

Nomination of James Ho to the Fifth Circuit
Questions for the Record
November 22, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. At your nomination hearing, Senators Durbin and Whitehouse both asked you questions about a memo you had written during your time in the Justice Department's Office of Legal Counsel (OLC). Your memo, entitled *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War*, was cited in one of the three "torture memos" signed by then-head of OLC Jay Bybee. I have written to the Department of Justice asking them to waive any privilege over this memo and disclose it to the Committee. It is critically important that the Committee understands your work on the torture memos and on detainee-related matters more generally.

- a. **Did you work on, advise on, review, or otherwise participate in any way on any of the "torture memos"? If so, what was your role?**

No.

- b. **At the time you wrote your memo, did you know it was going to be cited by Assistant Attorney General Bybee in his memo, which concluded that the statutory prohibition on torture only prohibited physical pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"?**

No.

- c. **As noted above, your memo was titled *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War*. What did your memo conclude?**

It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States.

That said, I am authorized to report that, as the most junior attorney in the Office of Legal Counsel, I typically engaged in legal research for the Deputy Assistant Attorneys General. As a career line attorney and member of the professional staff of the Justice Department, and not a political appointee, I did not have the power or authority to reach any legal conclusion on behalf of the office. (At the time this particular memo was written, I would have been out of law school for just over two years.)

- d. **Did your memo address whether any particular "enhanced interrogation technique" constituted torture?**

It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States.

That said, I am authorized to report that, to the best of my recollection, I had no involvement in analyzing the legality of any proposed method of enhanced interrogation.

e. When did you first learn of the “torture memos”?

When the press reported on them in 2004. (I left the Justice Department in early 2003, when I joined the Senate Judiciary Committee staff as chief counsel to Senator John Cornyn.)

f. After learning of the “torture memos,” did you express any concerns about the memos, their conclusions, or the legal analysis in those memos? If so, to whom, and what did you say?

As chief counsel to Senator John Cornyn, it would have been my responsibility to advise Senator Cornyn on any number of concerns about, and issues arising out of, the memo.

g. Did you have any role in drafting, reviewing, or otherwise contributing to memos about the following subjects? If so, please detail.

- **Interrogation practices?**
- **Detention policies and practices?**
- **Rendition?**
- **Warrantless wiretapping?**
- **Any other topics related to the war on terror?**

I am advised that my work at the Office of Legal Counsel remains privileged.

That said, I am authorized to report that, as the most junior attorney in the Office of Legal Counsel, I typically engaged in legal research for the Deputy Assistant Attorneys General in the office.

I am further authorized to report that, to the best of my recollection, I had no involvement in analyzing the legality of any proposed method of enhanced interrogation, rendition, or warrantless wiretapping.

As for the detention of members of al Qaeda, I am authorized to report that I engaged in legal research regarding some of the legal issues that were later addressed by the U.S. Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507

(2004). I was also involved in these issues when I later served as chief counsel to U.S. Senator John Cornyn, who filed an amicus brief in both *Padilla* and *Hamdi*.

h. Do you believe that waterboarding is torture?

I have never studied the legal issue, but it has always been my understanding that Congress enacted legislation for the purpose of expressing its serious opposition to waterboarding as torture.

2. At your nomination hearing, Senator Coons asked you about your work as Texas Solicitor General in defending Texas's ban on same-sex marriage. In that case, *In re Marriage of J.B. and H.B.*, you argued that “[t]he naturally procreative relationship between a man and woman deserves special societal support and protection — both to encourage procreation . . . and to increase the likelihood that children will be raised by both of their parents, within the context of stable, long-term relationships.”

a. Do you believe that same-sex marriages less likely to be “stable, long-term relationships” than marriages between a man and a woman? If so, on what basis have you reached that conclusion?

The brief you quote represented the position of the State of Texas that “[t]he naturally procreative relationship between a man and a woman deserves special societal support and protection,” in part to “increase the likelihood that children will be raised by both of their parents, within the context of stable, long-term relationships.” The brief cited several U.S. Supreme Court and other decisions, including *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Baker v. Nelson*, 409 U.S. 810 (1972), *aff’g* 191 N.W.2d 185 (Minn. 1971).

The State of Texas acknowledged, however, that “an individual may enter into any number of worthwhile and life-affirming relationships” outside of “[t]he naturally procreative relationship between a man and a woman.” To the best of my recollection, the State of Texas did not state a position on the question you pose.

b. Do you believe that same-sex married couples are less capable of raising children than opposite-sex married couples are? If so, on what basis have you reached that conclusion?

Please see my answer to Question 2b above. To the best of my recollection, the State of Texas did not state a position on the question you pose.

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

The U.S. Supreme Court spoke definitively on the constitutional right to same-sex marriage in *Obergefell v. Hodges* and *Pavan v. Smith*. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court.

3. As Solicitor General of Texas, you submitted an amicus brief on behalf of 38 states in *McDonald v. Chicago*, a 2009 case following on the heels of *District of Columbia v. Heller* that challenged Chicago's ban on handguns. In your brief, you wrote that "the right to keep and bear arms [is] the ultimate guarantor of all the other liberties enjoyed by Americans."

- a. **Please describe how the Second Amendment is "the ultimate guarantor of all the other liberties enjoyed by Americans."**

The amicus brief filed by 38 states in *McDonald* relies upon the decision of the U.S. Supreme Court in *Heller*, among other authorities, for the proposition that an "indispensable" "safeguard[] of liberty . . . under the Constitution" is "a man's 'right to bear arms for the defense of himself and family and his homestead.'" *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008).

4. In a 1997 article, you expressed your support for "abolish[ing] all restrictions on campaign finance," with the exception of the mandatory disclosure of campaign contributions. You argued that the "inevitable result" of an "expansion" of laws regulating campaign finance was "the end of free speech." In the same piece, you wrote that the debate over campaign finance reform "obscure[d] the true cause of corruption. Politicians can coerce campaign contributions from ever-willing donors for one simple reason: the state intrudes upon so many areas of personal and commercial life that success is impossible without permission from the sovereign."

- a. **Please describe your understanding of how campaign finance regulations will lead to "the end of free speech."**

When I wrote that statement 20 years ago, I had in mind arguments like the one later made by the United States Government before the Supreme Court of the United States that it "could prohibit the publication of book[s] using the corporate treasury funds." As Justice Alito observed, "most publishers are corporations."

Because such issues could someday come before me if I am so fortunate as to be confirmed to be a federal judge, as a pending federal judicial nominee, I should refrain from stating a personal view on these issues. If confirmed to be a federal judge, I would respect and enforce the campaign finance laws enacted by Congress, consistent with the precedents of the U.S. Supreme Court.

- b. **In what ways does the state "intrude[] upon . . . areas of personal and commercial life"?**

The government regulates personal and commercial conduct across a wide variety of subject matters. Whether a particular regulation is an appropriate and valid exercise of government power is frequently an issue of public debate that the legislative and executive branches of government must decide in the best interests of the American people.

Because such issues could someday come before me if I am so fortunate as to be confirmed to be a federal judge, as a pending federal judicial nominee, I should refrain from stating a personal view on these issues. If confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court concerning government regulation.

c. Please explain the relationship between this alleged intrusion and campaign finance regulations.

When the government decides to regulate on a particular subject matter, those citizens who are most directly impacted by those regulations (whether positively or negatively) may, and often will, engage in political activity in an effort to affect the course and content of such regulations.

Because such issues could someday come before me if I am so fortunate as to be confirmed to be a federal judge, as a pending federal judicial nominee, I should refrain from stating a personal view on these issues. If confirmed to be a federal judge, I would respect and enforce the campaign finance laws enacted by Congress, consistent with the precedents of the U.S. Supreme Court.

5. In 1996, you wrote an op-ed urging Californians to vote for Proposition 209, which prohibited the state “from discriminating or granting preference on the basis of race.” You argued in relevant part that racial preferences can create a harmful stigma for those who benefit from them, and you wrote that racial “[p]references are counterproductive and dilute the message of nondiscrimination that antidiscrimination is supposed to send.”

a. In what way are racial preferences “counterproductive”?

There is an on-going public debate over the extent to which various admissions policies positively or negatively affect certain communities, including the Asian American community.

Because such issues could someday come before me if I am so fortunate as to be confirmed to be a federal judge, as a pending federal judicial nominee, I should refrain from stating a personal view on those debates. If confirmed, I would follow the precedents of the U.S. Supreme Court concerning university admissions policies.

b. Do you believe there is enough racial diversity in the legal profession? Among federal judges?

As a pending judicial nominee, I would defer to the President and members of the United States Senate on who should be nominated and confirmed to the federal bench.

6. In a 2016 op-ed you wrote in a San Antonio newspaper, you praised Jeff Mateer's appointment as the first assistant Attorney General of Texas, writing that Mateer "firmly believes in the profound and abiding importance of protecting and enforcing the legal rights and civil liberties of every Texan." Since that time, Mr. Mateer has been nominated to be a judge on the Eastern District of Texas, and it has come to light that he once referred to transgender children as evidence of "Satan's plan."

a. Do you stand by your support of Mr. Mateer?

I was not aware of these comments at the time I wrote the 2016 op-ed. As a pending judicial nominee, I would defer to the President and members of the United States Senate on who should be nominated and confirmed to the federal bench. It is my understanding that Mr. Mateer is widely regarded as a strong and effective First Assistant Attorney General.

b. Do you agree with Mr. Mateer's views on transgender children?

I believe that every child is a child of God.

7. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

a. Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?

It has always been my understanding that nominees should answer the Senate Questionnaire fully and truthfully.

b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did not need to disclose certain material, including material "published only on the Internet," as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.

It has always been my understanding that responsive material "published only on the Internet" must be disclosed under Question 12a and I have done so to the best of my ability.

- c. **Have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.**

It has always been my understanding that responsive material published on public websites, whether under one's own name or under a pseudonym, must be disclosed under Question 12a, and I have done so to the best of my ability.

- d. **Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.**

No.

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

Yes, I am an originalist. Different people, of course, may mean different things when it comes to certain terminology. My approach to originalism is reflected in my personal writings. *See, e.g.,* James C. Ho, *Defining “American”: Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 Green Bag 2d 367 (2006). I agree with Justice Elena Kagan, when she testified in response to a similar question by a member of this Committee about the relevance of the original understanding of the Founders, that “we apply what they say, what they meant to do. So in that sense, we are all originalists.” *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 111-1044, at 62 (2010).

If I am so fortunate as to be confirmed as a federal judge, I would follow U.S. Supreme Court precedent.

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

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

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

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

Lower courts do not have the authority to depart from Supreme Court precedent.

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

Circuit judges have the authority to write concurring or dissenting opinions concerning any number of topics, including the possibility that the U.S. Supreme Court might someday revisit one of its precedents, and there is certainly a broad tradition of such opinions. But lower courts do not have the authority to depart from Supreme Court precedent.

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

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

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

Only the Supreme Court can decide when it is appropriate for that court to overturn its own precedent. As a nominee for a lower federal court, it would not be appropriate for me to opine on the circumstances in which the Supreme Court would overturn its own precedent.

11. Many conservative judges and legal scholars believe that the Constitution should be interpreted consistent with its "original meaning"—in other words, the meaning it had at the time it was enacted.

e. With respect to constitutional interpretation, do you believe judges should rely on the "original meaning" of the constitution?

With respect to constitutional interpretation, lower court judges must follow U.S. Supreme Court precedent. The U.S. Supreme Court has on various occasions instructed that the text and original meaning of various provisions of the Constitution is an essential part of the process of constitutional interpretation. As Justice Elena Kagan testified in response to a similar question by a member of this committee about the relevance of the original understanding of the Founders, "we apply what they say, what they meant to do. So in that sense, we are all originalists." *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, S. Hrg. 111-1044, at 62 (2010).

f. How do you decide when the Constitution's "original meaning" should be controlling?

Please see my answer to Question 11(e) above.

g. Does the “original meaning” of the Constitution justify a constitutional right to same-sex marriage?

The U.S. Supreme Court has held that there is a constitutional right to same-sex marriage. As a pending judicial nominee, it would not be appropriate for me to opine on my personal views as to the merits or reasoning of any particular U.S. Supreme Court decision. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court.

h. Does the “original meaning” of the Constitution explain the right to marry persons of a different race recognized by the Court in *Loving v. Virginia*?

As you note, the U.S. Supreme Court has held that there is a constitutional right to marry persons of a different race (a topic that happens to affect my family personally). As a pending judicial nominee, it would not be appropriate for me to opine on my personal views as to the merits or reasoning of a particular U.S. Supreme Court decision. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court.

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

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

If I am so fortunate as to be confirmed to be a federal judge, I would follow all Supreme Court precedents.

b. Is it settled law?

If I am so fortunate as to be confirmed to be a federal judge, I would follow all Supreme Court precedents.

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

If I am so fortunate as to be confirmed to be a federal judge, I would follow all

Supreme Court precedents.

14. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

The U.S. Supreme Court has held that the Second Amendment protects an individual right to possess a firearm unconnected with service in the militia. *District of Columbia v. Heller*, 554 U.S. 570, 598–600 (2008). As a pending judicial nominee, it would not be appropriate for me to opine on my personal views as to the merits or reasoning of a particular U.S. Supreme Court decision. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court.

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

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

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

As a pending judicial nominee, it would not be appropriate for me to opine on my personal views as to the merits or reasoning of a particular U.S. Supreme Court decision. If I am so fortunate as to be confirmed to be a federal judge, I would follow all Supreme Court precedents concerning the regulation of guns.

15. According to your Senate Questionnaire, you have been a member of the Federalist Society since 1989. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that

extends to all levels of the legal community.”

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

I graduated from law school nearly 20 years ago, so I do not believe that I am competent or qualified to comment on the current state of legal education.

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

It is my understanding that, although the Federalist Society takes no position on issues, it encourages debate and discussion about the meaning of the Constitution and the rule of law.

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

It is my understanding that, although the Federalist Society takes no position on issues, individuals such as myself typically become members of the Society out of an interest in the Constitution and the rule of law.

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

I drafted answers to all of the questions presented to me, solicited comments from the Justice Department attorneys working on my nomination, and revised my draft answers as I thought appropriate in light of those comments.

Senator Dick Durbin
Written Questions for Don Willett and James Ho
November 22, 2017

For questions with subparts, please answer each subpart separately.

Questions for James Ho

1. You worked for the Justice Department's Office of Legal Counsel from 2001 to 2003 as an attorney advisor. In 2002, the head of OLC, Jay Bybee, signed off on the notorious torture memos. The August 1, 2002 Bybee memo on Standards of Conduct for Interrogation – the infamous memo that concluded that abuse did not constitute torture unless it caused pain equivalent to organ failure or death – cites in several places a memo that you wrote on February 1, 2002 to John Yoo, who was then a Deputy Assistant Attorney General for OLC. Your memo was entitled “Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.”

During your hearing, I asked if you would provide your memo to the Committee. You said “It’s my understanding that that document is subject to privilege, so it’s not up to me to decide who should get to see that memo.”

- a. **Who asked you to prepare the memo that you wrote in February 2002?**

It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States.

That said, I am authorized to report that the memorandum is addressed to John Yoo and, to the best of my recollection, I cannot think of anyone other than John Yoo who would have asked me to prepare that memo.

- b. **To the best of your recollection, how long was the memo that you wrote in February 2002?**

It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States.

That said, I am authorized to report that, to the best of my recollection, the memo was a short summary of potentially relevant legal authorities, that I prepared as the most junior attorney in the office. (At the time my memo was written, I would have been out of law school for just over two years.)

- c. **To the best of your recollection, how many hours did you spend working on the memo that you wrote in February 2002?**

To the best of my recollection, the memo was a short summary of potentially relevant legal authorities, and accordingly did not involve a significant number of hours.

- d. **Did you discuss the memo that you wrote in February 2002 with John Yoo or with Jay Bybee?**

I would assume that I spoke with John Yoo, but it has been well over a decade since I served at the Office of Legal Counsel, so I cannot state with certainty.

- e. **Do you have any personal objection to the Justice Department providing your February 2002 memo to all members of the Committee for review?**

The memo is subject to privilege, and it is not the province of an attorney to publicly support or object to a client's decision whether or not to waive privilege.

- a. **Was the Office of Legal Counsel under Bybee's successor, conservative legal scholar Jack Goldsmith, right to withdraw the Bybee torture memos?**

Yes.

2. At your hearing I asked you if you believe that current law, as embodied in the 2006 McCain Amendment, makes it clear that such practices as waterboarding are cruel, inhuman, and degrading. You answered "[i]t's my understanding that this Congress made it very, very clear the whole point of passing that legislation was to deal precisely with those very serious concerns this body had." Your response did not directly answer my question.

- a. **Is waterboarding cruel, inhuman and degrading treatment?**

I have never studied the issue, but it has always been my understanding that Congress enacted legislation for the purpose of expressing its serious opposition to waterboarding as cruel, inhuman, or degrading treatment.

- b. **Is waterboarding torture?**

I have never studied the issue, but it has always been my understanding that Congress enacted legislation for the purpose of expressing its serious opposition to waterboarding as torture.

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

I have never studied the issue, but it has always been my understanding that Congress enacted legislation for the purpose of expressing its serious opposition to waterboarding as illegal under U.S. law.

3. In 2003 while you were serving as a counsel on this Committee, you co-authored an article with John Yoo in the Virginia Journal of International Law. The article was entitled "The Status of Terrorists." In the article, you argued that Taliban and al Qaeda prisoners did not need to be treated consistent with the Geneva Conventions.

- a. **How did you come to co-author a law review article with John Yoo?**

To the best of my recollection, John Yoo asked me to co-author the article with him when I was the most junior attorney at the Office of Legal Counsel. The article was not published until after I left the Office of Legal Counsel.

- b. Please discuss the extent and nature of the work you did with Mr. Yoo both while you were at OLC and after you left OLC.**

As the most junior attorney at the Office of Legal Counsel, I would perform legal tasks as requested by any of the Deputy Assistant Attorneys General. That responsibility naturally ended when I left the Office of Legal Counsel.

4. You have given lavish praise to Jeff Mateer, who is currently the First Assistant Attorney General of Texas and who has been nominated to serve on the federal district court. In an April 2016 op-ed in the *San Antonio Express News*, you described Mr. Mateer as having “an exceptional legal talent” and said that you “feel very fortunate he is now representing the people of our great state.” You said Mr. Mateer’s appointment as first assistant attorney general “should be celebrated, not criticized.”

Since he was nominated for the federal bench this year, it has come to light that Mr. Mateer has taken a number of highly controversial and ideological positions. For example, he said in 2015 that transgender children are part of “Satan’s plan.” He also lamented that states were banning so-called “conversion therapy,” the pseudoscience of attempting to “convert” LGBT Americans into heterosexuals.

- a. Were you aware of Mr. Mateer’s comments when you wrote your April 2016 op-ed praising him?**

No.

- b. Now that you are aware of these comments, do you stand by your praise of Mr. Mateer?**

As a pending judicial nominee, I would defer to the President and members of the United States Senate on who should be nominated and confirmed to the federal bench. It is my understanding that Mr. Mateer is widely regarded as a strong and effective First Assistant Attorney General.

- c. Do you believe Mr. Mateer should serve as a federal judge in the state of Texas?**

As a pending judicial nominee, I would defer to the President and members of the United States Senate on who should be nominated and confirmed to the federal bench.

5. When you were a law student in 1997 you wrote an article entitled “Free Speech, First and Foremost” in which you said we must “abolish all restrictions on campaign finance.” You endorsed a proposal to repeal all campaign finance law except mandatory disclosure, saying that campaign finance law encourages obfuscation and money laundering.

a. **Do you still support mandatory disclosure of all campaign contributions?**

As a pending judicial nominee, it would not be appropriate for me to state an opinion on what laws Congress should or should not enact.

b. **Do you still believe all other restrictions on campaign finance should be abolished?**

As a pending judicial nominee, it would not be appropriate for me to state an opinion on what laws Congress should or should not enact.

6. In a 2014 op-ed in the *Dallas Morning News* about the re-election bid of your former boss, Senator Cornyn, you said, “Cornyn was one of the earliest officials to predict that Obamacare would be not just bad policy, but a threat to the Constitution.” **Do you still believe that Obamacare is a threat to the Constitution? If so, how is it a threat?**

The U.S. Supreme Court rejected the constitutional challenge to the individual mandate of the Affordable Care Act. If I am so fortunate to be confirmed as a federal judge, I would follow all U.S. Supreme Court precedents concerning the Affordable Care Act.

7. In your questionnaire you list yourself as having been a member of the Federalist Society since 1996.

a. **Why did you join?**

I joined the Federalist Society out of an interest in the Constitution and the rule of law, and to learn from others who share that same interest in the Constitution and the rule of law.

I am proud to be a member of the Federalist Society. I have been a member of the Society since my earliest days in law school. Being a member of the Society has not only made me a better lawyer. It has also touched my life in as profoundly deep and personal way as one could imagine: I first met my wife Allyson at a Federalist Society law school event.

- b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News’ Steve Bannon on June 13, 2016, Trump said “[w]e’re going to have great judges, conservative, all picked by the Federalist Society.” In a press conference on January 11, 2017, he said his list of Supreme Court candidates came “highly recommended by the Federalist Society.”

As a pending federal judicial nominee, I would defer to the President on who he should nominate to the federal courts, and to the members of the Senate on who should be confirmed to the federal courts.

- c. **Please list each year that you attended the Federalist Society’s annual conference.**

To the best of my recollection, I have attended every annual Federalist Society lawyers conference since I graduated from law school in 1999. I also attended the Society's annual student conference in 1998 and 1999.

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

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

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

As a pending federal judicial nominee, I would not presume to comment on the political aspects of the confirmation process.

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

As a pending federal judicial nominee, I would not presume to comment on the political aspects of the confirmation process.

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

As a pending federal judicial nominee, I would not presume to comment on the political aspects of the confirmation process.

If I am so fortunate as to be confirmed to be a federal judge, I would fully comply with all governing recusal and disqualification requirements.

9. **Can an originalist view of the Constitution provide the answer to the question of whether a president can pardon himself?**

I have never had occasion to examine this issue.

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

As a purely personal matter, any human being, including any judge, should always strive to have empathy for all persons, including all persons who may come before a court.

But as a judicial matter, a judge should always follow the law. I agree with Justice Elena Kagan, who testified in response to a similar question about empathy by a member of this committee as follows: “I think it’s law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it’s true of statutory law—the question is what the law requires.” *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong., S. Hrg. 111–1044, at 103 (2010).*

**Nomination of James Ho to the
United States Court of Appeals
For the Fifth Circuit Questions
for the Record Submitted
November 22, 2017**

QUESTIONS FROM SENATOR WHITEHOUSE

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

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

I do. Judges should interpret the law, not make the law.

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

It is the province of Congress to consider the practical consequences of the laws it enacts.

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

No. Under Rule 56, a judge must determine whether, as an objective matter, a genuine dispute as to any material fact exists. A judge must evaluate the allegations and factual assertions made by each party, consider any relevant precedents involving similar facts, and determine whether summary judgment is appropriate based on this evaluation.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance “to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old.”

a. What role, if any, should empathy play in a judge’s decision-making process?

As a purely personal matter, any human being, including any judge, should always strive to have empathy for all persons, including all persons who may come before a court.

But as a judicial matter, a judge should always follow the law. I agree with Justice Elena Kagan, who testified in response to a similar question about empathy by a member of this committee as follows: “I think it’s law all the way down. When a

case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it's true of statutory law—the question is what the law requires.” *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong., S. Hrg. 111–1044, at 103 (2010).

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

All judges have personal life experiences, but no judge should allow those experiences to affect their ability to apply the law fairly and impartially in any case.

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

As noted above, I believe it is important to strive to have empathy for all persons, but that a judge must always apply the law fairly and impartially, administering justice without respect to persons, in accordance with the judicial oath.

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

No.

4. During your time at OLC, Jay Bybee, in one of the infamous torture memos, cited a memo you had written, entitled *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War*. If you claim that you had no involvement in the torture memos, why would you be working on a memo regarding the treatment of prisoners of war? Why would that memo then be cited as support in the Bybee memo?

I had no involvement in the Bybee memo. I first learned of the Bybee memo when it was reported in the press, well after I left the Office of Legal Counsel and joined the Senate Judiciary Committee staff as chief counsel to Senator John Cornyn.

As the most junior attorney in the Office of Legal Counsel, I typically engaged in legal research for the Deputy Assistant Attorneys General. As a career line attorney and member of the professional staff of the Justice Department, and not a political appointee, I did not have the power or authority to reach any legal conclusion on behalf of the office. (At the time my memo was written, I would have been out of law school for just over two years.)

As is apparent from the face of the Bybee memo, my memo involved common article 3 of the Geneva Convention. By contrast, the Bybee memo concerned various federal statutes, as well as the Torture Convention. Common article 3 of the Geneva Convention did not provide any support for the conclusions reached by the Bybee memo—as the Bybee memo itself points out.

5. You have argued that states hold a “profound interest” as “guardians of their citizens’ constitutional rights” in the context of the right to bear arms.
 - a. How does this “profound interest” weigh in comparison to the state’s interest in protecting their citizens?

If I am so fortunate as to be confirmed to be a federal judge, I would follow all Supreme Court precedents concerning the regulation of guns. The Supreme Court in *Heller* made clear that “[w]e are aware of the problem of handgun violence in this country The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns.” 554 U.S. 570, 636 (2008). *See also id.* at 626-27 & n. 26.

- b. Do you believe that states have the constitutional right to specify restrictions on gun rights within their state boundaries?

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

6. You have publicly opposed affirmative action programs. As a federal district court judge, would you uphold Supreme Court precedent that protects these programs, such as *Fisher v. University of Texas*?

If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court concerning university admissions policies, including *Fisher*.

7. Given your work on *In re Marriage of J.B. & H.B.*, you defended Texas’s ban on same sex-marriage, arguing that the “legal institution of marriage is about biology, not bigotry.”
 - a. In what way is the legal institution about biology?

The brief of the State of Texas in *J.B.* stated that “[t]he naturally procreative relationship between a man and a woman deserves special societal support and protection,” citing several U.S. Supreme Court and other decisions, including *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Baker v. Nelson*, 409 U.S. 810 (1972), *aff’g* 191 N.W.2d 185 (Minn. 1971).

- b. The Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) that, as a matter of civil law, same-sex couples are entitled to the same protections, rights, and benefits of marriage as heterosexual couples. Do you agree that the traditional view of marriage as a union between a man and a woman is irrelevant to the legal question of the right of same-sex couples to marry?

If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court, including *Obergefell*.

8. You appear to have sided with corporate interests on issues of tort reform - defending a Texas law that imposed non-economic caps in malpractice suits and stressing the “central role” that the Texas Solicitor General’s office played in protecting “the state’s business climate.”

- a. How important are tort and class action suits to protecting the next consumer against negligent or willful harm?

It is the province of Congress and state legislators to determine the proper scope and extent of tort liability. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court concerning the civil justice system.

- b. Do you believe that caps in malpractice suits promote these deterrence goals?

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

- c. Do you believe that alternative dispute resolutions are as effective as civil jury trials? Why or why not?

It is the province of Congress and state legislators to determine the proper scope and extent of tort law and the efficacy and fairness of various methods of alternative dispute resolution outside of traditional litigation, such as mandatory arbitration. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court concerning the civil justice system.

- d. Do you believe that the 7th Amendment right to a trial by jury is threatened by companies contracting away that right through mandatory arbitration?

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

Senate Judiciary Committee
“Nominations”
Questions for the Record
November 15 2017
Senator Amy Klobuchar

Questions for James Ho, Nominee to be United States Circuit Judge for the Fifth Circuit

As Texas Solicitor General, you defended the Texas Secretary of State in a suit filed by the NAACP of Austin, which asserted that the Secretary’s failure to require a contemporaneous paper record of an electronic vote violated their statutory right to a recount and audit. In that case, the state argued that the alleged injury was not sufficiently particularized to sustain an Equal Protection claim, and that the state’s procedures were adequate under the Texas Election Code.

- What do you believe is the proper role of the judiciary in protecting citizens’ right to vote?

Judges have a solemn duty to follow and apply the law. In the area of voting rights, that includes a variety of protections afforded under the 14th Amendment, the Voting Rights Act of 1965, and various other provisions. If I am so fortunate to be confirmed to be a federal judge, I would follow the Constitution, the laws enacted by Congress, and the precedents of the U.S. Supreme Court.

In 1997, you wrote an article criticizing campaign finance reform in which you expressed your support for “abolish[ing] all restrictions on campaign finance,” with the exception of disclosure requirements, and criticized the bipartisan McCain-Feingold legislation. You also argued that the “inevitable result” of the expansion of campaign finance laws was “the end of free speech.”

- Could you explain the point that you were making in this article, and does that article reflect your current views on this issue?

Please see my response to Question 4 from Ranking Member Feinstein.

- What do you believe is the appropriate standard for courts to use in reviewing campaign finance laws?

If confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court and Fifth Circuit concerning the appropriate standard of review for campaign finance laws.

**Nomination of James C. Ho, to be United States Circuit Judge for the Fifth
Circuit Questions for the Record
Submitted November 21, 2017**

QUESTIONS FROM SENATOR COONS

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

If fortunate enough to be confirmed, I would consider the various factors and considerations that the U.S. Supreme Court and Fifth Circuit have made clear that courts should consider in determining the proper scope and extent of the Fourteenth Amendment. I would be bound to follow Supreme Court and Fifth Circuit precedents interpreting the Fourteenth Amendment just as I would be bound to follow such precedents interpreting any other constitutional provision.

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

Please see my response above.

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

Please see my response above.

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

Please see my response above.

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

Please see my response above.

- 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*).

Please see my response above.

- f. What other factors would you consider?

Please see my response above.

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

The U.S. Supreme Court has made repeatedly clear in a variety of cases that the Equal Protection Clause applies to race and gender.

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

As a pending judicial nominee, it would not be appropriate for me to opine on my personal views as to the merits or reasoning of any particular U.S. Supreme Court decision. If I am so fortunate as to be confirmed to be a federal judge, I would follow the precedents of the U.S. Supreme Court concerning gender discrimination.

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

I do not know.

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

The Supreme Court has made clear that the Fourteenth Amendment protects same-sex couples, as well as heterosexual couples.

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

It is my understanding that this issue is currently pending in the federal courts. As a judicial nominee, I should refrain from stating a personal view on these issues.

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

The U.S. Supreme Court has held that there is such a right.

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

The U.S. Supreme Court has held that there is such a right.

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

The U.S. Supreme Court has held that there is such a right.

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

Please see my responses to this Question 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, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

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

If I am so fortunate as to be confirmed as a federal judge, I would follow the laws enacted by Congress and the precedents of the U.S. Supreme Court on all such questions concerning the proper role of various categories of evidence in the adjudication of any legal disputes that may come before the U.S. Court of Appeals for the Fifth Circuit.

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

Please see my response to Question 4(a) above.

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

- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools

deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Racism and bigotry have no place in our nation and under our Constitution, and the U.S. Supreme Court has made that repeatedly clear in numerous decisions. It is my understanding that respected scholars who have studied the issue closely have concluded that *Brown* is entirely consistent with originalism. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited November 21, 2017).

If I am so fortunate as to be confirmed to be a federal judge, I would follow the guidance of U.S. Supreme Court and Fifth Circuit precedents in interpreting such terms.

6. In the brief you coauthored in *In re Marriage of J.B. and H.B.*, you argued that marriage was about reproduction and that “biology, not bigotry” motivated the state’s position against same-sex marriage. You then suggested that privacy concerns prevent the government from barring infertile opposite-sex couples from marrying. Are privacy concerns the sole bar that prevents the government from stopping infertile heterosexual couples from marrying?

I am unaware of any government that has attempted to enact such a restriction on marriage based on infertility. If I am so fortunate as to be confirmed to be a federal judge, and this issue were to come before me, I would follow U.S. Supreme Court and Fifth Circuit precedent concerning the right to privacy.

7. In the article “US courts: Can’t pray at work, can’t pray at home,” you wrote that a decision barring a high school football coach from praying in front of students meant that a school could “force a teacher to remove her hijab before entering the classroom building”
 - a. Is there a legal difference between a state employee wearing a religious garment and a state employee engaging in prayer during a public school activity?

I wrote that article in my capacity as counsel in two cases that remain pending in various federal courts. Accordingly, it would be appropriate for me to let the article speak for itself, rather than to attempt to represent the interests of my clients in this forum.

- b. In the same article, you called Chief Justice Roberts and Justices Alito and Thomas

“sadly prescient” for expressing concern over the future of religious freedom in America. What did you mean?

Please see my response to Question 7(a) above.

- c. If confirmed, what would you do to protect religious freedom and equality for all people under the law?

If I am so fortunate as to be confirmed to be a federal judge, it would be my solemn obligation to protect the constitutional and civil rights of all people, as afforded to them by Congress, the Constitution of the United States, and the precedents of the U.S. Supreme Court and the Fifth Circuit.

8. Is it your view that the Affordable Care Act is “a threat to our Constitution,” as stated in your 2014 op-ed endorsing Senator Cornyn for reelection? If so, why?

Please see my response to Question 6 from Senator Durbin.

9. If a statute is unclear, what is the appropriate level of deference that should be afforded to an administrative agency’s interpretation?

The U.S. Supreme Court has spoken in countless decisions about the appropriate level of deference that should be afforded to an administrative agency’s interpretation, under the wide variety of circumstances in which agencies might reach such interpretations. If I am so fortunate as to be confirmed to be a federal judge, I would follow U.S. Supreme Court and Fifth Circuit precedents in the area of administrative deference.

Questions for the Record
James Ho
From Senator Mazie K. Hirono

1. In 2010, you led Texas's efforts to defend the constitutionality of the state's ban on same sex marriage. In *In re Marriage of J.B. & H.B.*, you argued that Texas courts had no authority to dissolve a same-sex union because such marriages did not comply with Texas law.

Do you agree that now same-sex marriage is constitutional and that *Obergefell v. Hodges* is the law of the land?

Yes, the U.S. Supreme Court made clear in *Obergefell* that there is a constitutional right to same-sex marriage. As with any U.S. Supreme Court precedent, *Obergefell* is the law of the land. If I am so fortunate as to be confirmed to be a federal judge, I would follow U.S. Supreme Court precedent.

2. You have argued for the rights of religious freedom in a number of different contexts, yet when it came to litigating the religious rights of Texas prisoners you argued in favor of strict prison rules challenged by prisoners as infringing on their religious beliefs.

Why were your views so different when dealing with prisoners?

I have been honored to represent a wide variety of clients throughout my career. That includes various pro bono clients as well as government agencies. My views in all such cases are precisely the same: I must provide zealous and enthusiastic representation of my client's interests, consistent with the traditions of the legal profession.

3. You argued in favor of the University of Texas's diversity policy in *Fisher v. University of Texas*.

Do you still believe the position you took in that case, which included arguing in favor of a policy that took diversity into account in some situations, is the right position?

I have been honored to represent a wide variety of clients throughout my career. My views in all such cases are precisely the same: I must provide zealous and enthusiastic representation of my client's interests, consistent with the traditions of the legal profession.

4. You have handled a few cases with the First Liberty Institute, a very politically motivated group trying to promote an extreme right-wing ideology, wearing the cloak of a "public interest law firm."

Having identified yourself with them so closely, how can you assure litigants in your courtroom that they will receive fair and unbiased consideration?

I have been honored to litigate both for and against the First Liberty Institute. If I am so fortunate as to be confirmed to be a federal judge, I would follow U.S. Supreme Court precedent,

without regard to whether it favors or opposes the positions of any public interest organization with which I have had the honor of working, prior to becoming a federal judge.

5. You were very outspoken in your support for Jeffrey Mateer's appointment as First Assistant Attorney General of Texas.

a. When you offered him your support, were you aware that he believes transgender teens are a part of "Satan's plan"?

No.

b. Do you agree with him about transgender teens?

I believe that every child is a child of God.

c. Were you aware that he had addressed a conference where the organizer espouses the death penalty for homosexuality?

No.

d. Do you believe there should be a death penalty for homosexuality?

Emphatically not.

e. Did you know he has compared the treatment of Christians in the U.S. to the actions of Nazis in Germany? Do you agree with him about that?

I was not aware of any such comparison, but I would not agree with it.