secretary, did you create documents?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of the substance of my work, my role was not to replace the President’s policy or legal advisors, but was to make sure that the President had the benefit of the views of his policy and legal advisors. I was not ordinarily an originator of documents.

a. Did you revise or add your views to other documents before they went to the President?

RESPONSE: Please see my answer to Question 52.

b. Please provide a list of the most substantive contributions that you made as White House Staff Secretary.

RESPONSE: Please see my answer to Question 52.

c. Are there documents that you created or contributed to during your time as White House Staff Secretary that bear on any of the issues that were discussed in the hearing?

RESPONSE: Please see my answer to Question 52.

d. Please provide a list of all of the signing statements you contributed to in any way while in the White House.

RESPONSE: Please see my answer to Question 52.

53. During our private meeting, you defended the refusal by Senate Republicans to request and release your Staff Secretary records from your time in the White House of President George W. Bush based on what you called “nominee precedent.”

a. Please explain whether and why you stand by your defense of the current refusal by Senate Republicans to request and release your Staff Secretary records.

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. As I further stated at the hearing, I do not take a position regarding the release of documents, which I believe is an issue for the Senate, the Executive Branch, and President Bush. As a matter of nominee precedent, I am aware that neither Chief Justice Roberts’s, Justice Alito’s, or Justice Kagan’s documents from the Solicitor General’s Office nor Justice Scalia’s and Justice Alito’s documents from the Office of Legal Counsel were turned over to the Committee during their confirmations.

b. Do you agree that your Staff Secretary records will eventually become public, at which time one will be able to determine whether you were truthful during your Supreme Court confirmation hearing?

RESPONSE: I have told the truth, to the best of my memory.

54. Given that, pursuant to the Presidential Records Act, documents from your time in the Bush White House will be released in the coming years, please answer the following questions regarding your Staff Secretary documents:

a. Are there going to be emails or other documents that pertain to torture?

RESPONSE: As I explained at the hearing, I was not read into the program involving the controversial enhanced interrogation techniques during the Bush Administration, nor the crafting of the legal memos justifying that program. That is why I was not mentioned in either of the reports, by the Senate Select Committee on Intelligence and the Justice Department Office of Professional Responsibility, respectively, on those matters. As Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk, but my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

b. Are there going to be emails or other documents that pertain to detainee treatment?

RESPONSE: Please see my response to Question 54.a.

c. Are there going to be emails or other documents that pertain to rendition?

RESPONSE: Please see my response to Question 54.a.

d. Are there going to be emails or other documents that pertain to ballot initiatives on marriage, the 2003 Proclamation of Marriage Protection Week, the May 17, 2004 Statement calling for a constitutional amendment barring marriage equality, or the July 12, 2004 Statement of Administrative Policy on S.J. Res. 40 also known as the “Federal Marriage Amendment”?

RESPONSE: Please see my response to Question 54.a.

e. Are there going to be emails or other documents that pertain to Plan B contraception?

RESPONSE: Please see my response to Question 54.a.

f. Are there going to be emails or other documents that pertain to CIA operative Valerie Plame?

RESPONSE: Please see my response to Question 54.a.

55. When you worked in the White House Counsel’s Office on judicial nominations, did the Bush administration have a preference for nominees inclined to end busing orders designed to racially integrate schools?

RESPONSE: As I explained during my confirmation hearing in 2006, my understanding was that President Bush sought judges from diverse backgrounds who would faithfully apply the law and who understood the distinction between the policymaking role and the judicial role. I have no specific recollection or independent knowledge of the policy preferences of all potential judicial nominees considered by the Bush administration during my service in the White House Counsel’s Office.

56. During your time in the White House, several senior staff members were using Republican National Committee and campaign email addresses and servers that did not preserve their emails, as required by law.

a. Did you have any email addresses during your time in the White House other than your official White House email address?

RESPONSE: In addition to my White House email address, I had a personal email address that I may have used on occasion for personal matters. That personal account was not affiliated with any email server run by the Republican National Committee. I did not have a personal device that could access personal emails. And White House employees were not able to access personal emails from our work computers, as I recall. To the best of my recollection, it was not my practice to use

my personal email address for official matters, although I cannot rule out isolated emails.

b. Did you use any other email addresses other than your official White House email address to conduct official business? If so, please provide it.

RESPONSE: Please see my response to Question 56.a.

57. Did you prepare for these hearings?

RESPONSE: Yes.

58. Assuming you prepared for these hearings, how many preparation sessions did you have? Approximately how long did you spend preparing?

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends.

59. During any part of your preparation for these hearings, were there any individuals from the White House present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

60. During any part of your preparation for these hearings, were there any individuals from the Department of Justice present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

61. During any part of your preparation for these hearings, were there any individuals from any other part of the Executive Branch present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

62. During any part of your preparation for these hearings, were there any individuals from Congress (including both Members and staffers) present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

63. During any part of your preparation for these hearings, were there any individuals from the Judicial Branch present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

64. During any part of your preparation for these hearings, were there any individuals from outside of the federal government present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

65. During any part of your preparation for these hearings, were you given guidance on what questions you should not answer? If yes, what was the guidance?

RESPONSE: Please see my response to Question 58. I made my own decisions about what to say at the hearing.

66. During any part of your preparation for these hearings, were you shown documents?
a. How many documents were you shown?

RESPONSE: In the course of preparing for the hearing, I spoke to a number of people and reviewed a number of documents. I cannot recall the specific number of documents that I reviewed; however, I am advised that it was a small subset of documents produced to the Senate, and that the vast majority of those documents were publicly produced. As I stated in my testimony, decisions concerning the production of documents were made by the Committee, the Executive Branch, and the Bush Library.

b. Have all of these documents been produced to the Senate Judiciary Committee?

RESPONSE: Please see my response to Question 66.a.

c. Are all of these documents publicly available?

RESPONSE: Please see my response to Question 66.a.

d. Will you agree to produce any documents that haven't been given to the Senate Judiciary Committee and make them publicly available?

RESPONSE: Please see my response to Question 66.a.

67. Has the testimony that you have provided during this hearing been 100 percent truthful?

RESPONSE: Yes, to the best of my memory.

68. Has the testimony that you have provided during this hearing been 100 percent accurate?

RESPONSE: Yes, to the best of my memory.

69. At any point during this hearing, did you answer a question a certain way to avoid disclosing relevant information?

RESPONSE: I have tried to be forthcoming with the Committee, consistent with my obligation to maintain judicial independence.

70. Is anyone helping you to provide answers to these written questions?

RESPONSE: I drafted answers to these questions in conjunction with members of the Office of Legal Policy at the U.S. Department of Justice and other attorneys from the Department of Justice, and the White House Counsel's Office, as well as my former clerks. My answers to each question are my own.

71. If anyone is helping you to provide answers to these written questions, please provide their names, how they are helping you, and who is compensating them for their work on your answers.

RESPONSE: Please see my response to Question 70.

72. Have you read and verified the answer to each one of these questions?

RESPONSE: I have done the best to provide answers in the time allotted.

73. Is the answer to each one of these questions 100 percent accurate?

RESPONSE: I have done the best I could to provide accurate responses to all questions.

Questions for the Record for Brett M. Kavanaugh
Submitted by Senator Richard Blumenthal
September 10, 2018

1. In a response to a question from Senator Cruz regarding your dissenting opinion in *Priests for Life v. HHS*, you referred to contraceptives as “abortion-inducing drugs.”
 - ☐ **Do you believe contraceptives are abortion-inducing drugs?**
 - ☐ **If yes, which ones?**
 - ☐ **What is the basis for this belief?**

RESPONSE: That was the position of the plaintiffs in that case, and I was accurately describing *the plaintiffs’* position. At the hearing, I was not expressing an opinion on whether particular drugs induce abortion; I used that phrase only when recounting the plaintiffs’ own assertions.

2. During the hearing, Fred Guttenberg, the father of a slain Parkland student, approached you to shake your hand. Video footage of the incident shows you turning around and walking away as soon as he greets you.
 - ☐ **Did you ask the Capitol Police to remove Mr. Guttenberg from the hearing room?**

RESPONSE: No.

- ☐ **Did anybody acting at your request or on your behalf ask the Capitol Police to remove Mr. Guttenberg from the hearing room?**

RESPONSE: No one acted at my request. If someone purported to act on my behalf, they did so without my knowledge and contrary to my wishes.

3. **Did you participate in practice questioning or mooting with any Senators or Senate staff prior to the hearing? If so, whom?**

RESPONSE: In preparation for my testimony before the Judiciary Committee, various people have provided me with advice, including senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. I have made no commitments to anyone on matters that might come before me as judge.

4. **Has anyone paid off any of your debts in the last 10 years? Who? Have you ever incurred any debt worth over \$5000 from gambling?**

RESPONSE: I have truthfully provided financial information in conjunction with this nomination process and my service in the judicial and executive branches. Since I graduated from law school in 1990, I have worked in public service for 25 of those 28 years. For most of her years of paid employment, my wife likewise has been a federal, state, or local government worker.

During that time, I have filed regular financial disclosure reports as required by law. The Federal Government's required financial disclosure reports list broad ranges for one's assets and debt as of one day or period in time.

At this time, my wife and I have no debts other than our home mortgage. We have the following assets:

- (1) A house minus the mortgage;
- (2) Two Federal Government Thrift Savings Plan retirement accounts (largely accessible to us in beginning in 2024), as well as a Texas employees' retirement account;
- (3) A bank account;
- (4) A car that we own and a car that we lease; and
- (5) Ordinary personal furniture, clothing, and belongings.

Since our marriage in 2004, we have not owned stocks, bonds, mutual funds, or other similar financial investments outside of our retirement accounts.

Our annual income includes my income as a federal judge, my income from teaching law each year, and now also my wife's income from being Town Manager of Section 5 of Chevy Chase, Maryland. Our annual income and financial worth substantially increased in the last few years as a result of a significant annual salary increase for federal judges; a substantial back pay award in the wake of class litigation over pay for the Federal Judiciary; and my wife's return to the paid workforce following the many years that she took off from paid work in order to care for our daughters. The back pay award was excluded from disclosure on my previous financial disclosure report based on the Filing Instructions for Judicial Officers and Employees, which excludes income from the Federal Government. We have not received financial gifts other than from our family, which are excluded from disclosure in judicial financial disclosure reports. Nor have we received other kinds of gifts from anyone outside of our family, apart from ordinary non-reportable gifts related to, for example, birthdays, Christmas, or personal hospitality. On the 2018 financial disclosure report, I correctly listed "exempt" for gifts and reimbursements because those are the explicit instructions in the 2018 Filing Instructions for Judicial Officers and Employees.

At this time, we have no debts other than our home mortgage. Over the years, we carried some personal debt. That debt was not close to the top of the ranges listed on the financial disclosure reports. Over the years, we have sunk a decent amount of money into our home for sometimes unanticipated repairs and improvements. As many homeowners probably appreciate, the list sometimes seems to never end, and for us it has included over the years: replacing the heating and air conditioning system and air conditioning units, replacing the water heater, painting and repairing the full exterior of the house, painting the interior of the house, replacing the porch flooring on the front and side porches with composite wood, gutter repairs, roof repairs, a new refrigerator, a new oven, ceiling leaks, ongoing flooding in the basement, waterproofing the basement, mold removal in the basement, drainage work because of excess water outside the house that was running into the neighbor's property, fence repair, and so on. Maintaining a house, especially an old house like ours, can be expensive. I have not had gambling debts or participated in "fantasy" leagues.

The Thrift Savings Plan loan that appears on certain disclosure reports was a Federal Government loan to help with the down payment on our house in 2006. That government loan program is available for federal government workers to help with the purchase of their first house. In our case, that loan was paid back primarily by regular deductions from my paycheck, in the same way that taxes and insurance premiums are deducted from my paycheck. That loan has been paid off in full.

I am a huge sports fan. When the Nationals came to D.C. in 2005, I purchased four season tickets in my name every season from 2005 through 2017. I also purchased playoff packages for the four years that the Nationals made the playoffs (2012, 2014, 2016, and 2017.) I have attended all 11 Nationals home playoff games in their history. (We are 3-8 in those games.) I have attended a couple of hundred regular season games. As is typical with baseball season tickets, I had a group of old friends who would split games with me. We would usually divide the tickets in a “ticket draft” at my house. Everyone in the group paid me for their tickets based on the cost of the tickets, to the dollar. No one overpaid or underpaid me for tickets. No loans were given in either direction.

My wife and I spend money on our daughters and sports, including as members of the Chevy Chase Club, which we joined in recent years. We paid the full price of the club’s entry fee, and we pay regular dues in the same amount that other members pay. We did not and do not receive any discounts. The club is a minute’s drive from our house, and there is an outdoor ice hockey rink and a very good youth ice hockey program. We joined primarily because of the ice hockey program that my younger daughter participates in, as well as because of the gym.

Finally, it bears repeating that financial disclosure reports are not meant to depict one’s overall net worth or overall financial situation. They are meant to identify conflicts of interest. Therefore, they are not good tools for assessing one’s net worth or financial situation. Here, by providing all of this additional information, I hope that I have helped the Committee.

5. Can the President offer someone a pardon in exchange for a promise not to testify against him?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on hypotheticals or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I cannot provide my views on this issue.

6. During the hearing, you testified that you were following the so-called “Kagan rule” of refusing to give either a “thumbs up” or “thumbs down” to any Supreme Court precedents. Yet you told Senator Coons that *Morrison v. Olson* was “wrong.” You claimed in a conversation with Paul Gigot at the American Enterprise Institute that *Morrison v. Olson* had “been effectively overruled” and you “would put the final nail in”

it.

- ☐ **Why did you make an exception for *Morrison* by giving it a “thumbs down” during the hearing?**

RESPONSE: I have previously spoken and written about *Morrison* and therefore referred to what I had said before, which is the approach that prior Supreme Court nominees have taken in similar circumstances.

- ☐ **Which case or cases effectively overruled *Morrison*?**

RESPONSE: I have addressed this question at the hearing and in my writings.

7. During the hearing, you stated that *Humphrey’s Executor* was “entrenched precedent.” You’ve described *Roe v. Wade* as “existing precedent.”

- ☐ **Please explain the distinction between “entrenched precedent” and “existing precedent.”**

RESPONSE: Both *Humphrey’s Executor* and *Roe v. Wade* are precedents of the Supreme Court entitled to respect under the law of precedent. *Roe v. Wade* was expressly reaffirmed in *Planned Parenthood v. Casey*, which is precedent on precedent.

8. During Independent Counsel Kenneth Starr’s investigation of President Clinton, there were numerous accusations that Mr. Starr’s staff leaked grand jury information to the press. At least one reporter, Dan Moldea, asserts that you were the designated person that Mr. Starr made available to the press.

- ☐ **Did you leak protected grand jury information to the press when you were on Mr. Starr’s staff?**

RESPONSE: No.

- ☐ **To the extent you spoke with reporters on background or off the record about the Starr investigation, are those reporters free to describe their interactions with you?**

Will you take this opportunity to explicitly and clearly release them from any commitment to keep their communications with you secret?

RESPONSE: No. It would be inappropriate in this context to disregard that foundational privilege and protection for the press. And as I stated at the hearing, I spoke with the reporters at the direction or authorization of Judge Starr.

9. In your dissenting opinion in *Priests for Life v. HHS*, you discuss why courts must accept employers’ claims that their religious beliefs have been substantially burdened even when those claims may be based on beliefs that are incorrect either as a legal or a factual matter. You quoted a lower court judge to say that as long as an employer’s beliefs are sincere, courts have “no choice” but to accept an employer’s claim that its religious

beliefs have been substantially burdened.

- ☐ **When should courts refuse to defer to a plaintiff's claim that his or her religious beliefs have been substantially burdened by a law?**
- ☐ **How should a court determine whether the burden placed on a plaintiff's religious beliefs is substantial?**

RESPONSE: As I stated in my dissent from denial of rehearing in *Priests for Life*, the “key inquiry” in assessing substantial burden is whether the mandated action “actually contravenes plaintiffs’ sincere religious belief.” The Supreme Court has “emphasized that judges in RFRA cases may question only the sincerity of a plaintiff’s religious belief, not the correctness or reasonableness of that religious belief.” The Supreme Court has given guidance on the types of consequences that are sufficient to qualify a burden as “substantial.” For example, as I wrote in my dissent from denial of rehearing in *Priests for Life*, it is “settled that a direct monetary penalty on the exercise of religion constitutes a ‘substantial burden.’” *Priests for Life*, 808 F.3d 1, 16-17 (D.C. Cir. 2105) (Kavanaugh, J., dissenting from reh’g en banc). Of course, the Government may impose even a substantial burden on religious exercise when that burden is the least restrictive means of furthering a compelling governmental interest. I repeatedly emphasized that point in *Priests for Life*.

10. The Supreme Court stated in *Burwell v. Hobby Lobby* that the impact of a religious person’s actions on third parties is relevant in deciding a RFRA claim. The Court said, “[I]n applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.’” Justice Kennedy’s concurrence in this case stated that, in deferring to the right to religious exercise, courts may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”

- ☐ **How do you take “adequate account” of the burdens on “non-beneficiaries” in analyzing a religious group’s requested accommodation to a law?**

RESPONSE: I emphasized in my dissent from denial of rehearing in *Priests for Life* that courts must take “adequate account of the burdens a requested accommodation may impose on non-beneficiaries.” As stated in that opinion, quoting the Supreme Court’s opinion in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), the burdens on non-beneficiaries can “inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.” *Priests for Life*, 808 F.3d at 24.

11. After the Supreme Court’s decision in *Hobby Lobby*, various entities have claimed that they should be exempt from laws under RFRA because of their religious beliefs. In many cases, they seek to be exempt from antidiscrimination laws. Businesses that serve the public are also claiming that they should be exempt from antidiscrimination laws under the First Amendment’s free exercise clause. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court reaffirmed that states may continue to enforce anti-discrimination protections for LGBTQ individuals so long as they are “neutral” towards the religious viewpoint.

- ☐ **How would you evaluate whether a government action or law is “neutral” towards a religious viewpoint in assessing a claim made under the First Amendment’s free exercise clause?**

RESPONSE: As a sitting judge, I follow all Supreme Court precedent, including *Masterpiece Cakeshop*, under the law of precedent.

12. In *Bluman v. FEC*, you authored the majority opinion for a three-judge panel rejecting a constitutional challenge to the foreign national ban on campaign contributions under 52 U.S.C. § 30121. The challenge was brought by individuals residing in the U.S. on temporary visas who wished to donate to certain candidates and to spend money on flyers expressly advocating for President Obama’s re-election. You acknowledged the government’s interest in preventing foreign interference in elections, but you also went out of your way to interpret the ban to only apply to “certain form[s] of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to *expressly advocate for or against* the election of a candidate.” You went on to declare that “[t]his statute, as we interpret it, does not bar foreign nationals from issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate.”

- ☐ **The intelligence community has determined that Russia’s election interference in the 2016 elections included spending that can be described as “issue advocacy.” Is it your position that current law cannot prevent such election spending?**

RESPONSE: *Bluman*, which was decided in 2011, did not address the fact pattern set forth in this question. Because the question could potentially come before me in future litigation, it would be improper for me to take any position on the matter. That approach is consistent with nominee precedent and with central principles of judicial independence.

13. In the last decade, the Supreme Court has repeatedly rejected First Amendment challenges to laws requiring political disclosure—from a federal statute requiring the reporting of donors financing candidate-related ads to a state measure allowing for the disclosure of signatories of ballot initiative petitions. Justice Scalia has stated in a 2010 opinion that “requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously. . . . This does not resemble the Home of the Brave.” Notably, even in the *Citizens United* decision, eight justices voted to uphold the federal electioneering communications disclosure law that requires groups to report their donors if they run broadcast ads referencing federal candidates shortly before a primary or general election.

- ☐ **Are there constitutional limits on political disclosure laws?**

RESPONSE: As the question states, the Supreme Court has addressed disclosure requirements

in *Citizens United v. FEC*, 558 U.S. 310 (2010), and many other cases. In *Citizens United*, the Court framed the constitutional analysis this way: “Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Id.* at 366-67 (citations and internal quotation marks omitted).

- ☐ **Can campaign finance disclosure laws regulate speech other than express advocacy?**

RESPONSE: This is a question that may be litigated before me as a sitting judge. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

14. In *McConnell v. FEC*, the Court upheld the so-called “soft money” limits on contributions to federal party committees on grounds that they prevented corruption and the appearance of corruption—this part of the decision is still good law today. In so holding, the Court rejected a “crabbed view of corruption” that “limit[ed] Congress’ regulatory interest only to the prevention of . . . actual or apparent quid pro quo corruption,” declaring that this view “ignores precedent, common sense, and the realities of political fundraising.” More recently in *Citizens United* and *McCutcheon*, however, the Court spoke of the corruption interest in narrower terms, suggesting that campaign finance laws could “target” only “what we have called ‘quid pro quo’ corruption.” As Chief Justice Roberts wrote in *McCutcheon*, “government regulation may not target the general gratitude a candidate may feel towards those who support him or his allies, or the political access such support may afford.”

- ☐ **What is the proper conception of corruption—the one articulated in *McConnell*, or the one articulated in *Citizens United*/*McCutcheon*?**
- ☐ **Do you have a different theory that would reconcile the two articulations of corruption?**

RESPONSE: These are questions addressed by the Supreme Court in *Citizens United*, *McCutcheon*, and *McConnell*. Those cases are precedents of the Supreme Court entitled to the respect due under the law of precedent.

15. You have described your role as White House Staff Secretary from July 2003 to May 2006 as “the most interesting and, in many ways, among the most instructive” work you did in preparation for the federal bench. As you know, President George W. Bush made it a priority to get an immigration reform bill passed during his second term.

- ☐ **As White House Staff Secretary, did you have any role in the**

President's immigration agenda?

- ☐ **If yes, what was the nature of your role?**
- ☐ **Did you advocate in favor or against any immigration policies as part of this role?**
- ☐ **If yes, what were those positions?**

RESPONSE: As I explained at the confirmation hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006—with the exception of a few covert matters—would have crossed my desk on its way to the President. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of what I did, my role was not to replace the President's policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

16. Your dissent in *United States Telecom Association v. Federal Communications*

Commission has two main points. First, you stated that there is no clear congressional authorization for "major rules" of the kind the FCC adopted. You argued that Congress has never adopted net-neutrality legislation or clearly authorized the FCC to regulate Internet service providers (ISPs) as common carriers. Second, you argued that the net-neutrality rule violated the First Amendment rights of ISPs, stating that the rule infringes on the editorial discretion of ISPs.

- ☐ **Does any issue relating to the economy that creates a "major rule" require a specific congressional authorization for agencies to promulgate regulations?**

RESPONSE: As I said at the hearing, the major rules doctrine, or major questions doctrine, is rooted in Supreme Court precedent. The "godfather" of the major rules doctrine is Justice Breyer, who wrote about it in the 1980s as a way to apply *Chevron*. The Supreme Court adopted the doctrine in *FDA v. Brown & Williamson Tobacco Corp.* and applied it in *Utility Air Regulatory Group v. EPA* ("UARG"). *UARG* indicates that Congress may delegate various matters to the executive agencies to create rules, but on questions of major economic or social significance, the Court expects Congress to speak clearly before such a delegation. With respect to the FCC's net neutrality rule, I concluded that Congress had not spoken clearly.

- ☐ **Does the absence of a "major rule" mean that regulatory agencies are barred from protecting public interests that generally fall under their enabling acts?**

RESPONSE: The Supreme Court's precedents explain the major rules doctrine.

- ☐ **How and in what areas can ISPs exercise editorial discretion?**

RESPONSE: As I said at the hearing, under the Supreme Court's decision in *Turner Broadcasting*, if a company exercising editorial discretion in the telecommunications arena has market power, then the government has broad authority to regulate. Likewise, pursuant to *Turner Broadcasting*, if a company does not have market power, then the First Amendment restricts (but does not eliminate) the government's ability to regulate the company's speech.

While *Turner Broadcasting* directly addressed cable operators, I explained in my opinion in *United States Telecom Association* that the principles announced in *Turner Broadcasting* applied in the closely analogous internet service provider context.

17. For nearly sixty years since its inception in 1925, the Federal Arbitration Act (FAA) was presumed to apply only in cases involving commercial disputes between businesses with relatively equal bargaining power. The Supreme Court has reinterpreted the FAA broadly in recent years, resulting in the proliferation of arbitration agreements in consumer, financial, and employment contracts.

- ☐ **Are there any limits to when individuals can be subjected to forced arbitration?**
- ☐ **If so, what are they?**

RESPONSE: Questions involving the interpretation of the FAA and the limitations on arbitration agreements are actively litigated and could come before me. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on such questions.

18. You were the lone dissenter in *Lorenzo v. SEC*. Your opinion articulated a standard for proving intent in securities fraud cases that would create an extremely high bar for plaintiffs. Specifically, you stated that only the original “maker” of the false or misleading statements would have the requisite intent to be liable for securities fraud. This means that even senior officials that are actively engaged in the fraud, sending emails incorporating the misleading statements to their clients in their capacity as an investment banker, would not have the requisite intent to prove securities fraud.

- ☐ **Can senior officials avoid liability for securities fraud if they claim ignorance as to their misstatements?**
- ☐ **Do these officials have a duty to ensure the information they are providing to shareholders and the public is correct?**

RESPONSE: The *Lorenzo* case is now pending before the Supreme Court, so it would not be appropriate for me to comment on it.

19. As the lone dissent in *Doe v. Exxon Mobil Corp.*, you argued that a mere mention by the State Department that an issue involved foreign policy interests was enough to block the case from its day in court. In that case, Indonesian villagers were trying to recover damages from Exxon Mobile for injuries inflicted by Exxon’s security forces such as murder, torture, sexual assault, battery, and false imprisonment. The court contacted the State Department for an opinion on the foreign policy interests involved. The State Department concluded that there were foreign policy interests involved in the case, but did not ask the court to dismiss the case.

- ☐ **You felt it was appropriate to intercede and evoke foreign policy interests on the Executive’s behalf. How did you make that judgement?**

RESPONSE: My opinion speaks for itself.

20. Please see attached a list of tweets by President Trump attacking the judiciary – to be submitted for the record.

- ☐ **Which statements do you agree with?**
- ☐ **Which statements do you disagree with?**

RESPONSE: As I stated during the hearing, it would be generally inappropriate for me—as a sitting judge and as a nominee—to comment on something a politician has said or to be drawn into political controversy.

21. During the 2016 presidential campaign, President Trump stated that the Federalist Society and Heritage Foundation were providing him a list of potential nominees to the Supreme Court and that he would select a nominee from that list.¹ You were not on the initial list of potential nominees but were added on November 17, 2017.

- ☐ **What communications, if any, did you, or anyone on your behalf, have with members of the board of directors, staff, or members of the Federalist Society or Heritage Foundation concerning your omission from the initial list? Did you or anyone on your behalf advocate for your name to be added? Please describe the participants in the conversations, the dates, the substance of the conversations, and any other relevant details. Please be specific.**

RESPONSE: As I testified at the hearing, it is my understanding that many judges and lawyers who know me suggested to various individuals that they thought I should be considered based on my judicial record.

- ☐ **If your answer is yes, were your views on any legal issues discussed? What were those legal issues, and what were your views? Please be specific.**

RESPONSE: N/A

- ☐ **Have you discussed any of your legal views with any member of the board of directors or staff of the Federalist Society or Heritage Foundation? If so, please describe the participants in and substance of those communications, as well as the dates. Please be specific.**

RESPONSE: Over the years, I have spoken at a number of events, including events sponsored by the Federalist Society and the Heritage Foundation.

22. During the hearing I asked you what happened in the period between when President

¹ Bob Woodward and Robert Costa, *In a revealing interview, Trump predicts a 'massive recession' but intends to eliminate the national debt in 8 years*, WashingtonPost.com (Apr. 2, 2016), https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33_story.html.

Trump released his list of potential Supreme Court nominees in May 2016, and when he released a subsequent list of nominees in November 2017. Your name does not appear on the first list, but it appears on the second. You responded that a number of your friends, specifically judges and lawyers that you know, made clear to the President that you should be considered for a Supreme Court nomination and be added to that list.

- ☐ **What are the names of the individuals who recommended you for this list?**

RESPONSE: As I testified at the confirmation hearing, it is my understanding that many judges and lawyers who know me suggested to various individuals that they thought I should be considered based on my judicial record.

23. During the time you were serving in the George W. Bush White House, some White House officials communicated about official business using a non-government email server run by the Republican National Committee.

- ☐ **Please identify all email accounts that you used from 2001-2006, the time of your service in the White House. Of these accounts, please identify those that were used to communicate about your work in the White House.**

RESPONSE: In addition to my White House email address, I had a personal email address that I used on occasion for personal matters. That personal account was not affiliated with any email server run by the Republican National Committee. I did not have a personal device that could access personal emails. And White House employees were not able to access personal emails from our work computers, as I recall. To the best of my recollection, it was not my practice to use my personal email address for official matters, although I cannot rule out isolated emails.

- ☐ **For any communications you may have sent using a non-governmental server, please provide copies of these communications to the Committee.**

RESPONSE: Please see my answer to the above subpart.

24. Do you have, or have you ever had, a Republican National Committee email account or an account maintained or associated with any other political party, official, or candidate for political office? If so, please identify each account and the time period used.

RESPONSE: Not that I am aware of.

25. White House spokesman Raj Shah told the *Washington Post* that you went into debt buying tickets for the Washington Nationals over the past decade.

- ☐ **For how many seasons have you purchased Nationals season tickets?**
- ☐ **How many tickets did you purchase each year? What was the overall cost**

and cost per ticket?

- ☐ **Please identify the other individuals in the group for whom you purchased tickets, when each repaid you for his/her tickets, the amount that each repaid, and whether any other individual or entity paid any part of the debt that you attribute to the purchase of baseball tickets.**

RESPONSE: Please see my response to Question 4.

26. White House also stated that, in addition to the season tickets, you accrued debt on your credit cards from expenditures on “home improvements.”

- ☐ **What is the percentage of the credit card debt you would attribute to these home improvements? Please also explain briefly what improvements were undertaken and when.**

RESPONSE: Please see my response to Question 4.

- ☐ **What percentage of the credit card debt would you attribute to the purchase of baseball tickets? If these two categories (home improvements and baseball tickets) do not account for your total debt, please explain any other reasons for your debt.**

RESPONSE: Please see my response to Question 4.

27. On your Financial Disclosure Report dated July 15, 2018, you do not report any liabilities. The prior year, you reported between \$60,004 and \$200,000 in liabilities between three credit cards and a loan from your Thrift Savings Plan (TSP) account. Your annual disclosures indicate that the TSP loan maintained a balance between \$15,001 and \$50,000 for at least 12 years.

- ☐ **For each debt (i.e., each credit card and the TSP loan), please identify the date upon which the debt was paid and the source of the funds for repayment.**

RESPONSE: Please see my response to Question 4.

- ☐ **Did you report any of the money obtained by you to pay off these debts on your income tax returns, financial disclosure forms, or any other reporting document?**

RESPONSE: Please see my response to Question 4.

28. On your Financial Disclosure Report dated July 15, 2018 in Section V. Gifts, you did not check the box for no reportable gifts, you simply wrote “Exempt.”

- ☐ **Does this response indicate that you received a gift(s) but considered that gift(s) exempt from the reporting requirements?**

RESPONSE: Please see my response to Question 4.

- ☐ **For each gift (if any) you believes is exempt from reporting, please provide a description of the gift, the approximate value, the date received, and the donor.**

RESPONSE: Please see my response to Question 4.

29. On your Financial Disclosure Report dated July 15, 2018, you did not list any reimbursements. Instead you simply wrote "Exempt."

- ☐ **Does this response indicate that you received reimbursement(s) but considered that reimbursement(s) exempt from the reporting requirements?**

RESPONSE: Please see my response to Question 4.

- ☐ **For each reimbursement you believe is exempt from reporting, please provide a description of the costs incurred, reasons for the costs, and the date and amount of any reimbursements that you received for these costs.**

RESPONSE: Please see my response to Question 4.

30. In 2014, federal judges received a lump sum equal to the amount of their delayed cost of living adjustments. For you, this was estimated at \$150,000. This amount does not appear to be reported anywhere in your financial disclosures. Please explain this discrepancy. Please also provide to the Committee, on a confidential basis, a complete copy of your state and federal tax returns for the three previous tax years.

RESPONSE: Please see my response to Question 4.

31. Your Bank of America accounts appear to have doubled in value between 2008 and 2009. Your Financial Disclosure Report dated May 15, 2009 reflected a value in the range of \$15,001 - \$50,000. Your Financial Disclosure Report dated May 14, 2010 reflected a value in the range of \$100,001 - \$250,000. You did not report any increase in Non-Investment Income, nor did you report any gifts during this period. Please explain the source of the funds that accounts for the difference reflected in these accounts between your 2008 and 2009 Financial Disclosure Reports.

RESPONSE: Please see my response to Question 4.

32. In 2006, you purchased your primary residence for \$1,225,000 in Chevy Chase, MD, however, the value of assets reportedly maintained in your "Bank of America Accounts" in the years before, during and after this purchase never decreased, indicating that funds used to pay the down payment and secure this home did not come from these accounts.

- ☐ **Did you receive financial assistance in order to make this down payment? And if so, was the assistance provided in the form of a gift or a personal loan?**

RESPONSE: Please see my response to Question 4.

- ☐ **If you received financial assistance, please provide details surrounding how this assistance was provided, including the amount(s) of the assistance, date(s) on which the assistance was provided, and who were the individual(s) that provided this assistance.**

RESPONSE: Please see my response to Question 4.

- ☐ **Was this financial assistance disclosed in your income tax returns, financial disclosure forms, or any other reporting document?**

RESPONSE: Please see my response to Question 4.

33. You have disclosed in your responses to the SJQ that you are currently a member of the Chevy Chase Club. It has been reported that the initiation fee to join this club is \$92,000 and annual dues total more than \$9,000.

- ☐ **How much was the initiation fee required for you to join the Chevy Chase Club? What are the annual dues to maintain membership and is this the amount that you pay?**

RESPONSE: Please see my response to Question 4.

- ☐ **Did you receive any financial assistance or beneficial reduction in the rate to pay the initiation or annual fees?**

RESPONSE: Please see my response to Question 4.

- ☐ **If you received financial assistance, please disclose the amount of the assistance, the terms, the dates the assistance was provided, and the individual(s) or entity that provided the assistance.**

RESPONSE: Please see my response to Question 4.

- ☐ **To the extent such assistance or rate reduction could be deemed a “gift,” was it reflected on your income tax returns, financial disclosure forms, or any other reporting document?**

RESPONSE: Please see my response to Question 4.

34. To date, you have not disclosed that you or your wife own any listed or unlisted securities, including but not limited to stocks, bonds, mutual funds or other investment products outside of those included in your retirement accounts. Is that accurate?

RESPONSE: Please see my response to Question 4.

35. In 2004, you were asked by Senator Hatch whether “Mr. Miranda ever share[d], reference[d], or provide[d] you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?” You replied that he had not. At your Supreme Court confirmation hearing you reaffirmed your previous testimony

- ☐ **Did Manuel Miranda ever send you talking points that Mr. Miranda attributed to “Dem staffers”?**
- ☐ **Prior to, or in preparation for, your testimony in 2004, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?**
- ☐ **Prior to, or in preparation for, your testimony at your 2006 confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?**
- ☐ **Prior to, or in preparation for, your testimony at this year’s confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?**
- ☐ **Would you like to amend or retract your assertion that Mr. Miranda never shared with you any documents drafted by Democratic staff?**

RESPONSE: During the hearing, I truthfully answered numerous questions regarding Mr. Miranda, and I refer you to those answers.

36. Should Supreme Court justices be bound by the same professional code of conduct that other federal judges are required to follow? If so, why, and if not, why not?

RESPONSE: If confirmed, I would commit to give careful consideration to the practice of the Supreme Court on these questions, and I would want to hear what my colleagues have to say.

37. What are some ways you would work to make the Supreme Court, and the judiciary as a whole, more open to and understood by the larger public?

RESPONSE: As I indicated at the hearing, I believe proposals for having same-time audio or video in the courtroom for the announcement of Supreme Court decisions (as distinct from oral arguments) are worth exploring. If confirmed, I would want to hear what my colleagues have to say about the benefits and detriments of such a change. I also discussed at the hearing how, each time I write an opinion, I work hard on “[t]he clarity of the opinion[] [and] the thoroughness of the opinion,” because I want “someone who just picks up the decision . . . to be able to read it and understand it and get it and to be able to follow it.” One method I believe often helps members of the public understand judicial opinions is “hav[ing] an introductory paragraph or few pages . . . where they could just read the introduction, [and] say ‘I got it.’”

38. What do you believe are the driving forces behind racial disparities in federal sentencing? Do you believe racial bias — implicit or otherwise — exists in the federal judicial system? What role do judges have in confronting and eliminating it?

RESPONSE: While a student in law school, I wrote a Note for the *Yale Law Journal* discussing the issue of racial bias, including the potential for implicit racial bias, in the justice system. That Note is included in an appendix to my Senate Judiciary Questionnaire. As I noted during the hearing, the long march for racial equality in the United States is not over. Judges must adhere to the judicial oath we take to administer justice without respect to persons, to do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all duties under the Constitution and the laws of the United States.

39. Immediately prior to my questioning on the second day of hearings (the first day you answered questions), we took an unexpected recess.

- ☐ **During that recess, did anybody discuss with you an email from your time in the Bush Administration in which you wrote that you were “not sure that all legal scholars refer to *Roe v. Wade* as the settled law of the land at the Supreme Court level”? If so, who?**
- ☐ **During that recess, did anybody help prepare you to answer a question regarding whether *Roe v. Wade* is settled law? If so, who?**
- ☐ **During that recess, did anybody suggest that I would ask you about abortion, *Roe v. Wade*, or related issues? If so, who?**

RESPONSE: I was of course prepared to discuss that issue. I do not recall that precise recess as affecting or altering my preparation. That email refers to the claims of legal scholars, not my own views.

40. You have expressed skepticism about *Chevron* deference, arguing that it allows the Executive Branch to effectively rewrite laws.

- ☐ **Is any deference due to agency expertise and democratic accountability?**

RESPONSE: *Chevron* is a precedent of the Supreme Court entitled to the respect due under the law of precedent. As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

- ☐ **If *Chevron* deference were eliminated by judicial fiat, should any allowances be made for decades of laws passed by Congress against the backdrop of *Chevron* deference?**

RESPONSE: *Chevron* is a precedent of the Supreme Court entitled to the respect due under the law of precedent. As I explained at the hearing, and in keeping with the approach of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on hypothetical issues of the kind raised in your question.

- ☐ **If deference to agencies is contrary to Congressional intent, why has Congress never passed legislation instructing the courts not to employ *Chevron* deference?**

RESPONSE: As I explained at the hearing, our constitutional structure separates power among

the legislative, executive, and judicial branches. It would be improper for me as a sitting judge and nominee to offer an opinion as to why Congress has passed, or not passed, legislation on any particular issue.

**The Nomination of Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States
Questions for the Record**

Senator Mazie Hirono

1. In response to a question from Senator Feinstein on your position on *Roe v. Wade*, you said *Planned Parenthood v. Casey* is “precedent on precedent,” which in your view “is quite important as you think about stare decisis in this context.” Please explain what you meant by these statements. By the term “precedent on precedent,” did you simply mean that *Casey* discusses “in great detail” when the Supreme Court should and should not overrule its past precedents or did you mean that *Casey* has stronger status as precedent because it reaffirmed *Roe*?

RESPONSE: As I testified at the hearing, the majority in *Planned Parenthood v. Casey* specifically reconsidered *Roe v. Wade*, analyzed the stare decisis factors, and decided to reaffirm *Roe*. As a result, *Casey* is important “precedent on precedent.”

2. When Senator Feinstein asked you whether you believed *Roe v. Wade* was correctly decided, you refused to answer, saying that you “studied very carefully what nominees have done in the past, what I’ve referred to as nominee precedent, and Justice Ginsburg” and that “I need to follow that nominee precedent here.”
 - a. At Justice Ginsburg’s nomination hearing, she said, “It is essential to woman’s equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.” Based on your own standard for “nominee precedent,” her statement falls within the scope of what you can discuss as a nominee. Do you agree with her statement? Yes or no.

RESPONSE: As I discussed at the hearing, it would be inconsistent with judicial independence, rooted in Article III, to provide answers on cases or issues that could come before the Supreme Court. This means no forecasts or hints, as Justice Ginsburg said during her confirmation hearing, and no thumbs up or thumbs down when discussing precedent, as Justice Kagan said during her confirmation hearing. Justice Ginsburg had previously written on that question. The other seven justices have not answered that question.

- b. During Chief Justice Roberts’ confirmation hearing, he agreed with the statement in *Casey v. Planned Parenthood* that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” Based on your own standard for “nominee precedent,” his statement falls within the scope of what you can discuss as a nominee. Do you agree with his statement? Yes or no.

RESPONSE: Please see my response to Question 2.a. above.

3. At your hearing, Senator Feinstein asked you if you agreed with Justice O’Connor, that a woman’s right to control her reproductive life impacts her ability to, “participate equally in the economic and social life of the nation.” You did not answer her. This question does not require you to prejudge any case that could come before the court. It asks only whether you agree about a particular impact of a woman’s right to decide whether and when to have

children. Please answer the question.

RESPONSE: Please see my response to Question 2.a. above.

4. At the hearing, Senator Blumenthal asked you whether you agreed with the President's statements attacking the Judiciary, including that Justice Ginsburg's "mind is shot." When you refused to answer and stated that you decide cases and controversies as a judge, I asked you whether "disagreeing with the President [was] a concern to you when it's not a case in front of you." Such a question goes to your ability to be an independent and unbiased Justice. You refused to answer, claiming that you were "[f]ollowing the lead of the judicial canons." Please explain which specific judicial canon prohibits you from answering that question. How is your refusal to answer my question consistent with your duty to provide information to the Senate to enable Senators to fulfill their constitutional advice and consent responsibilities?

RESPONSE: As stated at the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated at the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge—which is to decide cases, not to comment on current events as pundits.

5. Senator Harris asked you at the hearing whether you believed "there was blame on both sides," as the President had claimed, regarding an incident in Charlottesville where a rally by white supremacists left a young woman dead. You refused to answer, citing the "principle of the independence of the judiciary." Please explain how the "principle of the independence of the judiciary" applies in a Senate confirmation hearing for a Supreme Court Justice and how it constrains you from answering this question. Is it your view that statements equating the actions of white supremacists with those protesting against them are simply, as you describe it, a "political controversy," between Republicans and Democrats?

RESPONSE: Please see my response to Question 4.

6. At the hearing, you repeatedly refused to answer hypothetical questions about potential cases, citing to your position "as a sitting judge and as a nominee to the Supreme Court." However, since becoming a judge in 2006, you have regularly volunteered strongly-worded opinions on a variety of topics, including gun control, campaign finance, abortion rights, and oversight of the Executive Branch. You have even gone as far as to forecast which of Justice Scalia's dissents will become law. Please explain how your refusal to answer questions during the confirmation hearing is consistent with your actions and public speaking appearances while you have been a judge.

RESPONSE: As I explained at the hearing, it would be a violation of judicial independence for me to give the appearance of pre-committing to decide a case a particular way – or of viewing certain arguments with favor or hostility – in exchange for the vote of any Senator. Judges base their decisions on the law, not on politics. I have therefore followed the precedent of every sitting Supreme Court Justice in declining to give hints, forecasts, or previews about how I will rule in cases that come before me.

7. When Senator Leahy asked you whether you believe the President has the power to pardon himself if he becomes the subject of a criminal investigation, you refused to answer and stated that the "question of self-pardons is something I have never analyzed. It's a question

that I have not written about.” In your past writings and speeches, however, you have repeatedly adhered to a very expansive view of Presidential power. In 1999, you called the President, rather than the Attorney General, “the chief law enforcement officer.” In 2013, you wrote that the Constitution gives the President “an extraordinary and unfettered power to pardon,” and further describe his pardon power as “absolute, unfettered, unchecked.” In 2016, you referred to the President’s “raw constitutional power to pardon.”

Please explain how these writings and statements are consistent with what you stated at the hearing. Why isn’t the logical conclusion of these writings and statements that you would consider the scope of the pardon power to include the authority of the President to pardon himself?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. Additionally, as I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. In keeping with those principles and the precedent of prior nominees, I cannot provide my views on this issue.

8. Why did you treat the case of *Garza v. Hargan* as a “parental consent” case if the young woman in the case had already received a judicial bypass? At your hearing you relied on the fact that the woman was a minor, but that was irrelevant once she received the bypass. The validity of the Texas bypass procedure was not at issue in the case, and so any precedent on such cases was not applicable.

RESPONSE: I answered this at the hearing, and my dissent speaks for itself.

9. At your hearing Senator Hatch asked you how often you spoke on the phone to Judge Kozinski and how often you saw him in person. You only responded that you did not speak to him or see him often. Can you please be specific?

- a. About how many times each year, on average, do you think you saw Judge Kozinski in the years between the end of your clerkship and the public revelations of his misconduct? Please include any annual reunions, conferences, or other meetings, as well as any one-on-one meetings.
- b. About how many times each year, on average, do you think you spoke to Judge Kozinski in that same period? Please include any conversations about Justice Kennedy clerks or collaborating on books or articles, as well as conversations of a more personal nature.
- c. Did you and Judge Kozinski email one another during that period of time? How frequently?
- d. Did you and Judge Kozinski ever text one another? If so, how frequently?

RESPONSE: As I stated at the hearing, I did not communicate with Judge Kozinski very often and did not see him in person very often. We and ten other judges were co-authors of a book on precedent. For the last 30 years, Justice Kennedy asked Judge Kozinski to lead his law clerk hiring process. I would communicate with Judge Kozinski as part of that process at times. I do not have detailed records of my interactions with Judge Kozinski.

10. Judge Kozinski was quoted as saying he was heartened by having heard from some former clerks after his misconduct was revealed in public. Were you among them? Did you contact him after the revelations were made public? When was the last time you were in contact with him?

RESPONSE: I contacted Judge Kozinski shortly after he resigned because I was concerned about his mental health.

11. You told me at your hearing that you did not remember having received emails from Judge Kozinski sent to the so-called “gag list.” Could you look at your email accounts and refresh your memory and tell me whether you in fact received any of those emails containing obscenity and obscene jokes?

RESPONSE: At this time, I do not remember such emails.

12. At the hearing, I asked you to clarify your misstatement of the holding in *Rice v. Cayetano*. In your response to Senator Tillis, you stated that in *Rice*, the Supreme Court held that the voting structure for the Office of Hawaiian Affairs “was a straightforward violation of the 14th and 15th amendments of the U.S. Constitution.” When I asked you where in the *Rice* decision does the Court rely on the 14th Amendment to justify its holding, you avoided answering my question and vaguely responded that “the 14th and 15th Amendments, I think, both prohibit restrictions on voting on the basis of race.” Did you incorrectly inform Senator Tillis that the Supreme Court found a violation of the

14th Amendment in *Rice*?

RESPONSE: The Supreme Court has held that state discrimination on the basis of race in voting violates the 14th Amendment. State discrimination on the basis of race in voting also violates the 15th Amendment. It is also important to note the narrow scope of the Supreme Court's decision in this case. The Supreme Court's 7-2 opinion 18 years ago in *Rice v. Cayetano* had no effect on the rights and privileges of American Indians and Alaska natives that the Court had long recognized. In fact, the Supreme Court has recognized that Congress has the ability to fulfill its treaty obligations with Native Alaskan Regional or Village Corporations and American Indian tribes through legislation specifically addressed to their concerns. Unlike indigenous peoples of Hawaii, Congress has explicitly recognized in statute that "Indian tribe" includes any recognized "Indian or Alaska Native tribe, band nation, pueblo, village or community." 25 U.S.C. § 5130. Indeed, my amicus brief made exactly that point, stating that "Hawaiians are not a federally recognized Indian tribe." Br. at 29. Native Alaskans are Indian Tribes and therefore enjoy all of the relevant rights and benefits that come with their trust relationship with the United States. Moreover, *Rice* dealt with an election for a position within the Hawaii state government. The case had nothing to do with the sovereign rights of Alaska Natives and American Indians to run their own government affairs, including administering Tribal elections.

13. During the hearing, I asked you about an email you wrote in 2002 during your time as an associate White House counsel opining on the constitutionality of programs benefitting Native Hawaiians. As you know, the Senate Judiciary Committee did not receive any documents from the National Archives before the hearing. All of the White House documents we received were filtered and selectively produced by a Republican lawyer, William A. Burck. Moreover, we were denied access to all of the documents of your record during your tenure as Staff Secretary in the White House during the George W. Bush administration.

Given that we have been blocked from accessing more than 90 percent of your White House record, please confirm whether there are any documents that pertain to *Rice v. Cayetano* or Native Hawaiians in the withheld portion of your record as an associate White House counsel and Staff Secretary. Please also identify any and all such documents that you are aware of.

RESPONSE: I do not know.

14. In *Garza v. Hargan*, before the case was decided by the full D.C. Circuit, you authored a panel opinion that would have delayed an immigrant teenager's access to an abortion that was in full compliance with Texas law. When the full court reversed your order, you dissented and wrote that allowing this young woman to exercise her right to choose created "a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand." *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). Based on your statements in *Garza*, particularly the politicized language that you use, and the statements you have made in speeches, why should this be viewed as anything other than a signal that you are willing to overturn

Roe v. Wade?

RESPONSE: As I stated during the hearing, Chief Justice Burger used the phrase “abortion on demand” in his concurrence in *Roe v. Wade*.

15. At your hearing you told Senator Blumenthal that one reason you were put on the November, 2017 version of Donald Trump’s list of pre-approved Supreme Court nominees and not the May, 2016 list was because, “Mr. McGahn was White House counsel and the president had taken office,” implying that Mr. McGahn had only just had the opportunity to put you on the list. But Mr. McGahn is reported to have been involved in the Trump campaign by May, 2016, so his ability to put someone on the list was nothing new in November, 2017. Could it be that you were placed on this list after you demonstrated your commitment to restricting or eliminating a woman’s reproductive rights in your *Garza v. Hargan* decision and your subsequent dissent in that case?

RESPONSE: As I explained at the hearing, I am generally aware that a number of judges and lawyers recommended that the President consider me for a vacancy to the Supreme Court based on my 12-year record on the U.S. Court of Appeals for the D.C. Circuit.

16. At the hearing, you referred to contraceptives as “abortion-inducing drugs,” in your discussion with Senator Cruz about your *Priests for Life* dissent. Specifically, you stated that the plaintiffs “said filling out the form would make them complicit in the provision of *the* abortion-inducing drugs” (emphasis added).
 - a. During the hearing you reiterated that you believe words matter. Regardless of whether the term “abortion-inducing drugs” was used by a party, do you believe that birth control or contraceptives are “abortion-inducing drugs”?
 - b. If you don’t believe that birth control or contraceptives are “abortion-inducing drugs,” do you believe that your dissent is, in your words, “based on a mistake in premise or a mistake in factual premises” that could justify reconsideration of your opinion?

RESPONSE: That was the position of the plaintiffs in the case, and I was accurately describing *their* position. At the hearing, I was not expressing an opinion on whether particular drugs induce abortion; I used that phrase only to accurately recount the plaintiffs’ own assertions.

17. In response to Senator Cruz, you explained that you thought your decision in *Priests for Life* was “an opportunity” to find a “win-win” situation. Do you believe your dissent in that case was a “win-win” situation? Yes or No. If yes, please explain what about your dissent specifically was a “win-win” situation, when your argument would have left female workers without coverage for contraceptives. What information did you have about the practicality of the alternative form you discussed?

RESPONSE: As I discussed with Senator Cruz, the third prong of the Religious Freedom

Restoration Act is an opportunity to see whether a “win-win” alternative to the substantial burden at issue is available. As my dissent from the denial of rehearing in *Priests for Life* stated, the “least restrictive means requirement, properly applied, allows religious beliefs to be accommodated *and* the Government’s compelling interests to be achieved—a win-win resolution of these often contentious disputes.” *Priests for Life v. U.S. Dept. of Health and Human Servs.*, 808 F.3d 1, 23 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of reh’g en banc) (original emphasis). I concluded that the government in *Priests for Life* had not satisfied RFRA’s least-restrictive-means requirement, because the Supreme Court’s decision in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), had identified an alternative notice that would be less burdensome on the plaintiffs while still providing the same level of contraceptive coverage to employees. *Id.* at 23-25.

18. You agreed with Senator Cruz that in *Priests for Life*, “you sided with” the “little guy”— which you viewed as the employer objecting to having to provide contraceptive coverage to its female workers—“against the almost all-powerful federal government.” You then added, “I think a lot of the religious freedom cases the Supreme Court has had that has been the case.”
 - a. In your view, where the “little guy” is the employer, who represents the female workers who are being denied access to the contraceptive coverage that is granted to them under the Affordable Care Act?
 - b. Please identify the “little guy” in these recent “religious freedom cases” in the Supreme Court: *Burwell v. Hobby Lobby Stores* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

RESPONSE: As I stated in my discussion with Senator Cruz, my dissent from the denial of rehearing in *Priests for Life* reflected the analysis and conclusions that I believed were required by the Religious Freedom Restoration Act and by Supreme Court precedent. I emphasized that the law protects people regardless of the popularity of their religious beliefs. I will avoid commenting on particular parties in the cases you have mentioned to avoid giving the mistaken impression that my sympathies for a particular litigant plays any role in my judging.

19. At the hearing, you informed Senator Sasse that “dissents often speak to the next generation.” What messages did you intend to pass on to the next generation in your dissents in the following cases: *Garza v. Hargan*; *Priests for Life v. U.S. Department of Health & Human Services*; and *Agri Processor v. National Labor Relations Board*?

RESPONSE: As I explained at the hearing, all three of those dissents flowed from my careful attention to Supreme Court precedent. As I explained at the hearing, my *Garza* dissent was based on what I viewed as the “closest body of law on point”: the Supreme Court’s parental consent decisions, which apply *Casey*’s “undue burden” standard in a situation analogous to that at issue in *Garza*. My *Priests for Life* dissent was, in my view, dictated by Supreme Court precedent in *Hobby Lobby* and *Wheaton College*. Likewise, my *Agri Processor* dissent was

compelled by the Supreme Court's decision in *Sure-Tan*.

20. At the hearing, I asked you about the reversal of well-established precedent in *Janus* based in part on the “notice” of “misgivings” about that precedent that Justice Alito had provided in a few prior decisions over a six-year period. You simply recited what you called “established” factors that the Court considers in reconsidering its precedent: “whether the prior decision was grievously wrong, whether it is deeply inconsistent with subsequent precedent that’s developed around it, the real-world consequences, the workability of the decision as well as reliance in.”

You did not address whether you believe it is appropriate for a Justice to negate the reliance factor by expressing “misgivings” about a well-established precedent a few times over a few years. By contrast, you told Senator Sasse that “[p]recedent is important for stability and predictability” and that it is important that “the rules are set ahead of time” so that “you’re not making up the rules as you go along in the heat of the moment, which will seem unfair, which will seem like you’re a partisan.” Do you agree that *Janus* changed the rules for how to analyze precedent, particularly the reliance factor? Yes or no. Please explain

RESPONSE: As discussed at the hearing, I believe the factors that the Supreme Court considers in applying *stare decisis* are established, and that those established factors include an attention to reliance interests.

21. At the hearing, you referred to *Humphrey’s Executor* as “entrenched” precedent.
- a. What did you mean by “entrenched” precedent?

RESPONSE: As I said at the hearing, *Humphrey’s Executor* is the Supreme Court precedent that judges must follow in the independent agency context, as well as the case that allows independent regulatory agencies to exist. I have previously referred to it as “entrenched” in light of its age and the frequency with which it is applied.

- b. Do you believe that entrenched precedent cannot or should not be overturned?

RESPONSE: As I explained at the hearing, I have “reaffirmed repeatedly . . . and I have applied repeatedly the precedent of *Humphrey’s Executor* for traditional independent agencies and have never suggested otherwise.”

- c. Since you shared that you believe *Humphrey’s Executor* is entrenched precedent, do you believe *Roe v. Wade* is entrenched precedent?

RESPONSE: As I discussed at the hearing, based on the principle of judicial independence and the precedent set by previous Supreme Court nominees, it is important that I not offer hints, forecasts, or previews of my approach to any particular case. That said, I have explained that *Roe* is a precedent entitled to respect under principles of *stare decisis*. Importantly, *Roe* was

reaffirmed in 1992 in *Planned Parenthood v. Casey*. *Casey* in turn is precedent on precedent.

22. At your hearing you told Senator Cornyn that, “*Plessy* was wrong the day it was decided.” What other cases do you believe were wrongly decided? If you refuse to answer this question, please explain why you could say that to Senator Cornyn, but you won’t answer my question.

RESPONSE: *Dred Scott v. Sandford*, 60 U.S. 393 (1857), was a horrific decision that was corrected in part by the Thirteenth and Fourteenth Amendments. *Korematsu v. United States*, 323 U.S. 214 (1944), was likewise gravely wrong and inconsistent with the American rule of law.

23. At the hearing, you repeatedly refused to answer questions about hypothetical situations, particularly from Democratic Senators, but you did not hesitate to answer questions about hypothetical situations from Republican Senators. You refused, for example, to answer Senator Leahy’s question about whether you believe the President can pardon someone in exchange for a promise from that person to not testify against the President, claiming you could not answer a hypothetical question because there was no record, briefs, or arguments from the parties. By contrast, when Senator Sasse asked you “a hypothetical” about whether you believe the President is immune from civil or criminal liability for killing someone while driving drunk, you did not hesitate to respond, “no” and then provide your explanation. You also answered Senator Lee’s question about a hypothetical situation involving the nondelegation doctrine. Please explain your basis for differing responses to questions involving hypothetical scenarios.

RESPONSE: As I explained at the hearing, it would be a violation of judicial independence for me to give the appearance of pre-committing to decide a case a particular way – or of viewing certain arguments with favor or hostility – in exchange for the vote of any Senator. Judges base their decisions on the law, not on politics. I have therefore followed the precedent of every sitting Supreme Court Justice in declining to give hints, forecasts, or previews about how I will rule in cases that come before me.

24. When Senator Klobuchar asked you whether you believe there’s evidence of voter fraud, you did not answer her question. She cited to studies reported by the Brennan Center and the Washington Post and informed you that those studies found no evidence of widespread voter fraud. The Washington Post article by Professor Justin Levitt reported finding only 31 credible allegations of voter fraud from 2000 through 2014 out of more than 1 billion ballots were cast. The Brennan Center reported that “fraud by voters at the polls is vanishingly rare.” You also stated that you have looked at Professor Hasen’s election law blog, but you did not provide an answer, claiming that you wanted to “see a record” with respect to a particular case.
 - a. Please answer the question about voter fraud generally instead of in the context of a potential future case. Do you agree with the findings of the Brennan Center and the Washington Post article referenced by Senator Klobuchar?

- b. Are you aware of any credible reports of voter fraud significant enough to affect any election?
- c. Do you believe the President's claim that "millions and millions of people" voted fraudulently in the 2016 presidential election? If yes, what is the basis for that belief?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. Moreover, in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

- 25. In reply to Senator Feinstein's question about your dissent in *SeaWorld of Florida v. Perez*, you said you were following "precedent of the Labor Department." You also stated that you decided that the Department of Labor could not regulate the workplace safety of SeaWorld because the Department would not regulate "the intrinsic qualities of a sports or entertainment show."

- a. What did you mean by "precedent of the Labor Department"?

RESPONSE: As I explained in my *SeaWorld* dissent, "the Department of Labor's action [in that case] depart[ed] without acknowledgment or explanation from longstanding administrative precedent [and was] therefore arbitrary and capricious," since an "agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). In this case, the Department had departed from its own precedent in a case called *Pelron Corp.*, 12 BNA OSHC 1833 (1986), which held that "some activities, though dangerous, are among the 'normal activities' intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause." *SeaWorld of Fla.*, 748 F.3d at 1219.

- b. Do you always follow "precedent" of federal agencies?

RESPONSE: Under the Supreme Court's precedent in *FCC v. Fox Television Stations, Inc.*, "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." 556 U.S. 502, 515 (2009).

- c. Please explain how the workplace safety measures you argued against in *SeaWorld* are "intrinsic" to the killer whale shows at *SeaWorld* when SeaWorld self-imposed similar safety measures for its shows with the killer whale who had killed the trainer.

RESPONSE: As I explained in my *SeaWorld* dissent, "[t]he Department [of Labor] cannot reasonably distinguish close contact with whales at SeaWorld from tackling in the NFL or speeding in NASCAR. The Department's sole justification for the distinction is that SeaWorld

could modify (and indeed, since the Department’s decision, has had to modify) its shows to eliminate close contact with whales without going out of business. But so too, the NFL *could* ban tackling or punt returns or blocks below the waist. And likewise, NASCAR *could* impose a speed limit during its races. But the Department has not claimed that it can regulate those activities. So that is not a reasonable way to distinguish sports from SeaWorld. The Department assures us, however, that it would never dictate such outcomes in those sports because ‘physical contact between players is intrinsic to professional football, as is high speed driving to professional auto racing.’ Br. for Secretary of Labor 52. But that ipse dixit just brings us back to square one: Why isn’t close contact between trainers and whales as intrinsic to SeaWorld’s aquatic entertainment enterprise as tackling is to football or speeding is to auto racing? The Department offers no answer at all.” *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) (original emphasis).

26. At the hearing, Senator Feinstein asked you how you would feel about a President who said he could authorize worse than waterboarding. You responded, “Senator, I’m not going to comment on and I don’t think I can, sitting here.”

a. On what basis did you refuse to answer this question?

RESPONSE: The question from Senator Feinstein to which you are referring was: “Today, we have a President who said he could authorize worse than waterboarding. How would you feel about that?” As I understood it, Senator Feinstein’s question attributed a statement to President Trump and asked my opinion of this supposed statement. As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies, and also on hypothetical cases.

b. Do you believe the current President may actually authorize torture worse than waterboarding such that the issue may come before the Supreme Court?

RESPONSE: Please see my response to Question 26.a.

c. Do you believe a President can authorize waterboarding or torture worse than waterboarding?

RESPONSE: Please see my response to Question 26.a.

27. During the hearing, Senator Sasse asked you if a sitting President is immune from criminal prosecution. You responded by saying a President would not be immune, but that it is “just [a] timing question.” In essence, you said that you believe a criminal indictment may have to wait until after the President has left, or been removed, from office. However, our judicial system is filled with statutes of limitations that set a time limit on long after a crime is committed charges must be brought. How do you reconcile your belief that a prosecution against a sitting President may have to wait until after she or he leaves office with these various statute of limitations provisions? In your view, when should

the investigation of the criminal conduct take place to avoid stale, lost, or destroyed evidence?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

28. During Justice Gorsuch's confirmation hearing, he labeled some of President Trump's attacks on the judiciary "demoralizing" and "disheartening." During Chief Justice Roberts' confirmation hearing, he said that personal attacks on judges are "not appropriate" and "beyond the pale." Senator Blumenthal asked whether you agreed with then-Judge Gorsuch's sentiments, and you did not answer, claiming, "I'm not sure the circumstances." Regardless of the circumstances, do you believe the President's attacks on the judiciary "demoralizing" and "disheartening"? Do you agree with Chief Justice Roberts' comments? If you do, how do you reconcile those statements with your praise of President Trump's "appreciation for the vital role of the American judiciary"?

RESPONSE: Please see my response to Question 4.

29. After you were nominated and before the hearing, did you see or discuss any documents that were provided to the Senate Judiciary Committee by Bill Burck? Which documents did you see or discuss? Were any of these documents designated "Committee Confidential" in the version that you reviewed?

RESPONSE: I was informed that I might be asked about documents designated "committee confidential" in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions, I was shown some documents that were designated "committee confidential."

30. Senator Leahy asked you about information provided to you by Manny Miranda, who had "regularly hacked into the private computer files of six Democratic Senators" and stolen material from the Democratic Senators. The stolen information he sent you included "highly specific information regarding what [Senator Leahy] or other Democratic senators were planning in the future to ask certain judicial nominees" and information marked "confidential." You claimed that you "[n]ever knew or suspected" because the type of information Manny Miranda provided was "very common." In your preparation for the hearing, did anyone provide you with any information about what the Democratic Senators or staff intended to do similar to the type and format of information that former Republican Senate Judiciary Committee staffer Manny Miranda provided to you when you were working on judicial nominations in the White House?

RESPONSE: I am grateful to have had the opportunity to meet with many Senators on both

sides of the aisle in regards to my nomination, and I appreciate that members of this Committee and others shared with me some of their concerns and issues that they planned to ask about during my hearing. Additionally, as I mentioned at the hearing, it has been my experience that preparation for judicial confirmation hearings regularly involves discussion of the issues that Senators might ask about during the hearing. Much of that information is shared. It is relatively rare that a Senator tries to spring a surprise on a nominee, although it obviously happens on occasion.

31. In multiple speeches to law students, including at Federalist Society events, you repeatedly urged students to highly value loyalty. You noted: “[w]ho you work for and who works for you can make or break you. Whenever you are thinking about taking a job or hiring someone, you need to think about whether you want to be associated with that person for years to come, like forever.” You also instructed: “[b]e loyal. Never trash your boss.” You shared your view that “loyalty is a key to advancement in this profession.” President Trump also highly values loyalty. Before he fired FBI Director Comey, the President told him, “I need loyalty, I expect loyalty.”

a. Has the President ever asked you for your loyalty or suggested or implied that you might owe him anything for nominating you to the Supreme Court?

RESPONSE: No. In all of my discussions with law students and my clerks, including those referenced in your question, I couple my discussion of loyalty with an admonition about not letting loyalty lead you off an ethical or legal cliff.

b. Have you discussed your views on presidential pardon power, presidential immunity, or other forms of Executive power with the President, anyone who works on judicial nominations in the Executive Branch, or anyone from the Federalist Society or Heritage Foundation since September 2016?

RESPONSE: As reflected in section 12.a. and 12.d. of my Senate Judiciary Questionnaire, I have given speeches and written articles on matters of executive power. Details on those articles and speeches have been provided in my completed questionnaire.

32. The Foreign Emoluments Clause broadly prohibits federal office holders from accepting emoluments from foreign governments unless Congress has consented. It reads as follows:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, 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.

a. What is an “emolument?”

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending

litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- b. Does faithful adherence to the textualist, originalist judicial philosophies you espouse require you to interpret the clause consistent with founding-era dictionaries, which generally defined the term broadly to include any “profit” or “advantage?”

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- c. Do you believe that the President qualifies as a “Person holding any Office of Profit or Trust” within the meaning of the Foreign Emoluments Clause?

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- d. Do you believe that, as a general matter, is the Foreign Emoluments Clause judicially enforceable? In other words, if an individual or organization can satisfy the constitutional and jurisprudential standing requirements, is it within the power of the courts to consider such an individual’s or organization’s claims that they have been injured by an officeholder’s violation of the Emoluments Clause?

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- e. If one of the cases alleging President Trump has violated the Emoluments Clause were to reach the Supreme Court, do you believe you could impartially hear that case even though it would involve the man who nominated you to the Supreme Court?

RESPONSE: I am an independent judge.

- f. How would you decide whether your recusal from such a case would be appropriate, and what factors would you consider?

RESPONSE: I would follow the relevant law and precedents, and consult with my colleagues as appropriate.

33. You wrote in 2009 in a Minnesota Law Review article that “the political ideology and policy views of judicial nominees are clearly unrelated to their fitness as judges, and those matters therefore appear to lie outside the Senate’s legitimate range of inquiry.”
- a. Do you still believe there are some questions that are legitimate for Senators to ask and others that are not?

RESPONSE: As a nominee before this Committee, it is not my place to comment on how this Committee and each individual Senator conduct their business.

- b. What is the constitutional basis for your assertion that there is a range of legitimate inquiry for a Senator in evaluating a judicial nomination?

RESPONSE: The Constitution.

34. The National Rifle Association (NRA) has made their support of your nomination clear. Their commercials highlight that there are currently four Justices who favor gun control and four Justices who oppose gun control. They then explain, “President Trump chose Brett Kavanaugh to break the tie.” Are you aware of anyone in the White House or the Department of Justice who have spoken to the NRA regarding your nomination?

RESPONSE: I am an independent judge. As I stated in response to Question 26.c. of my Senate Judiciary Questionnaire, I have made no representations to any individuals or organizations as to how I might rule, if confirmed.

35. In *Heller v. District of Columbia*, you argued that gun laws must have a long history in order to be constitutional under the Second Amendment. Under your view, you would have struck down Washington, DC’s assault weapons ban and gun registration requirement even though—as the majority noted—“[t]he District has banned all semi-automatic firearms shooting more than twelve shots without reloading and has required basic registration since 1932.” In your view, how old must a gun law be to be constitutional under the Second Amendment?

RESPONSE: I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with these principles and the nominee precedent of prior nominees, I cannot answer this hypothetical.

36. You wrote in *Heller v. District of Columbia* that “[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles.” In recent years, countless mass shootings have been perpetrated with semi-automatic rifles— not handguns. Moreover, military-style semi-automatic rifles (such as the AR-15) are far more lethal than handguns because they fire bullets at greater velocity. In

view of this evidence, do you stand by your statement that “[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles?”

RESPONSE: The constitutional protections afforded to different classes of firearms is a subject that could, and is likely to, come before me as a judge. As such, and as I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on such an issue.

37. Your track record shows that your instinct is to defer to the Executive Branch any time it claims it is motivated by national security concerns, regardless of that claim’s merits. In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), for example, your dissent argued that all agency actions related to security clearances should be immune from judicial review— even claims presenting evidence of clear racial bias. This sort of blind deference calls to mind the Court’s shameful decisions in *Korematsu v. United States*, 323 U.S. 214 (1944), and, more recently, in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

- a. Are there other categories of cases in the area of national security that you believe should be judicially unreviewable? If so, what are those categories?

RESPONSE: As I explained in my dissenting opinion in *Rattigan v. Holder*, I believed that I was bound by the Supreme Court’s precedent in *Department of the Navy v. Egan* (1988), which held that security clearance decisions are committed to the broad discretion of the relevant governmental agency. I observed that in *Egan* the Court recognized that “Congress could override the presumption of unreviewability that attached to security clearance decisions, but . . . that Congress had not done so” in the context of the case. *Rattigan v. Holder*, 689 F.3d 764, 773 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). As I discussed at the hearing, the President remains subject to the limits set out in the Constitution and the laws passed by Congress. My writings have said the President does not have the authority to disregard statutes passed by Congress regulating war efforts except in certain narrowly described circumstances that are historically rooted, such as the command of troops in battle.

- b. Is there a national security exception to the Bill of Rights?

RESPONSE: No.

- c. Under what circumstances should a court look behind the President’s stated justifications?

RESPONSE: That question could come before me in litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me.

- d. In your view, how do courts ultimately determine whether a case involves an issue of national security? If courts are to show blind deference to the Executive

Branch's assertion that national security is at stake, how are we to avoid a second *Korematsu*?

RESPONSE: As I discussed at the hearing, national security is not a blank check for the President. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

38. In a speech to the American Enterprise Institute (AEI) in 2017, in tribute to the late Chief Justice William H. Rehnquist, you said:

He advocated for other remedies for police mistakes or misconduct, but he believed that freeing obviously guilty violent criminals was not a proper remedy and, in any event, was surely not a remedy required by the Constitution. Rehnquist of course did not succeed in calling for the overruling of the exclusionary rule, and not many people today call for doing so, given its firmly entrenched position in American law.

Is it your view that Chief Justice Rehnquist should have “succeed[ed]” in overruling the exclusionary rule? In other words, would you like to see the exclusionary rule overturned?

RESPONSE: My aim in my 2017 AEI speech was to spell out the consequential impact of Chief Justice Rehnquist's work, by describing “five different areas of his jurisprudence.”

39. In your 2017 AEI speech, you also said of late Chief Justice William H. Rehnquist:

It is fair to say that Justice Rehnquist was not successful in convincing a majority of justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of stare decisis. But he was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition.

Which free-wheeling judicially-created unenumerated rights were you referring to? Please be specific in identifying the unenumerated rights.

RESPONSE: As I discussed at the hearing, it is well-settled that the Constitution protects unenumerated rights. This speech was intended to spell out the consequential impact of Chief Justice Rehnquist's work, by describing “five different areas of his jurisprudence, where he had helped the Supreme Court achieve . . . a common sense middle ground that has stood the test of time . . .” I did not discuss particular unenumerated rights in my speech. Rather, in describing Chief Justice Rehnquist's important contributions to the law with *Washington v. Glucksberg*, 521 U.S. 702 (1997), I agree with Justice Kagan that the decision provides the primary test that “the Supreme Court has relied on for forward-looking future recognition of unenumerated rights” – and *Glucksberg* cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

40. President Trump has weighed in on a woman's right to choose, and has even promised to appoint "pro-life" Justices to the Supreme Court who will overturn *Roe v. Wade*. During one of the presidential debates, then-candidate Trump said that once he put "two or maybe three" Justices on the Supreme Court, *Roe* would be overturned "automatically."
- a. Have you promised or suggested to President Trump or any other individual in or associated with his administration that, given the opportunity, you would vote to overturn or undermine *Roe v. Wade* and its progeny?

RESPONSE: No.

- b. Have you discussed your views on abortion, *Roe v. Wade*, the Affordable Care Act, health care, or religious freedom with the President, anyone who works on judicial nominations in the Executive Branch, or anyone from the Federalist Society or Heritage Foundation since September 2016?

RESPONSE: As reflected in section 12.a. and 12.d. of my Senate Judiciary Questionnaire, I have given speeches and written articles on several areas of law. Details on those articles and speeches have been provided in my completed questionnaire. I have also discussed numerous legal issues with a number of people, including most notably 65 Senators. As I stated in response to Question 26.c. of my Senate Judiciary Questionnaire, I have offered no hints or forecasts on particular cases and made no commitments to any individuals or organizations as to how I might rule on particular cases, if confirmed.

41. Throughout this hearing, you have repeatedly praised the judicial philosophy of textualism. During Senator Lee's questioning, you said that "[j]udging is paying attention to the text." The text of Article II, Section 3 of the Constitution unequivocally states that the President "shall take Care that the Laws be faithfully executed."

Despite the apparent clear meaning of this words, you have said that "the President may decline to follow the law unless and until a final Court order dictates otherwise." *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013). You also went out of your way in a dissent to say that, "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." *Seven Sky v. Holder*, 661 F.3d 1, 50 fn.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

- a. How do you reconcile your position as stated in *Seven Sky* and *In re Aiken County* with the "take care" clause of the Constitution?

RESPONSE: As I said at the hearing, footnote 43 of my opinion in *Seven-Sky v. Holder*, 661 F.3d 1, 50 (D.C. Cir. 2011) refers to the concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974). The Supreme Court in *Nixon* said that the executive branch has the "exclusive authority and absolute discretion whether to prosecute a case." *Id.* at 693. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the

Supreme Court said this principle applies to civil enforcement as well. The limitations of prosecutorial discretion are uncertain.

- b. Which text in the Constitution supports your view that the President can decide for himself that a statute is unconstitutional, and can choose not to enforce a law passed by Congress and deemed constitutional by a court?

RESPONSE: Please see my response to Question 41.a.

42. If you are confirmed to the Supreme Court, your views on the Constitution's "take care" clause may take concrete form in the context of the Affordable Care Act (ACA). Despite providing access to health care of millions of previously uninsured Americans, the ACA has been under assault from the right from the day of its passage. Despite the various attacks, the Supreme Court has upheld the law as constitutional and the ACA has endured. However, President Trump has made no secret of his desire to dismantle the ACA. Under your view of the "take care" clause articulated in *Seven Sky* and *In re Aiken*, can the President ignore his constitutional duty to "take Care that the Laws be faithfully executed" and unilaterally repeal the ACA by choosing not to enforce that law or actively undermine the implementation of the ACA?

RESPONSE: If such a case were to come before me as a judge, I would analyze it under the principles of the Supreme Court, consistent with the principles of stare decisis, and the arguments of the parties.

43. During an AEI speech, you spoke about the view of the Constitution as a living document, and contrasted it to your own textualism. You said:

In the views of some, the Constitution is a living document, and the Court must ensure that the Constitution adapts to meet the changing times. For those of us who believe that the judges are confined to interpreting and applying the Constitution and laws as they are written and not as we might wish they were written, we too believe in a Constitution that lives and endures and in statutes that live and endure. But we believe that changes to the Constitution and laws are to made by the people through the amendment process and, where appropriate, through the legislative process – not by the courts snatching the constitutional or legislative authority for themselves.

- a. If, as you say, you are committed to interpreting the Constitution as it was understood at the time it was written, please explain how you justify deeming segregation and sexual discrimination unconstitutional?

RESPONSE: As I explained to Senator Lee, the text of the Fourteenth Amendment guarantees "equal protection." *Brown v. Board* applied that text. I explained at length why I agreed with *Brown*, the single greatest decision in American history.

- b. Under your view, how are the bundle of due process rights—the right to marry who you want, the right to love who you want, the right to use contraception in and out of marriage, the right for women to control their own bodies—guaranteed?

RESPONSE: The Supreme Court has grounded its decisions bearing on these rights in the due process clauses of the Fifth and Fourteenth Amendments.

- c. How would your views on original intent inform your thinking on a case that involved a direct conflict between precedent and original meaning? For example, suppose *Katz v. United States*, 389 U.S. 347 (1967), came before you today, and suppose the government argued that the Fourth Amendment’s prohibition against warrantless searches and seizures cannot apply to telephone calls, because the Framers of the Fourth Amendment clearly did not understand a “search” to include wiretapping. How would you approach such a case?

RESPONSE: As I explained at the hearing, I have not endorsed interpreting constitutional provisions based upon original intent as opposed to the original meaning of the text. Moreover, as a sitting judge and nominee, principles of judicial independence prevent me from speculating about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court. Moreover, if confirmed, I would respect the rules of stare decisis given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

- d. Under your view of originalism, how would you think through a case involving an indictment of a sitting president? Assuming there is no controlling precedent, what sorts of arguments and considerations would you take most seriously?

RESPONSE: As a sitting judge and nominee, principles of judicial independence prevent me from speculating about hypothetical contingent events or providing hints, forecasts, or previews of how I would decide a case. As I explained at the hearing, I have never taken a position on the constitutionality of that question and would have an open mind to any such issue, drawing on the briefs and arguments.

44. You have been nominated for Justice Kennedy’s seat on the Supreme Court. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Justice Kennedy wrote:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

- a. Do you agree with Justice Kennedy that the Fourteenth Amendment provides a path to protect liberty as a society evolves?

RESPONSE: As I stated in my opening statement, Justice Kennedy established a legacy of liberty for ourselves and our posterity. I will follow precedent subject to the rules of precedent.

- b. Do you believe that the Fourteenth Amendment protects individual rights regardless of a person's sexual orientation?

RESPONSE: The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

- 45. A number of cases on reproductive rights coming up through the courts involve narrowing the protections afforded by *Roe* and *Casey*. One is pending now in Hawaii federal district court. In a case called *Chelius v. Azar*, the ACLU of Hawaii is challenging unnecessarily restrictive laws about how and when women can be treated with medical abortion pills. How would you analyze a case where a new burden on the right to choose is being challenged?

RESPONSE: As discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. As a general principle, I would seek to apply the most relevant precedent to the facts at hand.

- 46. In a 2016 speech at Catholic University titled "The Judge as Umpire: Ten Principles," you acknowledged that constitutional adjudication is not always a mechanical process, but often entails an exercise of judicial discretion. After going through your ten principles, you said:

Having said all that, there are areas of the law that sometimes entail discretion. And it is important to acknowledge that sometimes judges must exercise reasoned decision-making within a law that gives judges some discretion over the decision.

- a. What interpretative and decisional tools do you believe should guide this exercise of discretion?

RESPONSE: As I explained in that same article, in cases where there is discretion—such as when it comes to construing what is "reasonable" under the Fourth Amendment, or what is a "compelling government interest" under the Religious Freedom Restoration Act—one of the most important tools for judges is precedent.

- b. Should a Justice bring his or her own values to bear?

RESPONSE: As the thesis of my article makes clear, I believe that in a system of even-handed justice dedicated to the rule of law, our aspiration should be to decide like cases alike and to

apply consistent and objective criteria, rather than subjective beliefs or popular values.

- c. Do the values of the President who nominated Justice carry special weight? If not, whose values count?

RESPONSE: See my answer to Question 46.b.

- d. What should a Justice do when the values at issue are in tension with each other (e.g., women's reproductive rights and the right of autonomy versus religious liberty)?

RESPONSE: See my answer the Question 46.b.

47. At the hearing, I asked you about Chief Justice Roberts' statement in *Trump v. Hawaii* that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" You answered that Chief Justice Roberts was recognizing that *Korematsu* "was no longer good law." In your 1999 amicus brief in *Rice v. Cayetano*, however, you cited *Hirabayashi v. United States*, 320 U.S. 81 (1943), to support your argument. *Hirabayashi*, which was decided the year before *Korematsu*, held that curfews imposed on Japanese Americans during World War II were constitutional. Why did you cite *Hirabayashi* when there are many other Supreme Court cases that state the principle for which you cited *Hirabayashi*? In fact, you included citations to those cases in your amicus brief, which made your citation to *Hirabayashi* repetitive.

RESPONSE: The amicus brief did not cite the majority opinion in *Hirabayashi v. United States*, 320 U.S. 81 (1943). It cited Justice Murphy's concurrence in that case, which emphasized that "[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals." *Id.* at 110 (Murphy, J., concurring).

48. Two professors, Elliott Ash and Daniel L. Chen, performed an empirical study of all your judicial opinions since 2006. They found the following:
- Compared to other Supreme Court Justices when they were circuit court judges, you rank in the top 1st percentile of partisan dissents (defined by dissents in which the other judges on the panel are appointed by the opposing party).
 - You dissented along partisan divisions at twice the rate of your colleagues.
 - You rank in the top 1st percentile of total number of dissents authored during election season.
 - Specifically, you dissented fifteen percent of the time before presidential elections, whereas other judges in your circuit dissented three percent of the time before presidential elections.
 - You were "extremely polarizing" in how you voted in cases and the language you used in your opinions was more partisan than your colleagues.
 - You justified your decisions with conservative doctrines "far more frequently" than your colleagues.

- The authors of the study conclude that you are “radically conservative” compared to other federal circuit judges and that you are “highly divisive in [your] decisions and rhetoric.”

a. How do you explain these findings in this data-driven study?

RESPONSE: I am not familiar with that study and the methodology by which it reached its conclusions. I am proud of my over 300 opinions and my high rate of agreement with all of my colleagues on the D.C. Circuit.

b. Do you think these findings help to explain why you were nominated for this position by Donald Trump?

RESPONSE: I am not familiar with that study and thus cannot comment on its methodologies and conclusions. I am proud of my over 300 opinions and my high rate of agreement with all of my colleagues on the D.C. Circuit.

49. In 2012, you approved South Carolina’s voter ID law under the Voting Rights Act’s preclearance regime that required South Carolina to get approval before changing its voting laws. South Carolina initially enacted a restrictive voter ID law that would disproportionately impact African-American voters. But during the preclearance process, South Carolina agreed to implement it in a way that would reduce its negative impact on African-American voters. In a concurring opinion, your colleague Judge Bates observed, “one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here.” He explained that “[w]ithout the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive.”

a. You were the only judge of the three-judge panel that did not join Judge Bates’ concurrence. Why did you decline to affirm the vital role Section 5 of the Voting Rights Act plays in protecting minorities from being disenfranchised?

RESPONSE: I wrote the unanimous majority opinion in *South Carolina v. United States*, which addresses all issues before the panel. Both Judges Kollar-Kotelly and Bates joined my opinion in full. In my opinion, I noted that “[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history.” *South Carolina v. United States*, 898 F. Supp. 2d 30, 32–33 (D.D.C. 2012). Both Judges referred to my opinion as “excellent.”

b. Did you disagree with Judge Bates’ opinion?

RESPONSE: Please see my response to Question 49.a.

50. Over the objection of all of its Democratic Members, the Senate Judiciary Committee requested only a limited subset of records from your time working in the White House and specifically excluded records during your time serving as Staff Secretary of the White House during the George W. Bush administration. Yet, you said in a speech:

When people ask me which of my prior experiences has been most useful to me as a judge, I...do not hesitate to say that my five and a half years in the White House – and especially my three years as Staff Secretary for President Bush – were the most interesting and in many ways among the most instructive.”

- a. Why was your work as Staff Secretary most useful and most instructive to you as a judge?

RESPONSE: As I explained at the hearing, my role as Staff Secretary involved seeing any issue that crossed the President’s desk, with the exception of a few covert matters. It also permitted me to travel extensively with the President. I learned a great deal about policy, legislation, the political process, the Congress, federal agencies, the media, and world leaders.

- b. Regardless of what role you had in the document request, in your opinion, should documents from your time as Staff Secretary be released so that the Senate and the public can see your full record?

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

- c. At the hearing you stated that you studied the nominations of recent Supreme Court nominees. In addition, you have extensive experience working on judicial nominations. Are you aware of any confirmation process for any of the Justices currently on the Supreme Court where the Ranking Member of the minority party has been denied access to documents that she or he believed were critical to review to determine the fitness of the nominee to be a Supreme Court Justice?

RESPONSE: Please see my response to Question 50.b.

51. In the same speech as above, you said, “As Staff Secretary...I saw and participated in the process of putting legislation together, whether it was terrorism insurance or Medicare prescription drug coverage or attempts at immigration reform.” The American people care about your views on Medicare, terrorism, and immigration reform. As a self-described “independent” and “pro-law” judge, you likely want your nomination process to be transparent and fair. What issues did you work on substantively while you were Staff Secretary? Please be as detailed as possible.

RESPONSE: As I testified at the hearing, while I was Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time. In any event, my role as Staff Secretary was not to replace the President’s policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

52. When President Obama nominated your colleague, Merrick Garland, to the Supreme Court, Majority Leader McConnell summarily blocked Judge Garland's nomination. Mr. McConnell left the Supreme Court seat vacant for more than a year, saying, "[t]he American people should have a voice in the selection of their next Supreme Court Justice." Do you think a confirmation process that allows a Supreme Court nominee to be summarily blocked is working as it should? Do you think this is a fair process?

RESPONSE: That is a decision for the Senate.

53. In May 2002, you quoted President Bush, saying "[e]very judicial nominee deserves a prompt hearing and a fair vote, no matter who lives in the White House and no matter which party controls the Senate." In fact, you went further to say, "there is simply no justification, in our view [for] circuit court nominees to wait a year for a hearing." Based on these statements, do you believe Senate Republicans were wrong to deny Merrick Garland a hearing for nearly a year? Does your view of what is a "prompt hearing and a fair vote" change depending on which party controls the Senate?

RESPONSE: That is a decision for the Senate.

54. In *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 5 (2016), you wrote that the Consumer Financial Protection Bureau (CFPB) is a "threat to individual liberty." Your opinion focused primarily on the costs of compliance to a company accused of illegal behavior, but CFPB has returned nearly \$12 billion to 29 million people who were cheated out of their hard-earned money by companies that broke the law. On issues ranging from clean air and water to occupational health and safety to consumer protection, you have opposed Congress' grants of authority to executive agencies to create safeguards based on their expert analysis of risks and potential solutions. In short, your writings on liberty and freedom seem to translate to rulings for the liberty of polluters and freedom from regulation. Is your conception of individual liberty expansive enough to also account for ordinary Americans' expectations that they will be free to earn a living or enjoy clean air and water because our laws are being enforced?

RESPONSE: As I explained at the hearing, I concluded in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016), the Consumer Financial Protection Bureau was unconstitutionally structured. As a single-Director independent agency exercising substantial executive authority, the Bureau was the first of its kind and a historical anomaly. *PHH Corp.*, 839 F.3d at 17. In light of the historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, I concluded that *Humphrey's Executor* could not be stretched to cover the Bureau's novel agency structure. *Id* at 8.

55. In *Chevron v. Natural Resources Defense Council*, the Supreme Court wrote that "federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." The Court laid out the doctrine of "*Chevron* deference,"

holding that, when an agency's organic statute is silent or ambiguous with respect to a specific issue, a reviewing court should consider only whether the agency's answer is based on a permissible construction of that statute. However, you have written that *Chevron* deference is "an a textual invention by the courts" that is "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch." In your opinion, courts should "simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes." Brett Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev 1907, 1910- 1912 (2017).

Your opposition to *Chevron* deference appears to reflect a more general hostility to agency regulations, particularly when those regulations are often critical to protecting workers, consumers, and the environment, for example.

- a. Why do you believe a reviewing court should substitute its own judgment for that of Congress, or of the experts and scientists at the EPA, or of the Nuclear Regulatory Commission, or of the National Highway Transportation and Safety Authority, or of the Federal Communications Commission, or for any of the independent agencies that Congress has created?

RESPONSE: As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

- b. How does your theory of allowing courts to "determine the best reading" of a law avoids inconsistent interpretations that are based solely on the subjective views of judges on a particular case?

RESPONSE: Please see my answer to Question 55.a.

56. You have acknowledged the serious problem posed by climate change, saying "the task of dealing with global warming is urgent and important at the national and international level." Do you agree, as a general principle, that someone who is injured or imminently will be injured by climate change has standing to challenge government regulations relating to climate change? Please provide one or more concrete examples of "injury-in-fact" resulting from climate change that would establish standing.

RESPONSE: This issue is the subject of ongoing litigation. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

57. Forced arbitration clauses are ubiquitous in modern agreements, including credit card

contracts, cell phone contracts, online click-through “agreements,” employee handbooks, and nursing home admissions forms to name a few. These clauses restrict Americans’ access to justice by stripping them of their constitutional right to go to court. The Federal Arbitration Act (“FAA”), as originally drafted and passed by Congress in 1925, was intended to apply—and for nearly 60 years had been presumed to apply—only in cases involving commercial disputes between two businesses with relatively equal bargaining power. Congress did not intend to force individual American consumers, employees, and patients into secret, private arbitration as a means of depriving them of their constitutional right to trial by jury. Despite the original intent of the FAA, the Supreme Court in recent years has reinterpreted the FAA more broadly, leading more and more individuals to be shut out of courts and forced into arbitration. Given the Act’s history and the fact that these clauses now apply to every aspect of American life, are there any limits to when individual consumers, nursing home residents, and workers should be subject to forced arbitration? What are those limits?

RESPONSE: The limits under the FAA on the enforceability of arbitration agreements include those noted by the Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001), namely that Section 1 of the FAA provides “exemption from coverage” for certain kinds of contracts, including “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” To the extent that the existence of other limits has not yet been explicated by the Supreme Court, the question could come before me in the future either on the D.C. Circuit or on the Supreme Court. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on any other such limits.

58. You served as Co-Chair of the Federalist Society’s School Choice Subcommittee, Religious Liberties Practice Group from 1999 to 2001. Please describe your involvement in that subcommittee’s conferences, symposia, publications, speaking engagements, litigation and the like during that time.

RESPONSE: I do not recall the specifics of my involvement in that particular subcommittee. But as I explained at the hearing, my experience with the Federalist Society has generally been that it hosts many panels and discussions at which people of various perspectives offer commentary and debate on legal and policy issues. Such events educate and enrich the legal community.

**Nomination of Brett M. Kavanaugh
Supreme Court of the United States
Questions for the Record
Submitted September 10, 2018**

QUESTIONS FROM SENATOR BOOKER

1. During last week’s hearing, I asked you about your insistence to several members of the Committee that you had “never” taken a position on the constitutionality of criminally investigating or indicting a sitting President, “period.” However, you have addressed the constitutionality issue a number of times in your writings and public statements. In particular, you have written:

- “*The Constitution itself seems to dictate*, in addition, that congressional investigation must take place *in lieu of* criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur *only* after the President has left office.”¹
- “During the impeachment ordeal, the president’s congressional supporters and foes agreed—*consistent with the Constitution, which appears to preclude indictment of a sitting president*—that the government should consider indicting Bill Clinton after he leaves office.”²
- “If the President does something dastardly, the impeachment process is available. *No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.* Moreover, an impeached and removed President is still subject to criminal prosecution afterwards. In short, *the Constitution establishes a clear mechanism* to deter executive malfeasance; we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions. . . . I think this temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal investigations.”³

In addition, in 1998, you participated in a panel discussion at the Georgetown University Law Center on the future of the independent counsel statute.⁴ During the

¹ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2158 (1998) (emphases added).

² Brett M. Kavanaugh & Robert J. Bittman, *Indictment of an Ex-President?*, WASH. POST, Aug. 31, 1999, at A12 (emphasis added), *available at* <https://www.justsecurity.org/wp-content/uploads/2018/07/Brett-Kavanaugh-Indictment-of-an-Ex-President-Washington-Post-1999.pdf>.

³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461-62 & n.35 (2009) (emphasis added) (footnotes omitted).

⁴ *Independent Counsel Statute Future*, C-SPAN (Feb. 19, 1998), <https://www.c-span.org/video/?101056-1/independent-counsel-statute-future>.

discussion the moderator asked the panel, “How many of you believe, as a matter of law, that a sitting President cannot be indicted during the term of office?” In response to this query, your hand went up, along with those of several other members of the panel. Next, the moderator asked you, “What is the implication, Brett, of your point if in fact a sitting President cannot be indicted during a term of office?”⁵ You replied:

The implication is that that Congress has to take responsibility for overseeing the conduct of the President in the first instance. *That’s the role I believe the Framers envisioned*, and that’s the role that makes sense if you just look at the last 20 years. It makes no sense at all to have an independent counsel looking at the conduct of the President.⁶

When I asked you about these statements at the hearing, you said that you would consider these issues “with an open mind.”

- a. In light of these statements, do you still maintain that you have “never taken a position” on the constitutionality of criminally investigating or indicting a sitting President? Please explain your answer.

RESPONSE: As I explained at the hearing, for 45 years – through Republican and Democratic Administrations – the Department of Justice has taken the position (and still does) that a sitting President may not be indicted while in office. Therefore, unless the Department of Justice changes its position, this issue presumably will never come before a court. In my 2009 Minnesota Law Review article, when President Obama was in office, I made a series of legislative proposals for Congress to consider. However, I have made clear that if a constitutional question came to me, I would have an open mind. I have repeatedly referred to the constitutional question of whether a sitting President can be indicted as an open question. Specifically, in my 1998 Georgetown Law Journal article, I stated that “[w]hether the Constitution *allows* indictment of a sitting President is debatable.” In my 2009 Minnesota Law Review article, I stated that “a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office.” 2009 Minn. L. Rev. at 1461 n.31.

- b. At a minimum, do these statements—three of which invoke the Constitution, and one of which invokes the intent of the Framers—send a clear signal about where you stand on the constitutionality of criminally investigating or indicting a sitting President? Please explain your answer.

RESPONSE: No.

2. In your 2006 testimony before the Senate Judiciary Committee for your nomination to the D.C. Circuit, you denied that the Bush White House used political filters to put forward candidates for judicial nominations. Senator Schumer asked you whether you ever would use words such as “too liberal or too conservative” as a filter for nominees. You responded by indicating that you would object only on the basis that someone was “too activist.”

⁵ *Id.*

⁶ *Id.* (emphasis added).

You gave similar testimony to this Committee in 2004 as well.⁷

But in an e-mail dated March 9, 2001, a colleague asked you whether a potential judicial nominee was “too liberal to be considered.” You responded, “Far too liberal.”⁸

Do you stand by the statements you gave to this Committee in 2004 and 2006 about ideological filters in the selection process for judicial candidates? Please explain why, in light of your response in this e-mail.

RESPONSE: I disagree with the premise of the question. In neither 2004 nor 2006 did I testify that I had never described judicial nominees as “too conservative” or “too liberal.” In fact, in 2004, I testified that I did not know whether I had ever used those words. In 2006, I likewise made clear that I may have referred to a potential nominee’s tendency or failure to understand the distinction between the role of policymakers and the role of the judiciary—in other words, the tendency of a potential nominee to be “too activist.”

3. The *Washington Post* reported on March 8, 2017, that you had been considered for the job of Solicitor General, one of the top positions at the Justice Department. The *Post* reported that “representatives of the Trump transition approached” you about the job. The article said that “apparently” the discussions “did not advance very far.”⁹
 - a. Did you talk with anyone formally or informally affiliated with the Trump campaign, the Trump transition team, or the Trump Administration about the Solicitor General position? This includes interviews, applications, formal conversations, or even informal talks, and it includes interactions with any informal advisors or intermediaries to the Trump campaign, Trump transition team, or the Trump Administration.

RESPONSE: Yes. I had a conversation with then-Senator Sessions (before he was confirmed to serve as Attorney General) about the position, which was arranged by members of the presidential transition team.

- b. What did you discuss in your conversations with those individuals concerning the Solicitor General position?

RESPONSE: We discussed, among other things, the general responsibilities of the office.

⁷ S. Hrg. 108-878, at 49 (Apr. 27, 2004), <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>.

⁸ REV_00269074 (e-mail dated March 9, 2001).

⁹ Robert Barnes, *Trump Nominates D.C. Lawyer Noel Francisco as Solicitor General*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/politics/courts_law/trump-nominates-dc-lawyer-noel-francisco-as-solicitor-general/2017/03/08/c62b0774-040f-11e7-b9fa-ed727b644a0b_story.html.

- c. Did you express interest in the Solicitor General position under President Trump?

RESPONSE: I was uncertain about it, but I was interested in learning more. I ultimately decided that I wanted to remain a judge. I kept my Chief Judge—Chief Judge Garland—apprised about this in real time.

- d. Did you talk with anyone formally or informally affiliated with the Trump campaign, the Trump transition team, or the Trump Administration about any *other* positions in the Executive Branch under President Trump? This includes interviews, applications, formal conversations, or even informal talks, and it includes interactions with any informal advisors or intermediaries to the Trump campaign, Trump transition team, or the Trump Administration.

RESPONSE: I do not remember any such discussions, although it is possible that other positions were informally and briefly mentioned in passing. I decided I would remain a judge.

- e. If so, what other positions in the Executive Branch did you discuss with those individuals?

RESPONSE: Please see my response to Question 3.d.

- f. What did you discuss in your conversations with those individuals concerning any other positions in the Executive Branch?

RESPONSE: Please see my response to Question 3.d.

- g. During any of the conversations referenced above, did you express or imply your personal support for President Trump?

RESPONSE: No.

4. Do you believe it is important that the federal judiciary more accurately reflect the diversity of the United States?

RESPONSE: As I stated during the hearing, I believe my record demonstrates my commitment to addressing the dearth of minority law clerks in the federal judiciary. After hearing Justices Breyer and Thomas speak to Congress in 2010 about the lack of minority law clerks at the courts of appeals, I reached out to Black Law Students Associations at Yale and later Harvard Law Schools to speak to students about why and how to clerk, to provide advice and mentorship, and to demystify the application process. I am proud that, through these efforts, I have helped several African-American students obtain clerkships, including with other judges. I am also proud that more than a quarter of my law clerks have been minorities and that more than half of my law clerks have been women. Finally, I am proud that I have hired far more African-American law clerks than the percentage of African Americans in American law schools.

5. You've spoken often of your own efforts to hire women and racially diverse law clerks. What efforts have you made to ensure that *law schools* are more diverse?

RESPONSE: I am, of course, not a law school dean or admissions officer. My efforts have focused on law clerk hiring, and I believe I have made a big difference. I am very proud of that. Whether I am confirmed or not, I intend to continue those efforts.

6. In a December 12, 2001, draft of a speech to the Federalist Society, you wrote:

I can't leave the topic of judicial nominations without one final observation. This President strongly believes—and I share that belief—that federal judicial nominees should be persons of the highest reputation, having a sound understanding of the limited role of the judiciary and who represent the diversity of America. *I am sure that some will say that this last requirement—diversity—is not appropriate, that quality is determined not by external characteristics but by internal discipline and training. The President—and I—would agree heartily with that premise.* But at the same time, he recognizes that quality can be found in many colors and that those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve.¹⁰

- a. What did you mean when you said “diversity . . . is determined not to by external characteristics but by internal discipline and training”?
- b. What did you mean by “those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve”?

RESPONSE: The above quotes are from a speech given by White House Counsel Alberto Gonzales. Your first quote is from Judge Gonzales describing the apparent views of others. I think the words in the second quote speak for themselves as a reflection of the views of President Bush and Judge Gonzales.

7. You have repeatedly touted the diversity of the law clerks whom you have hired. Do you believe that diversity, including with respect to race and gender, is an important goal in law clerk hiring?

RESPONSE: I hire the best, and the best includes women and minorities. I believe it is important to break down barriers and to encourage and recruit law clerks who might not otherwise apply.

8. I understand that you have actively tried to recruit a wide pool of law clerk *applicants*, including by speaking at Black Law Students Associations and encouraging members to apply. Have you ever used race or gender as a consideration in *hiring* law clerks?

¹⁰ REV_00137649 (document draft dated Dec. 12, 2001) (emphasis added).

RESPONSE: Please see my answer to Question 7.

9. The Bush Administration frequently described the diversity of the individuals the President selected as judicial nominees. To your knowledge, was race or gender ever used as a factor in (1) your and/or other White House staff's initial selection of potential judicial candidates for President Bush's consideration; and/or (2) President Bush's ultimate decisions in nominating judges?

RESPONSE: President Bush wanted diversity in his nominees. During my service in the White House Counsel's Office, I followed the President's directions.

10. During your time in the Bush White House Counsel's office, a colleague e-mailed you to ask about the propriety of including individuals' ethnicity in a database of potential candidates to serve on various presidential boards and commissions.¹¹ You responded that this was permissible, but you said that "in a perfect world, no one would keep track."¹²

- a. Please explain why "in a perfect world, no one would keep track."

RESPONSE: In a perfect world, the legacies of racial discrimination would be fully behind us and no one would be judged or "tracked" by the color of their skin. We are not in that perfect world, and as I have explained repeatedly in my cases and at the hearing, the long march for equality for African-Americans is not over.

- b. Please explain why, in this context, you advocated against keeping track of racial diversity, but the administration kept track of and publicized the diversity of its judicial nominees, and you yourself have referenced and publicized the racial and gender diversity of your law clerks.

RESPONSE: I disagree with the premise of the question. I did not "advocat[e] against keeping track of racial diversity." The Administration kept track of and publicized the diversity of its judicial nominees because the President wanted diversity in his nominees. For my part, I have hired a diverse group of law clerks. I am proud of my record.

- c. Please explain why keeping track of ethnicity in this context is consistent with a view that race should not be used as a factor in personnel decisions.

RESPONSE: Please see my answer to Question 10.b.

11. During your nomination hearing, I quoted from an e-mail in which you stated that the Department of Transportation regulations at issue in *Adarand v. Mineta*¹³ "use a lot of

¹¹ REV_00135177 (e-mail dated Nov. 12, 2001).

¹² REV_00135177 (e-mail dated Nov. 13, 2001).

¹³ 534 U.S. 103 (2001).

legalisms and disguises to mask what in reality is a *naked racial set-aside*.”¹⁴

- a. Do you still believe that efforts to promote minority-owned businesses are “naked racial set-aside[s]”?

RESPONSE: The quote to which you refer arose in the context of my analysis of how the majority of the Supreme Court Justices would likely perceive and rule on the specific facts in a case under Supreme Court precedent. I was concerned that the Supreme Court would not uphold the program.

- b. Do you believe that efforts to promote student body diversity at institutions of higher education are “naked racial set-aside[s]”?

RESPONSE: As discussed during the hearing, the Supreme Court has made clear that higher educational institution may seek to promote diversity in certain ways. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). But the Supreme Court has said that quotas or set-asides are not ordinarily permissible.

12. You said in another of your e-mails about *Adarand* that the Solicitor General should independently come to his own conclusion about whether to defend the constitutionality of Department of Transportation’s program.¹⁵ But you also stated that this arrangement was “admittedly not my ideal of how a unitary executive should work.”¹⁶ Under your “ideal of how a unitary executive should work,” would the President and/or his White House attorneys instruct the Solicitor General about what position(s) to take in cases challenging the constitutionality of federal laws or programs?

RESPONSE: I was talking about the traditional process, and about the perceptions on the outside of that process.

13. During your nomination hearing, I also quoted from an e-mail in which a colleague of yours referred to a “school of thought” within the Bush Administration that “if the use of race renders security measures more effective, then perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as *Korematsu v. United States*.”¹⁷ In response, you said you “generally favor effective security measures that are race-neutral.”¹⁸ But you said there was still an “interim question”—with which you and your colleagues “need[ed] to grapple”—of what to do before such a system could be developed.¹⁹ The subject line of these e-mails

¹⁴ REV_0028956 (e-mail dated Aug. 8, 2001) (emphasis added).

¹⁵ REV_00125572 (e-mail dated Mar. 26, 2001).

¹⁶ *Id.*

¹⁷ REV_00328554 (e-mail dated Jan. 17, 2002).

¹⁸ REV_00328552 (e-mail dated Jan. 17, 2002).

¹⁹ *Id.*

was “Racial Profiling.”²⁰

During your time in the White House Counsel’s office, did you ever support—in e-mails, internal memoranda, or internal conversations—the use of racial profiling as a security measure? If records of such support exist, please include them with your response.

RESPONSE: Beyond the email you reference, I have no specific recollection. As your question notes, my email states that I “generally favor effective security measures that are race-neutral.”

14. In the brief that the Bush Administration filed in *Grutter v. Bollinger*, the Solicitor General stated that “[m]easures that ensure diversity, accessibility and opportunity are important components of government’s responsibility to its citizens.”²¹ Do you personally agree with that statement?

RESPONSE: As noted at the hearing, the Supreme Court has held that higher education institutions may seek to promote diversity in certain ways. That was also President Bush’s position. Judicial independence prevents me from weighing in with a thumbs up or thumbs down on specific precedents, especially those that are the subject of ongoing litigation.

15. Do you personally agree that *diversity* is an “important component[] of government’s responsibility to its citizens”?

RESPONSE: Please see my response to Question 14.

16. On February 17, 2001, a colleague of yours at the Bush White House sent you an e-mail about potential candidates for the U.S. Court of Appeals for the Fifth Circuit. Your colleague described one candidate from Louisiana as “pretty good on finally ending all the busing.” From what is available in this document, it appears that you did not respond directly to this comment.²² “Busing” evidently refers to efforts to counter the persistent legacy of segregation in our schools.

- a. What was your reaction to a White House colleague who praised a prospective judicial nominee as “pretty good on finally ending all the busing”?
- b. Why would being “pretty good on finally ending all the busing” be considered a positive attribute for a prospective judicial nominee for the Bush White House?
- c. You’ve indicated that you believe *Brown v. Board of Education* was one of the great moments in the Court’s history. Did you view busing efforts to

²⁰ *Id.*

²¹ Brief for the United States, *Grutter v. Bollinger*, No. 02-241, 2003 WL 176635, at *8 (filed Jan. 17, 2003).

²² REV_00174567 (e-mail dated February 19, 2001).

integrate schools negatively?

RESPONSE: In the email to which you refer, it appears that a colleague forwarded unsolicited advice from an anonymous “acquaintance” who referred to “busing” in connection with a judicial candidate. I did not refer to that candidate in my response to my colleague. I have no specific recollection of that candidate or what my colleague’s anonymous acquaintance was referring to.

17. According to a Brookings Institution 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.²³ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.²⁴ 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.²⁵ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²⁶

- a. Do you believe people of color are disproportionately represented in our nation’s jails and prisons?
- b. What role do you believe the judiciary should play in addressing the racially disparate impact the criminal justice system has in American society?

RESPONSE: The statistics that you cite suggest a troubling disparity. As I stated in my testimony, the long march for racial equality in the United States is not over. I believe it is the responsibility of all participants in the criminal justice system, including judges, to be cognizant of racial disparities and to work diligently to ensure that our criminal justice system treats people fairly and equally.

18. The Eighth Amendment to the Constitution forbids “cruel and unusual punishment.”²⁷

- a. What is the standard for judging whether a punishment is cruel and unusual?
- b. Do you believe placing someone in a pillory is prohibited as “cruel and unusual”

²³ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

²⁴ *Id.*

²⁵ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

²⁶ *Id.* at 8.

²⁷ U.S. CONST. amend. VIII.

pursuant to the Eighth Amendment?

- c. Do you believe branding an individual is “cruel and unusual” punishment proscribed under the Eighth Amendment?
- d. Do you believe placing an individual in solitary confinement is “cruel and unusual” punishment prohibited under the Eighth Amendment?
- e. You are a self-proclaimed originalist. At the time of our nation’s founding, placing someone in a pillory was not considered “cruel or unusual.” How do you square your mode of statutory and constitutional interpretation with a “claim that punishment is excessive is judged not by the standards prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”?²⁸
- f. On June 20, 2002, you replied to an e-mail with the subject line: “Next Justice Watch.”²⁹ In the e-mail you discussed the *Atkins v. Virginia* decision, which was just handed down. You wrote, “Applying the original meaning of cruel and unusual’ would lead to one of two standards: (i) ‘cruel and unusual’ means ‘cruel and illegal,’ meaning that no statutorily authorized punishment is ‘cruel and unusual’; or (ii) the clause was meant to proscribe certain modes of punishment, but not to impose any standard of proportionality.”³⁰ Do you still believe that applying the original meaning to “cruel and unusual” means “cruel and illegal,” meaning that no statutorily authorized punishment is “cruel and unusual”; or (ii) the clause was meant to proscribe certain modes of punishment, but not to impose any standard of proportionality”?

RESPONSE: The meaning of “cruel and unusual punishments” under the Eighth Amendment is the subject of ongoing litigation and is likely to come before me in some form. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue. I will note that any views expressed in the White House as an attorney 16 years ago do not necessarily reflect by views as a judge now.

- 19. In capital punishment cases, the race of the criminal defendant and of the victim plays a significant role in whether a defendant ultimately receives the death penalty. According to the American Civil Liberties Association, people of color account for 43 percent of

²⁸ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

²⁹ REV_00147341 (e-mail dated June 20, 2002).

³⁰ REV_00147342 (e-mail dated June 20, 2002).

total executions since 1976 and 55 percent of individuals currently awaiting execution.³¹ In our meeting on August 23, 2018, we talked about racial disparities in the use of capital punishment and you spoke about how the jury selection process might partially account for the disproportionate rate of executions of people of color.

- a. Based on current data, do you believe that racial disparities still exist in the application of the death penalty?
- b. In *Gregg v. Georgia*, the Supreme Court said that the use of capital punishment is unconstitutional if it is “inflicted in an arbitrary and capricious manner.”³² Do you believe that the disproportionate application of the death penalty on African Americans is arbitrary and capricious?

RESPONSE: We should always want to know the cause of racial disparities in the criminal justice system. But questions regarding the application of the death penalty are the subject of ongoing litigation and are likely to come before me in some form. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. In keeping with those principles and the precedent of prior nominees, I cannot provide my views on this issue.

20. According to the Constitution Accountability Center, “the U.S. Chamber of Commerce went 9-1 at the Supreme Court in the 2017-2018 Term, its best record in six years. Since 2006, the Chamber has won more than 70% of its cases at the Supreme Court, compared to 43% and 56% during comparable periods during the Burger and Rehnquist Courts.”³³ Do you believe those statistics damage the American people’s perception of the Supreme Court as a fair arbiter of justice? If not, please explain.

RESPONSE: As I explained at the hearing, “it builds overall confidence . . . in the judiciary to know you are getting a fair shake even when you lose,” and it is to our detriment if people believe cases are decided based on the identity of the parties. As I noted, I am “not a pro-plaintiff or pro-defense judge,” but rather a “pro-law judge” who has “ruled for parties based on whether they have the law on their side.”

21. You dissented in *SeaWorld of Florida v. Perez* arguing that the Department of Labor’s finding was arbitrary and capricious because it departed from longstanding administrative precedent that it not “regulate participants taking part in the normal

³¹ ACLU, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (last visited Sept. 7, 2018).

³² *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

³³ Brian R. Frazelle, *Corporations and the Supreme Court: A Banner Year for Business as the Supreme Court’s Conservative Majority Is Restored—October Term 2017*, CONST. ACCOUNTABILITY CTR. (July 2018), https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored.

activities of sports events or entertainment shows.”³⁴

- a. Is SeaWorld a corporation operating in the entertainment industry?

RESPONSE: Yes.

- b. Does the Department of Labor regulate the entertainment industry?

RESPONSE: Yes, as a general matter, but as I stated in my dissent in *SeaWorld*, “the Department of Labor, acting with a fair degree of prudence and wisdom, has not traditionally tried to stretch its general authority under the Act to regulate participants taking part in the normal activities of sports events or entertainment shows.” *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014).

- c. The general duty clause of the Occupational Safety and Health Act provides: “‘Each employer [] shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.’”³⁵ Do you believe that the general duty extends to the entertainment industry?

RESPONSE: As I stated in my dissent in *SeaWorld*, “the Department of Labor, acting with a fair degree of prudence and wisdom, has not traditionally tried to stretch its general authority under the Act to regulate participants taking part in the normal activities of sports events or entertainment shows.” *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014). Specifically, under the Department’s *Pelron* precedent, *Pelron Corp.*, 12 BNA OSHC 1833 (1986), the Department has followed the rule that “some activities, though dangerous, are among the ‘normal activities’ intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause.” *SeaWorld* at 1219.

- d. You posed the following question: “When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants?”³⁶

- i. Do you believe it is paternalistic for the Department of Labor to regulate the coal mining industry?

RESPONSE: No. The Department of Labor has traditionally regulated coal mining to ensure the safety of miners. These regulations are critically important and as a judge I will of course follow the law. During the hearing, I noted that my *SeaWorld* dissent dealt with a narrow class of employers in the sports and entertainment industries. As I explained in that dissent, “[t]he Department [of Labor] cannot reasonably distinguish close contact with whales at SeaWorld from tackling in the NFL or speeding in NASCAR. The Department’s sole justification for the

³⁴ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2004).

³⁵ *Id.* at 1207 (citing 29 U.S.C. § 654(a)(1)).

³⁶ *Id.* at 1217.

distinction is that SeaWorld could modify (and indeed, since the Department's decision, has had to modify) its shows to eliminate close contact with whales without going out of business. But so too, the NFL could ban tackling or punt returns or blocks below the waist. And likewise, NASCAR could impose a speed limit during its races. But the Department has not claimed that it can regulate those activities. So that is not a reasonable way to distinguish sports from SeaWorld. The Department assures us, however, that it would never dictate such outcomes in those sports because 'physical contact between players is intrinsic to professional football, as is high speed driving to professional auto racing.' Br. for Secretary of Labor 52. But that ipse dixit just brings us back to square one: Why isn't close contact between trainers and whales as intrinsic to SeaWorld's aquatic entertainment enterprise as tackling is to football or speeding is to auto racing? The Department offers no answer at all." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014).

- ii. Do you believe it is paternalistic for the Department of Labor to regulate the logging industry?

RESPONSE: See my response to Question 21.d.i.

- iii. Do you believe it is paternalistic for the Department of Labor to regulate the film industry?

RESPONSE: See my response to Question 21.d.i.

- iv. Do you believe it is paternalistic for the Department of Labor to regulate SeaWorld?

RESPONSE: See my response to Question 21.d.i.

- e. You also wrote: "To be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest forms of personal achievement for many who take part in these activities."³⁷
 - i. Do you believe that fearless, courageous, and tough people do not expect their employer to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."? If not, please explain.

RESPONSE: State tort law helps ensure that workplaces are reasonably safe. Congress may also regulate workplace safety, as it has done. And federal agencies may also do so within the limits of the statutes and precedents.

- f. Do you think it is unreasonable for employees—regardless of what industry they work in—to expect to go home safely at night?

³⁷ *Id.* at 1218.

RESPONSE: No.

22. Do you believe it is paternalistic for the government to work to ensure—to the best extent practical and reasonable—that employees work in a safe environment?

RESPONSE: See my response to Question 21.d.i.

23. In *Garza v. Haragn*, you said several times that the government was somehow acting out of an interest to place this young woman in a better environment where she could “make the decision” about whether to have an abortion.³⁸

Putting aside for a moment the fact that the government had been looking for a sponsor for many weeks and could not find one, what is troublesome here is that this young woman had *already made* her decision. She had received a bypass from a judge in Texas against having to obtain parental consent, and she was found to be mature enough to make her own choice. She made her choice, and her pregnancy was advancing each day against her will.

- a. Why did you write your opinion as though she hadn’t decided what to do with her own body?

RESPONSE: I answered this question at the hearing, and my dissent speaks for itself.

- b. You wrote that everyone agreed, for purposes of this case, that Jane Doe had a right under *Roe* and *Casey* to obtain an abortion and that her status as undocumented did not diminish that right.

If this case involved a 17-year-old American citizen who was being held in a juvenile detention facility, and the authorities running the facility imposed multiple obstacles that forced the young woman to wait for several weeks before obtaining an abortion, is there any set of circumstances in which you might have found this was permissible under *Roe* and *Casey*?

RESPONSE: It would be improper for me as a sitting judge and a nominee to comment on hypothetical cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

- c. In your dissent in the *SeaWorld* case, you wrote that the Occupational Safety and Health Administration “paternalistically decide[d]” that trainers needed to

³⁸ *Garza v. Haragan*, 874 F.3d 735, 754-55 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting).

“be protected from themselves.”³⁹

When the government seeks to restrict women’s access to health care services— or to bar that access altogether—on the grounds that the restrictions are for the women’s own good, why isn’t that paternalistic?

RESPONSE: The *SeaWorld* cases involved interpretation of a statute and agency precedent. By contrast, the Supreme Court’s undue burden standard governs abortion cases. The two are unrelated.

24. In your dissent in *Garza*, you argued that the en banc majority was establishing “*a new right* for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”⁴⁰ You also stated that “[t]he majority’s decision represents *a radical extension of the Supreme Court’s abortion jurisprudence*.”⁴¹

- a. However, the Supreme Court’s decision in *Bellotti v. Baird* held that minors may fulfill alternative procedures to bypass a state’s parental consent requirement.⁴² An opinion by one of your D.C. Circuit colleagues made exactly this point⁴³ and countered your assertion that the court was creating “radical” “new right.” You did not cite *Bellotti* in your dissent. Why did you decline to heed or even address the Supreme Court’s precedent in *Bellotti* in your opinion in *Garza*?

RESPONSE: I answered this question at my hearing, and my dissent speaks for itself.

- b. In *Whole Woman’s Health v. Hellerstedt*, the Supreme Court (in an opinion joined by Justice Kennedy) explained that the “correct legal standard” for the undue burden test is to “weigh[] the asserted benefits against the burdens.”⁴⁴ Your dissent in *Garza* does not appear to weigh the potential harms to Jane Doe resulting from a further delay against any claimed benefits from that delay, as *Whole Woman’s Health* requires. Why did you not adhere to precedent in this regard?

RESPONSE: I answered this question at the hearing and my dissent speaks for itself.

25. On several occasions in late 2001 and early 2002, you expressed enthusiasm for John Yoo as a candidate for a judgeship on the United States Court of Appeals for the Ninth

³⁹ *SeaWorld*, 748 F.3d at 1217.

⁴⁰ *Id.* at 752 (Kavanaugh, J., dissenting) (emphasis added).

⁴¹ *Id.* (emphasis added).

⁴² 443 U.S. 622, 643 (1979) (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.” (footnote omitted)).

⁴³ *Id.* at 737 (Millet, J., concurring) (emphasis added).

⁴⁴ 136 S. Ct. 2292, 2310 (2016).

Circuit.⁴⁵

- a. What was the basis of your support for Mr. Yoo?
- b. What insights did you have as to whether he would be a good judge?

RESPONSE: While I do not have specific recollection of all comments that I made during my service in the White House Counsel's Office, I do recall that there was consideration of John Yoo as a potential nominee for the Court of Appeals for the Ninth Circuit. He was a highly respected academic at Boalt Hall and had worked as a respected staff member for the Senate Judiciary Committee. These comments were made in 2001 and early 2002, I believe.

26. Knowing what you know now about Mr. Yoo's role in drafting the infamous August 1, 2002, memorandum for the Office of Legal Counsel authorizing abusive interrogation techniques (as well as his role in drafting other related memoranda), do you still think that Mr. Yoo would have made a good judge?⁴⁶ Please do *not* respond simply by stating that you disagree with the August 1, 2002, memorandum's conclusions

RESPONSE: At this time and in this context, it would not be appropriate for me to opine on whether someone else would or would not make a good judge.

27. You also expressed enthusiasm in early 2002 for the prospect that Mr. Yoo could serve as the General Counsel for the Central Intelligence Agency.⁴⁷ Knowing what you know now about Mr. Yoo, do you think he would have performed that job responsibly?

RESPONSE: At this time and in this context, it would not be appropriate for me to opine on whether someone else would or would not make a good general counsel of the CIA.

28. On September 17, 2001, you wrote an e-mail to Mr. Yoo under the subject line "4A issue." You asked Mr. Yoo if there were "[a]ny results yet on the [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?"⁴⁸

According to a report by the Department of Justice's Inspector General, Mr. Yoo drafted a memorandum that day "evaluating the legality of a 'hypothetical' electronic surveillance program within the United States to monitor communications of potential

⁴⁵ REV_00206814 (e-mail dated Nov. 29, 2001); REV_00210698-99 (e-mails dated Jan. 10, 2002).

⁴⁶ U.S. Dep't of Justice, Office of Legal Counsel, *Standards for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download>.

⁴⁷ REV_00210698 (e-mail dated Jan. 10, 2001).

⁴⁸ REV_00023540 (e-mail dated Sept. 17, 2001).

terrorists.”⁴⁹ Mr. Yoo expanded upon that memorandum on October 4, 2001, and President Bush formally authorized what became known as the “Stellar Wind” program on the same date.⁵⁰ Alberto Gonzales, who was the White House Counsel at this time, subsequently stated that he believed that the September 17 and October 4 memoranda by Mr. Yoo “described as lawful activities that were broader than those carried out under Stellar Wind, and that therefore these opinions ‘covered’ the Stellar Wind program.”⁵¹

During your 2006 testimony before the Senate Judiciary Committee, you had the following exchange with Senator Leahy:

SENATOR LEAHY. What was your reaction—as Staff Secretary, you see virtually every piece of paper that goes to the President; is that correct?

MR. KAVANAUGH. On many issues, yes, Senator. Not everything, but on many issues.

SENATOR LEAHY. Did you see documents relating to the President’s NSA warrantless wiretapping program?

MR. KAVANAUGH. Senator, I learned of that program when there was a *New York Times* story—reports of that program when there was a *New York Times* story that came over the wire, I think on a Thursday night in mid- December of last year.

SENATOR LEAHY. You had not seen anything, or had you heard anything about it prior to the *New York Times* article?

MR. KAVANAUGH. No.

SENATOR LEAHY. Nothing at all? MR. KAVANAUGH. Nothing at all.⁵²

At your hearing last week before the Senate Judiciary Committee, you made similar representations.

⁴⁹ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE DEPARTMENT OF JUSTICE’S INVOLVEMENT WITH THE PRESIDENT’S SURVEILLANCE PROGRAM 25 (July 2009), *available at* https://www.aclu.org/sites/default/files/field_document/71-6_exhibit_e_4.20.16.pdf.

⁵⁰ *Id.* at 25, 28.

⁵¹ *Id.* at 28.

⁵² S. Hrg. No. 109-435, at 42-43 (May 9, 2006), <https://www.congress.gov/109/chrg/shrg27916/CHRG-109shrg27916.htm>.

- a. What was your understanding of the Bush Administration's activities, or of any proposed or hypothetical activities, that prompted you to write your e-mail on September 17, 2001? (If you are concerned that a response might contain classified information, then please consult with the appropriate classification authorities. Please note, as well, that most aspects of the Stellar Wind program have been declassified.)
- b. Did Mr. Yoo respond to your September 17, 2001, e-mail, either by e-mail or by phone? If he responded by e-mail, please produce that e-mail. If he responded by phone, please summarize what he said.
- c. Did you ever read Mr. Yoo's September 17, 2001, memorandum, his October 4, 2001, memorandum, or any drafts thereof? If so, please provide the dates or dates, to the best of your recollection, on which you read any such memoranda.
- d. Did Mr. Yoo ever describe the contents and/or conclusions of any such memoranda to you? If so, please provide the date or dates, to the best of your recollection, on which this occurred. A statement that you were not "read into" the Stellar Wind program is not a complete answer to the above questions.
- e. In light of the e-mail you sent to Mr. Yoo dated September 17, 2001, do you still stand by your statements to this Committee—both in 2006 and last week—about your knowledge of the warrantless-wiretapping program under President Bush?
- f. If you stand by your previous statements, please explain why your exchange with Mr. Yoo concerning "the [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence" does not pertain to the warrantless-wiretapping program carried out under President Bush.

RESPONSE: As I explained at the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office. The email on September 17, 2001, mere days after the attacks, was sent in that context. Further, as I explained at the hearing last week, I testified accurately in 2006 that I did not learn about the secret Terrorist Surveillance Program, or TSP, until I read about it in a *New York Times* article in December 2005. I was not read into that program. As I understand it, the September 17, 2001, email was not referring to the TSP, which did not exist at that time.

29. In *Klayman v. Obama*, you wrote an opinion concurring in your colleagues' decision to deny rehearing en banc of Mr. Klayman's emergency petition, which sought review of a panel's decision to stay the district court's order pending appeal.⁵³ In your opinion

⁵³ *Klayman v. Obama*, 805 F.3d 1148, 1148-1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc).

concurring in the denial of rehearing, you stated that the bulk collection of Americans' telephone records "is entirely consistent with the Fourth Amendment."⁵⁴

Your colleagues' order had already stayed the district's court's partial injunction below, and you agreed that Mr. Klayman's petition should *not* be reheard. Additionally, when you wrote your opinion on November 20, 2015, the program that was the subject of Mr. Klayman's challenge was set to expire in just a matter of days pursuant to the USA FREEDOM Act, Pub. L. No. 114-23 § 109(a).

- a. Given these circumstances, did you find it *necessary* to write a separate opinion defending the constitutionality of this program?

RESPONSE: I answered that question at the hearing.

- b. If writing this opinion was not *necessary*, why did you do it?

RESPONSE: Please see my response to Question 29.a.

30. In your opinion in *Klayman*, you concluded in just one paragraph that, even if the collection of millions of Americans' phone records constituted a "search" for Fourth Amendment purposes, a warrant for such collection would not be required under the so-called "special needs" doctrine. You further stated that "[t]he Government's program for bulk collection of telephony metadata serves a critically important special need—preventing terrorist attacks on the United States." To support this assertion, you cited the entirety of the *9/11 Commission Report*, which is over 500 pages long.⁵⁵

- a. What specific portion of the *9/11 Commission Report* did you rely upon for your assertion that the *bulk* collection of telephony metadata (as distinct the *targeted* collection of telephony metadata) helps to prevent terrorist attacks?

RESPONSE: The point of citing the *Report* was simply to make the obvious point that preventing terrorist attacks on the United States is a critically important goal. Of course, that goal must be balanced against the intrusion on privacy and liberty. As I said at my confirmation hearing, the Supreme Court's recent decision in *Carpenter* is a game-changer with respect to the latter consideration.

- b. If you did not rely on the *9/11 Commission Report* to support that assertion, what other data, reports, and/or statements by government officials or other parties? Please list the data, reports, and/or statements by government officials or other parties on which you relied.

⁵⁴ *Id.* at 1148.

⁵⁵ *Id.* at 1149; see *The 9/11 Commission Report* (2004).

RESPONSE: Please see my response to Question 30.a.

31. You also authored a concurrence in the denial of rehearing en banc in *Al-Bihani v. Obama*.⁵⁶ Your opinion (in the D.C. Circuit's slip opinion format) was 87 pages long. In it, you argued that international law does not constrain the President's wartime detention authority. However, you agreed with your colleagues on the very first page of your opinion that resolving the question of whether international law constrains the President's detention authority was not necessary to decide the case.⁵⁷ Additionally, the government itself argued that "[t]he authority conferred by the [2001 Authorization for Use of Military Force] is informed by the laws of war," and it repeatedly cited principles of international law in its brief.⁵⁸ Given these circumstances, why did you find it appropriate to write this lengthy opinion arguing that international law should play no role in construing the scope of the President's wartime detention authority?

RESPONSE: I wrote the concurrence to address "two fundamental questions" raised by Al-Bihani's argument that international-law principles prohibited his continued detention: "First, are international-law norms automatically part of domestic U.S. law? Second, even if international-law norms are not automatically part of domestic U.S. law, does the 2001 AUMF incorporate international-law principles as judicially enforceable limits on the President's wartime authority under the AUMF?" *Id.* at 9 -10. These questions raised numerous complex issues that required thorough analysis.

32. Please explain whether you believe that your opinions in *Klayman* and *Al-Bihani* are consistent with principles of judicial restraint.

RESPONSE: I do.

33. When we met in my office, I asked if you would be willing to provide a list of topics on which you authored substantive memoranda while serving as Staff Secretary for President Bush. You said you would take this request under consideration. Please provide a list of all subject areas in which you authored memoranda advising the President for or against any:

- a. Proposed legislation;
- b. Proposed constitutional amendment(s);
- c. Proposed White House policy initiative(s); and/or

⁵⁶ 619 F.3d 1, 9-53 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of reh'g en banc).

⁵⁷ *Id.* at 9 ("The premise of Al-Bihani's plea for release is that international-law norms are judicially enforceable limits on the President's war-making authority under the AUMF. Even accepting that premise, Al-Bihani cannot prevail in this case.").

⁵⁸ Brief for Appellees at 22, *Al-Bihani v. Obama*, No. 09-5051, 590 F.3d 866 (filed Sept. 15, 2009); *see id.* at 24-25, 30-31, 40-42.

- d. Proposed policy initiative(s) within the Executive Branch.

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 until May 2006—with the exception of a few covert matters—would have crossed my desk on its way to the President. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of what work I did, my role was not to replace the President's policy or legal advisors, but to make sure that the President had the benefit of the views of his policy and legal advisors.

34. While serving as Staff Secretary, did you ever provide substantive input with respect to:

- a. President Bush's decision to support a constitutional amendment banning same-sex marriage; and/or
- b. Any speeches that President Bush gave about this subject?

If so, please describe the nature of any such input.

RESPONSE: Please see my answer to Question 33.

35. In his State of the Union address in January 2004, delivered while you were Staff Secretary, President Bush suggested he might support a constitutional amendment banning same-sex marriage.⁵⁹

- a. Were you involved in any way in the drafting of President Bush's 2004 State of the Union address? This includes authoring or editing memoranda, authoring or editing any drafts of the address, and any other relevant input.
- b. Were you involved in any way in the drafting of the line above from that address?
- c. Did you voice any objections internally to this statement?

RESPONSE: Please see my answer to Question 33.

36. In February 2004, shortly after he delivered the State of the Union address, President Bush formally declared his support for a constitutional amendment banning same-sex

⁵⁹ *Transcript of State of the Union*, CNN (Jan. 20, 2004), <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.6/index.html> (“If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process.”).

marriage.⁶⁰

- a. Were you involved in any way in the drafting of any part of this speech? This includes authoring or editing memoranda, authoring or editing any drafts of the speech, and any other relevant input.
- b. Did you voice any objections internally to this decision?

RESPONSE: Please see my answer to Question 33.

37. While serving as Staff Secretary, did you ever provide substantive input with respect to:
- a. The 2005 Detainee Treatment Act;⁶¹ and/or
 - b. President Bush's signing statement made in connection with that statute?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors. As discussed at the hearing, I recall internal debate relating to the President's signing statement made in connection with the 2005 Detainee Treatment Act.

38. You were serving as Staff Secretary to President Bush when Hurricane Katrina hit. You have acknowledged traveling with President Bush to New Orleans and the Gulf Coast in the wake of the storm.⁶²
- a. When did you become aware of the disproportionate impact that Hurricane Katrina would have, or had had, on communities of color?
 - b. What was your role as Staff Secretary in support President Bush during the Administration's response to Hurricane Katrina?
 - c. From your vantage point as Staff Secretary, did you think the Bush Administration performed adequately in responding to the impact of Hurricane

⁶⁰ *Transcript of Bush Statement*, CNN (Feb. 24, 2004), <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.transcript> ("Today, I call upon the Congress to promptly pass and to send to the states for ratification an amendment to our Constitution defining and protecting marriage as a union of a man and woman as husband and wife.").

⁶¹ Pub. L. No. 109-148, div. A, tit. X (2005).

⁶² Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTER. INST. 5 (Sept. 18, 2017), <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

Katrina, particularly with regard to communities of color affected by the storm?

- d. Did you urge Bush Administration officials to take any steps to redress the impact of Hurricane Katrina that were not ultimately taken?
- e. Did you oppose or otherwise disagree with any particular measures regarding the Bush Administration's response to Hurricane Katrina?
- f. As the Bush Administration responded to Hurricane Katrina, did you ever advocate for or against any race-conscious remedy?

RESPONSE: Please see my answer to Question 33.

39. In a report authored by the White House Transition Project, you provided detailed descriptions of the role of the Staff Secretary.⁶³ You described the Staff Secretary as responsible for coordinating a rigorous fact-checking process for speeches by the President, and you stated that you would often personally “take questions back to the President for resolution about the wording of specific proposals or decisions.”⁶⁴

On November 7, 2005, as Congress was considering legislation that would ban torture and cruel, inhuman, or degrading treatment of detainees, President Bush gave an address in Panama City in which he stated, “We do not torture.”⁶⁵

Please describe what steps you took in order to fact-check that statement.

RESPONSE: I do not recall what specific steps were taken in connection with the specific address you mention from 13 years ago.

⁶³ See generally Kathryn Dunn Tenpas & Karen Hult, White House Transition Project, *The Office of the Staff Secretary* (Report No. 2017-3), <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-23-Staff-Secretary.pdf>.

⁶⁴ *Id.* at 13.

⁶⁵ Deb Riechmann, *Bush Declares: ‘We Do Not Torture,’* WASH. POST (Nov. 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700521.html>.

**Questions for the Record from Senator Kamala D. Harris
Submitted September 10, 2018
For the Nomination of**

Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States

EXECUTIVE POWER

1. On August 15, 1998, when you were working with then-independent counsel Ken Starr to investigate President Clinton, you wrote a memorandum to your colleagues insisting that the President needed to be held accountable because you believed he had (1) “lied to the American people” and (2) tried to taint the independent counsel’s work with “a sustained propaganda campaign that would make Nixon blush.”¹
 - a. Do you still agree that it is a problem for a President to lie to the American people?
 - b. Do you continue to agree that it is a problem for a President to undermine the work and reputation of an independent counsel or a special counsel?

RESPONSE: To the extent this question pertains to current political events, I stated during the hearing that one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

- c. Do you have any reservations about accepting a nomination from a President who many people believe is untruthful to the public?
 - d. Do you have any reservations about accepting a nomination from a President who has sought to undermine the work and reputation of a special counsel?

RESPONSE: As I stated at the announcement of my nomination and in my testimony before the Committee, I am deeply grateful to President Trump for nominating me, and I appreciate the careful attention that he devoted to the nomination process.

2. Multiple members of this Committee, along with many members of the public, have questioned whether you could impartially decide cases relating to special counsel Mueller’s investigation or other matters that could place President Trump in personal legal jeopardy. These questions derive from the views you have previously expressed on presidential investigations and liability, coupled with the fact that the President was presumably aware of these views when he chose to nominate you at a time when he is the subject of the special counsel’s investigation and faces other legal jeopardy. Are those who harbor such concerns about your impartiality being unreasonable?

RESPONSE: As I stated in the hearing, I am an independent judge, and I would decide all cases according to the Constitution and laws of the United States.

¹ Memorandum from Brett M. Kavanaugh to Judge Starr, *Slack for the President?* (Aug. 15, 1998), available at <https://www.politico.com/f/?id=00000165-5810-d47f-a5f5-5a3c9a020001>.

LGBTQ RIGHTS / ANTI-DISCRIMINATION LAWS

3. Does the Constitution permit a state to pass a law saying stores cannot put a “whites only” sign in their windows?

RESPONSE: The Supreme Court has made clear on numerous occasions that discrimination against African Americans violates the Constitution and laws. The Supreme Court has also made clear that the government has a compelling interest in eradicating racial discrimination.

4. If a store owner does not want to comply with that law and wants to put up a whites only sign, can the store owner say his whites only sign is free speech and so he gets to keep it in his window?

RESPONSE: Please see my response to Question 3.

5. If a store owner claims his religious beliefs do not allow him to serve black customers, can the state still make him take down the whites only sign, or does he have a constitutional right to discriminate against black customers?

RESPONSE: Please see my response to Question 3.

6. What if a state has a law saying a store cannot put up a “heterosexuals only” sign in the window. Could the store owner say the sign is free speech and so he gets to keep it up?

RESPONSE: As I said in the hearing, the Supreme Court made clear in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

7. Under your view of the Constitution, could the store refuse to serve gay and lesbian customers because of the store owner’s religious beliefs?

RESPONSE: Please see my response to Question 6.

8. Does the right to marry include ensuring that those who have that right may exercise it equally?
 - a. So, if a county or state makes it harder for same-sex couples to marry than for heterosexual couples to marry, are those additional hurdles constitutional?

- b. If a county or state makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?

RESPONSE: Please see my response to Question 6.

- 9. In deciding how closely to look at discriminatory laws, there are two things the Supreme Court often considers: (1) is the group being discriminated against defined by immutable characteristics, and (2) has the group faced discrimination in the past. If a group satisfies those two characteristics, the Court has said it should be more suspicious of laws that harm them.

- a. Is being gay or lesbian an immutable characteristic?

RESPONSE: In *Obergefell v. Hodges*, Justice Kennedy noted that “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

- b. Have gay and lesbian Americans been subject to discrimination in the past?

RESPONSE: Yes, as well as in the present.

- c. Is being transgender an immutable characteristic?

RESPONSE: I would want to study that question in more depth before giving a definitive answer.

- d. Have transgender Americans been subject to discrimination in the past?

RESPONSE: Yes, as well as in the present.

- e. Given that LGBTQ Americans have faced discrimination in the past, do you believe they should be protected by federal antidiscrimination laws?

RESPONSE: It is my understanding that this issue is currently the subject of litigation in federal courts. As I discussed at the hearing, and in keeping with the nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

- 10. During your hearing, you stated that “[a]ll roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test” for substantive due process.

- a. How do you square that statement with the Supreme Court’s statement in *Obergefell* that, while *Glucksberg*’s approach “may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy”?
- b. During a speech last year, you stated that “*Glucksberg*’s approach to unenumerated rights was not consistent with the approach of the [Court’s earlier] abortion cases such as *Roe* [and] *Casey*.” Does that remain your view?

RESPONSE: In her 2010 confirmation hearing, Justice Kagan stated that “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” And, in her response to Questions for the Record, Justice Kagan stated that the *Glucksberg* test “would be the starting point for any consideration of a due process liberty claim.”

JUDGE KOZINSKI

11. Have you ever recommended any individual to clerk for Judge Kozinski? If so, how many individuals have you recommended and at what times did you make those recommendations?

RESPONSE: In my capacity as a law professor, it is possible that I talked to students who had applied or were interested in applying to clerk for Judge Kozinski and assisted them.

12. In the fall of 2017, at least 15 women came forward to accuse Judge Kozinski of sexual harassment and other workplace misconduct.² You clerked for Judge Kozinski. You worked with him for years on Justice Kennedy’s law clerk hiring process. You worked with him for several years on a book about judicial precedent. And in 2006, you even chose to have him introduce you at your D.C. Circuit confirmation hearing. Yet you said in our one-on-one meeting and again in your testimony before this Committee that you were “surprised to the point of shock” and felt “gut-punched” when you learned about the fall 2017 allegations against him.

² Matt Zapotosky, *Prominent appeals court Judge Alex Kozinski accused of sexual misconduct*, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.7d32190767bd; Matt Zapotosky, *Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them*, Wash. Post (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.0113cd27f8c9.

- a. One of the charges against Judge Kozinski was that he showed pornography to his law clerks.
 - i. Has Judge Kozinski ever shared pornography with you? If so, on what occasion(s) did he do so?

RESPONSE: No.

- ii. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski sharing pornography with friends, colleagues, or law clerks?

RESPONSE: I believe that I first became aware of these allegations when they became public and led to the 2008 – 2009 judicial misconduct investigation. I was unaware of any allegation that Judge Kozinski shared pornography with law clerks until I read the story in the news in late 2017.

- iii. Are you aware that in 2008, sexually explicit images that Judge Kozinski had maintained on a private server and shared with friends were inadvertently made public, resulting in a judicial misconduct investigation?³ If so, when did you become aware?

RESPONSE: I believe that I first became aware of this website when news of the website broke publicly in news outlets, which led to the 2008 – 2009 judicial misconduct investigation.

- b. One of the charges against Judge Kozinski was that he made inappropriate sexual comments to his law clerks.
 - i. Has Judge Kozinski ever made comments about sexual matters to you, either in jest or otherwise? If so, on what occasion(s) did he do so?

RESPONSE: I do not remember any such comments.

- ii. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski making inappropriate sexual comments to his law clerks?

RESPONSE: No.

- iii. Are you aware of a 2008 L.A. Times story reporting that Judge Kozinski had made inappropriate sexual comments to friends and associates, including his law clerks, over an e-mail listserv?⁴ If so, when did you become aware of the reports?

³ Scott Glover, *9th Circuit's chief judge posted sexually explicit matter on his website*, L.A. Times (June 11, 2008), <http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html>.

⁴ Scott Glover, *Judge e-mailed jokes to 'gag list'*, L.A. Times (Dec. 8, 2008), <http://articles.latimes.com/2008/dec/08/local/me-gaglist8>.

RESPONSE: I believe that I first became aware of this website when news of the website broke publically in news outlets, which led to the 2008 – 2009 judicial misconduct investigation.

- c. One of the charges against Judge Kozinski was that he inappropriately kissed, touched, or fondled female law clerks and colleagues.
 - i. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski inappropriately kissing, touching, or fondling anyone?

RESPONSE: No.

- ii. Prior to the fall of 2017, had you ever seen video—which has long been available on YouTube—of Alex Kozinski’s appearance on the game show, *The Dating Game*?⁵

RESPONSE: I believe that I have seen that video.

- iii. In the game show appearance, he forcibly kisses a woman on the mouth without her consent. Was that appropriate?

RESPONSE: I do not think that it was appropriate.

- d. The Judicial Council investigation into Judge Kozinski’s alleged misconduct was terminated when Judge Kozinski announced his resignation from the bench. Do you believe that the allegations against Judge Kozinski should be fully investigated by the federal government?

RESPONSE: That is an issue for the Judicial Conference and others to decide. Those bodies have the authority and responsibility for making such decisions.

LEON HOLMES’ NOMINATION

- 13. Publicly available information indicates that, while you worked in the White House Counsel’s Office, you were involved with the nomination of J. Leon Holmes. He was subsequently confirmed by a 51-46 vote of the U.S. Senate, and he now serves as a Senior United States District Judge of the United States District Court for the District of Arkansas. Holmes was a divisive nominee. Among other things, while Holmes’s nomination was pending, the press reported that Holmes had compared the abortion rights movement to the Nazis, writing: “The pro-abortionists counsel us to respond to [societal] problems by abandoning what little morality our society still recognizes. ... This was attempted by one highly sophisticated, historically Christian nation in our century—Nazi Germany.”⁶ While his nomination was pending, it also came to light that

⁵ Kozinski on the Dating Game (and Squiggy, too!), YouTube (posted Nov. 2, 2006), <https://www.youtube.com/watch?v=OdjCdbGucCU>.

⁶ Jennifer 8. Lee, *Attack on Judicial Nominee Leads Panel to Delay Vote*, N.Y. Times (Apr. 11, 2003), <https://www.nytimes.com/2003/04/11/us/attack-on-judicial-nominee-leads-panel-to-delay-vote.html>.

he had previously made a false and highly problematic statement about rape, saying: “Concern for rape victims is a red herring, because conceptions from rape occur with the same frequency as snow in Miami.” On April 11, 2003, you received an email forwarding an article describing Holmes’s statement about rape. The email flagged that Senator Pryor had said he would still vote to confirm Holmes, to which you responded “excellent.”

- a. While Holmes’s nomination was pending, were you aware of his statement comparing pro-choice advocates to Nazis?

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nomination was divided among eight associate counsels in the White House Counsel’s Office. Each associate counsel was responsible for district court nominations from certain states. Judge Holmes’s nomination was not one of the nominations I was primarily assigned during my service in the White House Counsel’s Office. Nonetheless, and as I noted in responses to questions for the record in 2004, “[i]t is fair to say that all of the attorneys in the White House Counsel’s office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President’s judicial nominations.”

While I do not have specific recollection of all of the circumstances surrounding Judge Holmes’s nomination, I believe I was aware of his prior comments at some point during the pendency of his nomination.

- b. Can rape lead to pregnancy?

RESPONSE: Yes.

- c. While working in the White House, did you ever recommend that Holmes’s nomination be withdrawn?
 - i. If yes, why?
 - ii. If no, did you have any concerns about pressing forward with Holmes’s nomination after you became aware of his false and offensive statement about rape? Did you convey those concerns to anyone in the White House? Did you have any concerns about pressing forward with Holmes’s nomination after you became aware of his statement about pro-choice advocates? Did you convey those concerns to anyone in the White House?

RESPONSE: See my response to Question 13.a above.

DISABILITY RIGHTS

- 14. Senator Duckworth recently wrote an op-ed about how thankful she is that the Americans with Disabilities Act is in place to safeguard the basic rights she relies on to lead a full

life. During your confirmation hearing, you agreed with Chief Justice Roberts that you had no basis for viewing Section 2 of the Voting Rights Act as constitutionally suspect. Do you have any basis for questioning the constitutionality of the Americans with Disabilities Act?

RESPONSE: I have no basis for questioning the constitutional validity of the Americans with Disabilities Act.

15. In *Tarlow v. District of Columbia*, three adult women with intellectual disabilities who received medical services from the District of Columbia brought suit alleging that the District illegally authorized elective medical procedures to be performed on them in violation of their procedural and substantive due process rights guaranteed by the Fifth Amendment. The District, without considering the women’s wishes, forced two of them to have their pregnancies involuntarily aborted, and the third to undergo eye surgery. You ruled that consideration of the wishes of patients who are not and “have never had the mental capacity to make medical decisions for themselves” is not required by due process. In *Buck v. Bell* (1927), the Supreme Court upheld a statute permitting compulsory sterilization of a woman believed to have an intellectual disability—rather than “waiting to execute degenerate offspring for crime,” the Court said, “society can prevent those who are manifestly unfit from continuing their kind.”

a. Is *Buck* still good law?

b. Was *Buck* correctly decided? On what basis?

RESPONSE: As I said during the confirmation hearing, *Buck v. Bell* is a disgrace.

16. Just last year, the Supreme Court issued a unanimous opinion in *Endrew F. v. Douglas County School District*, a case about what kind of “educational benefits” the Individuals with Disabilities Education Act (IDEA) requires public schools to provide to students with disabilities. The Court settled the issue by rejecting the Tenth Circuit’s rule (previously applied by Justice Gorsuch) that schools need only provide barely more than *de minimis* benefits, and holding instead that, “[t]o meet its substantive obligation under the IDEA, a school must offer an individualized education program (IEP)] reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court emphasized that schools must provide an IEP that is “appropriately ambitious in the light of” the student’s circumstances, and that while “[t]he goals may differ, . . . every child should have the chance to meet challenging objectives.”

a. Do you believe this decision was a proper application of prior Supreme Court precedent on the Individuals with Disabilities Education Act?

b. Do you believe that schools must proactively provide every child with a disability an IEP that rejects the “merely more than *de minimis*” standard and offer every

child the chance to meet challenging state academic objectives?

- c. In your view, should the Supreme Court have gone further and adopted the standard urged by Andrew's parents (i.e., one that would provide a child with a disability "opportunities to achieve academic success ... substantially equal to the opportunities afforded children without disabilities")?

RESPONSE: *Endrew F.* is a precedent of the Supreme Court entitled to respect under the law of precedent. Because the scope of that precedent is the subject of pending litigation that could come before me, I cannot provide a view on the additional questions asked above.

REPRODUCTIVE RIGHTS

17. You have given speeches that praise Chief Justice Rehnquist and Justice Scalia and comment favorably on their dissenting opinions in *Roe v. Wade* and *Planned Parenthood v. Casey*. Have you given a speech or published a writing that praises the majority in *Roe*, the controlling opinion in *Casey*, or the opinions of Justices Stevens or Blackmun in *Casey*? If yes, please provide the relevant passage(s).

RESPONSE: As we discussed at the hearing, both of the cases are precedents of the Supreme Court entitled to respect under the law of precedent, which is rooted in Article III. Importantly, *Roe* has been reaffirmed many times over the past 45 years, including in *Casey*, which specifically analyzed the *stare decisis* factors at great length and is itself a precedent on precedent. And lastly, I also praised Justice Kennedy at the hearing, calling him a "hero."

SPECIAL COUNSEL DISCUSSIONS

18. Between your work for independent counsel Ken Starr and your own research and writing, you have a wealth of knowledge about presidential investigations and related subjects. This is a time when your expertise is especially relevant and perhaps sought after.

- a. Have you had any contact with Robert Mueller or any members of his special counsel team—including through an intermediary—since March 1, 2017? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: Not to my knowledge. I may have seen or said hello to members of his team when passing them in the courthouse. I have had no inappropriate discussions.

- b. Since November 8, 2016, have you communicated with Attorney General Sessions, Deputy Attorney General Rosenstein, or anyone else in the U.S. Department of Justice—including through an intermediary—about Robert Mueller's investigation, special counsel investigations generally, recusals, or any other matters related to President Trump or the 2016 election? If yes, please

describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: To the best of my knowledge and recollection, I have not had inappropriate communications with the people identified on the subjects referenced in your question.

- c. Since November 8, 2016, have you communicated with anyone who represents or advises (or has represented or advised) President Trump or the White House—including through an intermediary—about Robert Mueller’s investigation; about any other investigations or legal matters that may implicate President Trump personally; or about presidential investigations, liability, or pardons generally? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: To the best of my knowledge and recollection, I have not had inappropriate communications with the people identified on the subjects referenced in your question.

NOMINATION PROCESS

- 19. Has President Trump, Don McGahn, or anyone else involved in the decision to nominate you, communicated with you about any of the following subjects since November 8, 2016:

- a. Your views on government regulation and administrative law?

RESPONSE: Consistent with the practice of past nominees, I prepared for this this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. In preparation for the hearing and for meetings with individual Senators, I was asked questions similar to those posed by Senators in both settings. I have given no previews or hints on particular cases, and I have made no commitments on particular cases.

- b. Robert Mueller and his investigation, any other investigations related to the President, or any other legal matters that may implicate the President personally?

RESPONSE: Please see my answer to Question 19.a.

- c. The President’s pardon power?

RESPONSE: Please see my answer to Question 19.a.

- d. Recusals?

RESPONSE: Please see my answer to Question 19.a.

- e. For all subjects where your answer is yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: Please see my answer to Question 19.a.

20. On how many occasions have you and President Trump communicated with one another? (Note: This question encompasses communications in any form and at any time, including prior to his election and up to the present.) Please describe the nature of the contact, including the timing and substance of the communications.

RESPONSE: As discussed in my Senate Judiciary Committee Questionnaire, I interviewed with President Trump on Monday, July 2. I spoke to President Trump by phone on the morning of Sunday, July 8. On the evening of Sunday, July 8, I met with President Trump and Mrs. Trump at the White House. I also met and talked with the President on July 9 when he announced his intent to nominate me to the Supreme Court. Since my nomination, he has called me two times to offer words of encouragement. At no time did he ask for any promise or representation as to how I would rule in any case, and at no time did I offer any commitments.

21. Has anyone offered you advice or assistance in responding to the Questions for the Record? If yes, please identify all such individuals by name and affiliation.

RESPONSE: I drafted answers to these questions in conjunction with members of the Office of Legal Policy at the U.S. Department of Justice, others at the Department of Justice, the White House Counsel's Office, and my former clerks. My answers to each question are my own.

DIVERSITY

22. As a practical matter, do you believe that educational institutions are likely to be able to achieve meaningful racial diversity without recognizing and taking account of race?

RESPONSE: The extent to which educational institutions can take into account race and racial diversity is the subject of ongoing litigation in the courts. As I explained during the hearing, principles of judicial independence prevent me from providing hints, forecasts, or previews on issues that may come before me.

VOTING RIGHTS

23. More than fifty years ago (in *Reynolds v. Sims*), the Supreme Court wrote: "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Do you agree?

RESPONSE: As I wrote in my unanimous opinion for the court in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), "[t]he Voting Rights Act of 1965 is among the most

significant and effective pieces of legislation in American history.” I noted that the Act’s “simple and direct legal prohibition of racial discrimination in voting laws and practices has dramatically improved the Nation, and brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments.”

24. The Supreme Court has long held that Section 2 of the Voting Rights Act, as amended in 1982, prohibits states from drawing voting districts that dilute the votes of minorities. Do you accept that interpretation of Section 2 as a matter of statutory *stare decisis*?

RESPONSE: As I explained at the hearing, principles of judicial independence make it inappropriate for me to give, as Justice Kagan described it at her confirmation hearing, a thumbs up or thumbs down on particular opinions. That said, I explained at the hearing that “the judicial power clause of Article III” and “Federalist 78” make clear that respect for precedent is not mere policy, but rather “part of the proper mode of constitutional interpretation.” If confirmed, I would respect the rules of *stare decisis* given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

25. At your confirmation hearing, Senator Klobuchar asked you whether you believe there is evidence of voter fraud. You refused to answer her question, saying you would only want to answer it based on the record in a particular case. You have previously presided over a case involving the constitutionality of South Carolina’s voter ID law, which was purportedly enacted based on concerns about voter fraud. Based on your experience as a judge, how prevalent is voter fraud?

RESPONSE: Judges are constrained by Article III to decide only cases or controversies. As I explained to Senator Klobuchar, I would want to see a record before me of the facts, circumstances, and evidence relating to any particular law or locality before issuing judgment. I discussed at the hearing how process protects us; having the briefs, the arguments of the parties, the record and appendices, and the deliberative process are essential elements of judicial impartiality.

26. As you know, states that have enacted voter-ID laws have argued that the laws are appropriate because they help combat voter fraud. We have seen sensationalized assertions, including from the President, suggesting that voter fraud is rampant, to the point that elections are being “rigged.” The President has claimed that he won the popular vote for the presidency if you deduct the “millions of people who voted illegally.” The claim is not supported by any verifiable facts. Rather, independent analyses by the non-partisan Brennan Center, leading scholars, and other credible sources have found virtually no confirmed cases of voter fraud in the 2016 election, let alone millions of them. More broadly, every credible study of the issue indicates that voter fraud—and particularly the sort of in-person voter impersonation fraud that photo-ID laws purport to address—is incredibly rare. By one count, between 2000-2014, there were just 31 credible instances of impersonation fraud nationwide out of more than a billion ballots cast. In fact, the President’s claims of massive fraud were contradicted by his own legal team, which argued in response to a recount request filed by Green Party

Candidate Jill Stein: “On what basis does Stein seek to disenfranchise Michigan citizens? None really, save for speculation. All available evidence suggests that the 2016 general election was *not* tainted by fraud or mistake.”

- a. Are you aware of any credible evidence indicating that “millions of people” voted illegally in 2016?

RESPONSE: As I stated during the hearing, principles of judicial independence compel me, as a sitting judge and nominee, to refrain from commenting on current events and political controversies.

- b. Is it appropriate for the President of the United States to make unsubstantiated, false allegations about the integrity of our electoral system?

RESPONSE: Please see my response to Question 26.a.

EDUCATION

27. Are charter schools fundamentally public schools that must uphold all federal education and civil rights laws as well as state sunshine laws? Please provide a YES/NO response followed by an explanation.

RESPONSE: It is my understanding that this issue is currently the subject of litigation in federal courts. As I discussed at the hearing, and in keeping with the nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case/issue.

ACCESS TO JUSTICE

28. Do you believe there is a “justice gap” that results in low income Americans having a lack of access to justice?

RESPONSE: Ensuring that all Americans have equal access to justice is an important public policy goal. Although such policy goals are generally the purview of the elected branches of government, the Judiciary should do all that is appropriate to ensure that the words written on the façade of the Supreme Court—“Equal Justice Under Law”—are fulfilled. As a judge, I have always tried to ensure that my decisions are based on the law and the facts, and that I “do equal right to the poor and to the rich.”

29. What have you done in your career as a judge and as an attorney to help reduce this “justice gap”?

RESPONSE: As a lawyer in private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez’s American relatives.

Although I have spent the majority of my career in public service in a variety of capacities—many of which (including particularly my service on the D.C. Circuit) have limited my opportunities to engage in traditional pro bono legal work—I have sought, and will continue to seek, other avenues by which I can live up to the professional obligation of an attorney to help the less fortunate.

30. Have you ever represented or litigated a case on behalf of indigent clients? If so, please describe the circumstances of the case and client.

RESPONSE: As a lawyer in private practice, I represented several clients pro bono, without regard to their ability to pay, although I do not know that any of them ever qualified as indigent.

Specifically, I represented Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland before Judge Andre Davis. The district court decided the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County’s zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county’s special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the county. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

I represented the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for a stay in the Supreme Court of the United States, and petition for a writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing en banc, stay application, and petition for a writ of certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS’s decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference that should be accorded to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit’s subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS’s contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing en banc, arguing, in essence, that the court’s original decision granting an

injunction pending appeal had analyzed the issues correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

In 2000, I briefly represented a pro bono criminal defendant on appeal to the Fourth Circuit. The defendant had been convicted of conspiracy to harbor an alien and harboring an alien. I filed an appearance in the Fourth Circuit on behalf of the defendant but withdrew from the case before any briefs were filed. I withdrew because I had taken a new job at the White House in January 2001.

31. Many employers require their workers to give up the right to file lawsuits against their employer in court, as a condition of their getting the job. These kinds of agreements are known as forced arbitration clauses. More than 60 million American workers are bound by these kinds of agreements. Unlike a court proceeding, arbitration is hidden from public scrutiny and usually cannot be reviewed by a court. This means that arbitration keeps the public from learning about employers who violate the law by discriminating against workers, sexually harassing them, or cheating them out of wages. Do you have any concerns that the existence of such arbitration clauses may deny individuals access to the courts to enforce their rights under employment laws?

RESPONSE: Issues regarding arbitration clauses are frequently litigated before the Supreme Court. As I discussed at the confirmation hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on such issues.

QUALIFIED IMMUNITY

32. What is the basis for the qualified immunity doctrine? Is it statutorily or constitutionally based?

RESPONSE: It has been described as statutory, meaning that Congress could alter it. The qualified immunity doctrine is a legal issue that is currently the subject of litigation and may come before me. As I explained during the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

33. What is the common law basis for the doctrine, if any?

RESPONSE: Please see my response to Question 32.

34. Would you agree that it is a judicially created doctrine?

RESPONSE: Please see my response to Question 32.

35. Do you have any concerns that the current state of the qualified immunity doctrine may be improperly barring too many plaintiffs from presenting their cases to a jury of their peers?

RESPONSE: Please see my response to Question 32.

36. Have you reviewed any studies or academic literature on the qualified immunity doctrine to determine whether the doctrine may be improperly barring too many plaintiffs from presenting their cases to a jury of their peers? If so, please indicate the studies or academic literature and provide a brief description.

RESPONSE: Yes. Also, please see my response to Question 32.

37. Do you have any concerns that the qualified immunity doctrine over-insulates state actors from consequences of unconstitutional conduct and therefore incentivizes further unconstitutional conduct? Is that a concern that a Supreme Court justice should take into consideration?

RESPONSE: Please see my response to Question 32.

38. According to a law review article by Will Baude, the Supreme Court rules more often for police officers in cases where they assert qualified immunity than for plaintiffs asserting constitutional violations? *See* Will Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 82–83 (2018). The article states that “nearly all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials.” Baude notes that of the thirty cases applying the standard since it was fully articulated in 1982, only two of them ruled for the plaintiffs. Based on your experience as a judge, what do you believe drives this disparity?

RESPONSE: Please see my response to Question 32.

39. Does the Court have a role in addressing issues of police brutality? If so, what is that role?

RESPONSE: No one should be subjected to police brutality. As a judge, I have twice reversed jury verdicts in cases where the jury had ruled for police officers where an officer killed someone. As a starting point, the role of the Court is to adhere to the judicial oath we all take to administer justice without respect to persons, do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all the duties incumbent upon judges under the Constitution and the laws of the United States.

TEXAS v. JOHNSON

40. At the hearing, you spoke with Senator Cruz about how important our First Amendment is. And you repeatedly lauded Justice Kennedy's opinion in *Texas v. Johnson*, calling it "one of his greatest opinions." In *Johnson*, which held Americans have a right to burn the flag under the First Amendment, Kennedy wrote "[i]t is poignant but fundamental that the flag protects those who hold it in contempt." Do you agree with Justice Kennedy?

RESPONSE: As I explained at the hearing, Justice Kennedy's opinion in *Texas v. Johnson* is a powerful example of judicial independence. He explained that, for judges, "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." 491 U.S. 397, 420–21 (1989). As to the specific legal issue resolved in *Texas v. Johnson*, that decision is a precedent of the Supreme Court entitled to the respect due under the law of precedent.

41. For a third straight season, NFL players have been demonstrating during the national anthem, kneeling in protest over police brutality and other forms of institutional racism. Do you believe that the First Amendment prevents Congress from passing a law requiring athletes to stand during the national anthem?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain on commenting on current events and political controversies. It would likewise be improper for me as a sitting judge and a nominee to comment on cases or issues that could potentially come before me. Accordingly, I cannot provide my views on this issue.

42. In 1940, the Supreme Court in *Gobitis* upheld a Pennsylvania law requiring school children to stand and salute the flag at school. Three years later, in *West Virginia v. Barnette*, the Court overruled *Gobitis*—holding that people in the United States have a First Amendment right to refrain from saluting the flag. Justice Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

President Trump said about the NFL players' peaceful protest "You have to stand proudly for the national anthem or you shouldn't be playing, you shouldn't be there, maybe you shouldn't be in the country." Do you think it is appropriate for the President to suggest an American citizen should be deported because he or she chose to speak out about racial injustice in our country? Can an American citizen be deported because he or she spoke out about racial injustice?

RESPONSE: Please see my response to Question 41.

ENVIRONMENT

43. In 2017, you dissented from the denial of rehearing en banc in *U.S. Telecom Association v. Federal Communications Commission*, a case about the FCC's net neutrality rule. A

three-judge panel of your court had upheld the rule. You contended that the panel's decision was wrong, and you unsuccessfully sought to have its ruling reconsidered by the entire D.C. Circuit.

- a. You first argued that the net neutrality rule was a so-called “major rule,” and that agencies cannot adopt major rules without clear statutory authorization. What is your understanding of the “major rules” or “major questions” doctrine?

RESPONSE: As I discussed during the hearing, the major rules doctrine, or major questions doctrine, is rooted in Supreme Court precedent. The “godfather” of the major rules doctrine is Justice Breyer, who wrote about it in the 1980s as a way to apply *Chevron*. The Supreme Court adopted the doctrine in *FDA v. Brown & Williamson Tobacco Corp.* and applied it in *Utility Air Regulatory Group v. EPA* (“*UARG*”). *UARG* indicates that Congress may delegate various matters to the executive agencies to create rules, but on major questions of major economic or social significance, the Court expects Congress to speak clearly before such a delegation.

- b. As a practical matter, the “major questions” doctrine shifts power from administrative agencies to courts. It means that the court does not give the agency any flexibility to construe ambiguous statutes, which can make it impossible for agencies to regulate effectively in an effort to advance statutory goals. Do you acknowledge that the scope—and even the existence of—this doctrine is a matter of controversy among jurists?

RESPONSE: As I explained in my opinion in *United States Telecom Association v. FCC*, “[t]he key reason for the doctrine . . . is the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those major policies Because a major policy change should be made by the most democratically accountable process—Article I, Section 7 legislation—this kind of continuity is consistent with democratic values.” 855 F.3d 381, 422 (D.C. Cir. 2017).

- c. Given your position in *U.S. Telecom*, is it fair to say that you have a more expansive view of the “major questions” doctrine than many of your colleagues? If not, why not? Please provide evidence.

RESPONSE: In my opinion in *United States Telecom Association*, I explained at length the history and purpose of the major rules doctrine, and its validity pursuant to Supreme Court precedent and supported by legal scholarship. See *United States Telecom Association*, 855 F.3d at 418–422.

- d. Since the New Deal, the Supreme Court has given Congress significant leeway to delegate regulatory decisions to expert agencies. Would you agree that your views of the “major questions” doctrine would make it a lot more difficult for agencies to take action and issue regulations?

RESPONSE: As I said in my response to Question 43.c and explained at length in my opinion in *United States Telecom Association*, my view of the major rules doctrine is rooted in Supreme

Court precedent and supported by legal scholarship. *See United States Telecom Association*, 855 F.3d at 418–422.

44. You also asserted in *U.S. Telecom* that net neutrality violates the First Amendment rights of internet service providers by preventing them from exercising editorial control over the content that passes through their networks. Commentators have described your position as one that embraces a very broad and activist conception of corporate speech rights.

- a. Do you believe it is within a judge’s role to take an issue like net neutrality out of the political process? Is this not an economic policy matter that is primarily the domain of the political branches, not courts?

RESPONSE: As I said at the hearing, I applied Supreme Court precedent in my opinion in *United States Telecom Association v. FCC*. As I explained in that case, “[t]he Supreme Court’s landmark decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, (1994), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner Broadcasting II*), established that those foundational First Amendment principles apply to editors and speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment.” 855 F.3d 381, 427 (D.C. Cir. 2017). As I explained in my opinion, I believed that the regulation of internet service providers was subject to First Amendment limitations for the same reasons that the Supreme Court concluded that regulation of cable operators was subject to First Amendment limitations in the *Turner Broadcasting* cases.

- b. Given that you have already staked out such a clear position on the unconstitutionality of net neutrality, will you commit to recusing yourself from a case if the Supreme Court were to consider a future First Amendment challenge to net neutrality?

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me, including a possible recusal. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on a potential recusal.

SECOND AMENDMENT

45. In your *Heller II* dissent, you argued that judges must ignore public safety in evaluating gun safety laws under the Second Amendment.

- a. Does your position prioritize the rights of gun owners and gun carriers over the rights of the millions of Americans who live under constant threat of gun violence, including in schools, churches, and in the line of duty?

RESPONSE: I wrote in *Heller II* that “D.C.’s public safety motivation in enacting these laws is worthy of great respect.” 670 F.3d 1244, 1271 (D.C. Cir. 2011). I concluded that binding Supreme Court precedent did not allow the District of Columbia to enforce its ban on semi-automatic rifles or its handgun-registration program. Regardless, your question asks me to weigh in on a political or policy question. As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain on commenting on current events and political controversies. To do so would lead the people to view judges as politicians instead of fair and impartial arbiters of the law.

- b. Can a judge ever consider the public safety justifications animating a gun safety law when evaluating the law’s constitutionality? If so, when?

RESPONSE: Please see my response to Question 45.a.

- c. Are judges ever permitted to consider the public safety justifications underlying other public safety laws when evaluating their constitutionality? If so, when?

RESPONSE: Please see my response to Question 45.a. Additionally, these questions asks me to present my views on cases that may come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on such issues. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

DISSENTS

- 46. You have the highest dissent rate on your circuit, and one of the highest dissent rates in the federal judiciary. During your tenure on the D.C. Circuit, you have dissented about sixty times. Over the same period, Chief Judge Garland, who is widely regarded as a model of judicial restraint and moderation, has dissented only six times. In other words, your colleagues think you reach the wrong result about ten times as often as Judge Garland. Given that cases and panels on the D.C. Circuit are basically assigned at random, what do you think accounts for this stark disparity?

RESPONSE: I cannot speculate about what causes different judges to write or join dissents at different rates. As I said in the confirmation hearing, Chief Judge Garland is a careful, hardworking, and great judge, and he and I have found common ground in the vast majority of cases.

- 47. You have dissented, for example, in ten cases involving labor and employment issues. And in all ten of those cases, you would have ruled against workers or labor, splitting with the majority of your colleagues, who ruled the other way. Can you identify

any instance in which your colleagues ruled against workers or labor and you wrote a dissent concluding that the position taken by workers or labor should prevail?

RESPONSE: As I explained at the hearing, I have tried as a judge always to rule for the party who has the best argument on the merits. That has included workers in some cases, businesses in others; coal miners in some cases, environmentalists in others; unions in some cases, the employer in others; criminal defendants in some cases, the prosecution in others. And I have a long line of labor cases ruling for the employees. *See, e.g., Veritas Health Services, Inc. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012); *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183 (D.C. Cir. 2008); *United Food & Commercial Workers, AFL-CIO v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008); *E.I. du Pont de Nemours v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007); *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016).

48. You have dissented in ten cases involving environmental issues, and in all ten of those cases, you would have rejected the position favored by environmental groups, splitting with the majority of your colleagues, who took the pro-environmental position. Can you identify *any* instance in which your colleagues ruled against environmental interests and you wrote a dissent concluding that the environmentalists should prevail?

RESPONSE: As I explained at the hearing, I have ruled for environmental interests in some cases, and I have rule against environmental interests in other cases. In each case, I have followed the law.

49. Four more of your dissents involved issues relating to consumer protection. And again, in all four, you chose industry over consumers, splitting from the majority of your colleagues, who would have gone the other way. Can you identify *any* instance in which your colleagues ruled against consumer protection and you wrote a dissent endorsing the pro-consumer, anti-industry view?

RESPONSE: As I discussed at the hearing, I am an independent and pro-law judge. As a judge, I have ruled for the party who has the best argument on the merits regardless of whether some would characterize my view as pro-consumer or anti-industry. *See, e.g., Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016); *Utility Air Regulatory Group v. EPA*, 744 F.3d 741 (D.C. Cir. 2014).

50. Ten of your dissents involved criminal law and procedure. And in nine of them, you would have ruled for the government or against the defendant, splitting from the majority of your colleagues, who would have gone the other way. The only exception was a case in which your pro-defendant position also happened to be the pro-gun position. Can you identify *any* other instance where your colleagues ruled for the government or against the defendant and you wrote a dissent concluding the defendant should prevail?

RESPONSE: With respect, that is not a fair way to describe my opinions. I point you to the testimony of Federal Public Defender AJ Kramer. I have written numerous opinions ruling in favor of criminal defendants on issues unrelated to firearms—and in a number of those cases, my colleagues would have ruled in favor of the government. *See, e.g., United States v. Nwoye*,

824 F.3d 1129 (D.C. Cir. 2016); *United States v. Williams*, 836 F.3d 1, 19 (D.C. Cir. 2016) (Kavanaugh, J., concurring); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011); *Valdes v. United States*, 475 F.3d 1319, 1330 (D.C. Cir. 2007) (en banc) (Kavanaugh, J., concurring). My opinion in *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) is also relevant to your question. In *Jones*, I wrote a dissent stating that the D.C. Circuit should grant rehearing to consider “the defendant’s alternative submission” that the installation of a GPS device on his vehicle by police constituted a physical encroachment that would be considered a search under Fourth Amendment precedent. *Id.* at 770. I observed that “[o]ne circuit judge has concluded that the Fourth Amendment does apply to installation of a GPS device.” *Id.* at 771. I also stated that “[w]ithout full briefing and argument, I do not yet know whether I agree with that conclusion.” *Id.* The Supreme Court subsequently granted certiorari to review the case. The defendant’s brief in the Supreme Court repeatedly cited my opinion, and the Court’s majority opinion ultimately adopted reasoning similar to the argument that I discussed in my dissent. See *United States v. Jones*, 565 U.S. 400 (2012).

STARE DECISIS

51. When you describe a decision of the Supreme Court as “precedent,” “important precedent,” or “precedent on precedent,” are you making a commitment not to overrule that decision?

RESPONSE: As discussed at the hearing, “the judicial power clause of Article III” and “Federalist 78” make clear that respect for precedent is “part of the proper mode of constitutional interpretation.” If confirmed, I would commit to respecting the rules of stare decisis given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

52. Justice Thomas testified at his Supreme Court confirmation hearing about the importance of stare decisis, stating, among other things: “There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decisionmaking, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case [incorrect], but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case.” Once on the Supreme Court, however, Justice Thomas has repeatedly suggested—in opinions and in public fora—that a constitutional precedent should be overruled when it is wrong, without giving stare decisis any weight. Which of these two competing approaches do you intend to adopt, if you are confirmed to the Supreme Court?

RESPONSE: Please see my response to Question 51.

ADMINISTRATIVE AGENCIES

53. The Supreme Court has long held that courts should defer to reasonable agency interpretations of ambiguous statutory provisions. You seem skeptical of that doctrine (the *Chevron* doctrine). For instance, you have said that you prefer not to acknowledge

that a statute is ambiguous even when the proper interpretation is a close question. You once suggested that, if you find a statute “60/40 clear,” you regard it as unambiguous. Why not leave those close calls to the expert agencies that have been tasked by Congress with implementing the particular statutes at issue?

RESPONSE: As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

54. In a speech last year, you also said that when evaluating an agency rule, a judge should determine what the “best reading” of the underlying statute is—rather than determining whether the statute is ambiguous and deferring to the agency under *Chevron*.

- a. What prevents a judge from imposing his or her own policy preferences in determining the “best reading” of an ambiguous statute?

RESPONSE: As the Court explained in *Chevron*, the “judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In reading a statute, a court must employ “traditional tools of statutory construction,” not a judge’s own policy preferences. *Id.*

- b. Why should the judge’s view of what is “best” be preferable to the view of the agency charged by Congress with implementing the statute?

RESPONSE: Please see my response to Question 54.a.

OTHER

55. In the period since you began your service on the U.S. Court of Appeals for the D.C. Circuit until the present, has any person, organization, corporation, or institution made any gift, loan, promise, or commitment of any kind (financial or otherwise) to you, to your spouse, or to your children in relation to the reduction or elimination of any debt owed by you or by your spouse or your children, including but not limited to credit card debt?

RESPONSE: Please see my response to Senator Whitehouse’s Question 11.