

Senator Thom Tillis
Questions for the Record
Senate Judiciary Committee Hearing
for the Nomination of
Ketanji Brown Jackson to be an
Associate Justice of the Supreme Court of the United States

I. Judicial Philosophy

1. How would you describe your judicial philosophy?
2. Do you believe that your judicial philosophy involves being open-minded?
3. What is the difference between precedent and super precedent?
4. Are cases safe from reconsideration only when they are super precedent?
5. What is your level of familiarity with originalism?
6. Do you look to a statute's text/structure or the purpose of a statute?
7. Why do some observers label the Emergency Order Docket the Shadow Docket?
8. Is there anything shadowy about the emergency orders sought?
9. What is your favorite Federalist Paper and why?
10. What is the counter-majoritarian difficulty?

11. Are courts undemocratic when they undo the will of elected officials?
12. Was Justice Kagan correct when she said “we are all originalists” at her confirmation hearing?
13. When should precedent be overruled?
 - a. In *Ramos v. Louisiana* (2020) Justice Kavanaugh listed examples of when every justice has called for the overruling of precedent. Which justice’s factors do you agree the most with?
 - b. Does the original meaning of the Constitution override *stare decisis* when they are in conflict?
14. Regarding severability—
 - a. Should courts defer to Congress and strike only the unconstitutional portion of the law allowing the other sections to stand, or should they strike the entire law down?
 - b. How do we tell what Congress’ intent was?
15. Please explain the Oath Clause. Does the Oath Clause fix the Constitutional meaning in time and thus only the Constitution’s meaning at that time is allowed?
16. Do the words of the Constitution or instead does the history of the Constitution fix its meaning?

17. Is the Constitution an intergenerational project?
18. Regarding your responses to QFRs for the D.C. Circuit - Do you believe in original public meaning as your judicial philosophy?
19. Does the Constitution concentrate power at the local level or the national level?
20. Outside of the amendment process, does the Constitution change? If so, how so?
21. Is the President's refusal to enforce a law absent a constitutional concern proper?
22. Is the doctrine of Separation of Powers an essential part of our Constitution?
23. Should judges weigh public opinion when making decisions?
24. Are there some areas or doctrines of law that judicial review should not extend to?
25. Was *Marbury* a textual decision?
 - a. If yes, what is your basis for this answer?
26. Does Federalist 78 describe or endorse judicial review?

27. Do you agree with some liberal scholars who claim that it is immoral to choose original intent over social welfare, broadly conceived?
28. What are the theories of incorporation for the Bill of Rights?
29. Does selective incorporation rely on the prioritization of some rights deemed sufficiently fundamental to enforce against the states but not others?
30. Why are some rights important enough to be in the Bill of Rights but not important enough to be applied to the states?
31. What factors should be used in deciding whether to grant relief on the Court's emergency order ("shadow") docket?
32. Do these factors remain consistent across all substantive areas of law or do some areas of law warrant a lower threshold for emergency relief?
33. When is it appropriate to deny relief on the emergency order docket?
34. As Justice Breyer wrote this month, are there "problems inherent in a system that allows for the imposition of the death penalty?"
35. Justice Kagan in argument last month in *Ysleta del Sur Pueblo v. Texas* pondered whether the Supreme Court should "toss out" all substantive canons—a set of legal principles that

are indeed “all over the place.” Would “tossing out” these substantive canons uproot statutory interpretation?

II. Administrative Law

1. Does agency deference enable administrative absolutism?
2. Does agency deference violate a judge’s duty under Article III by compelling them to forgo their independent judgment?
3. Is agency deference contrary to the text of the APA that instructs “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action”? 5 U.S.C. Section 706.
4. Is agency deference contrary to the standard of *de novo* review?
5. What is Brand X deference?
6. Does Brand X deference allow an agency to effectively overrule judicial precedents?
7. How do we ensure an independent co-equal judiciary if it must defer to another branch’s judgment?
8. Does agency deference run contrary to Federalist No. 51 where James Madison wrote, “In framing a government which is to be

administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. ... experience has taught mankind the necessity of auxiliary precautions.”

9. What is the *Chevron* doctrine?
10. What are the various *Chevron* steps?
11. Does *Chevron* improperly favor the government?
12. Should *Chevron* apply when the government’s interpretation “tends to favor the government’s own pecuniary interests?”
13. What is the Major Questions Doctrine?
14. Justice Breyer wrote some decades ago that allocation of responsibility should be based on “institutional capacities and strengths.” So, doesn’t this mean that Congress and not agencies should decide major policy matters? An example being a major matters like a workplace vaccine mandate?
15. Is the Major Questions Doctrine a substantive canon or constitutional canon?
16. Is Major Questions Doctrine a doctrine of interpretation or canon of construction?
17. What is constitutional avoidance?
18. What is the clear statement rule?
19. Is the Major Questions Doctrine a non-delegation canon or constitutional standard?

20. Does Article I vest legislative power solely in Congress?
- a. If no, what constitutional text suggests it can be vested elsewhere?
 - b. If yes, how can Congress delegate this vesting to the executive branch?
21. What is an “intelligible principle”?

III. Effect of forum shopping and due process that national injunctions raise

1. Where is the power to grant injunctions in the Constitution?
2. What factors do you consider in whether to grant a preliminary injunction?
3. What factors do you consider in whether to grant a permanent injunction?
4. What is *Grupo Mexicano de Desarrollo S. A. v. Alliance Bond Fund, Inc.* (1999)?
5. Must equity development be tied to the tradition of equity?
6. Are respect, dignity, or vindication justiciable remedies that can be awarded by federal courts?
7. What is the rightful position principle?

8. Should damage awards be increased to account for attorney fees, even though that can leave a plaintiff with less relief than they feel they deserve?

IV. Civil Procedure

1. Please explain the importance of *Ex parte Young*, in particular with respect to modern jurisprudence.

2. What is the writ of erasure?

3. Is *Bivens* an example of judicial activism?

4. Should *Bivens* be extended in new circumstances?

5. Does a *Bivens* extension violate the separation of powers per *Mesa*?

6. Does *Bivens* usurp legislative power?

7. What are the various abstention doctrines?

8. Does abstention promote federalism and deference to state power?

9. Does each branch of government interpret the Constitution?

10. Is the judiciary the most powerful branch of the federal

government? If no, what branch is?

11. Which branch did the Framers design to be the most powerful?
12. What does Alexander Hamilton mean in Federalist No. 78 when he says the judiciary is the “weakest branch”?
13. Is the judiciary the weakest branch today?
14. Where does standing doctrine arise from?
15. What is Article III standing?
16. Are there other requirements of standing?
17. Did *Transunion LLC v. Ramirez* (2021) change standing doctrine, and if so how did it?
18. Can Congress confer standing for a widely shared but specific and concrete injury?
19. Does standing depend on the type of claim brought?
20. Is standing determined without considering the nature of a plaintiff’s claim?
21. Is standing jurisprudence hostile to suits seeking to redress executive wrongdoing?

22. Has standing doctrine transformed from a tool of judicial modesty to a tool of judicial aggrandizement?
23. What is third-party standing?
24. Is this doctrine applied consistently?
25. Can I challenge a law when application of the law violates another's constitutional rights?
26. What is the difference between an injury in law and an injury in fact?
27. Why is an injury in law not sufficient for standing?
28. Are harms to reputation "concrete" for standing analysis?
29. Are there some injuries that do not have a remedy?
30. How do you reconcile *Dep't of Commerce v. NY* (2019) with *Simon v. Linda R.S.* (1973) in the sense that one case found standing and the other did not when both dealt with the effect of government action on numerous third parties?
31. Does the political question doctrine override other justiciability doctrines?
32. Is there a consistent test that can be applied to prevent the political question doctrine from being manipulated?

33. Could Congress jurisdiction strip courts of their ability to hear cases in one topical area?
34. Can Congress remove jurisdiction specifically to determine the outcome of a particular case?
35. Can Congress repeal legislation which gave federal jurisdiction over a matter, even if it changes the outcome of a case currently on appeal?
36. Can Congress create statutes requiring cases be brought to a specific court, giving that court exclusive jurisdiction over a topical area?
37. If a defendant has a constitutional defense to agency review, may that defendant skip agency review and proceed in federal district court?
38. Is there specific statutory language necessary for jurisdiction stripping?
39. Is there limit to what jurisdiction Congress can remove from the judiciary?
40. Does an original jurisdiction matter between two states mandate Supreme Court review?
41. When can Congress amend existing law and change what law courts apply to a pending case?

42. When can Congress preempt *Erie* considerations?
43. When can federal courts use state law to fill in meaning or gaps of federal law to provide meaning?
44. Does *Erie* eliminate any federal common law?
45. What is a uniquely federal interest?
46. If Congress does not explicitly provide a cause of action in a statute, when can the court create one?
47. If Congress creates a complex scheme of public enforcement, does Congress intend concurrent private enforcement?
48. What branch of government can waive sovereign immunity?
49. Is there a historical source justifying sovereign immunity?
50. What does congressional silence on a matter mean to you as a judge?
51. Are there some rights so important they must have a remedy?
52. How do you reconcile the Eleventh Amendment with Article III's Diversity Clause?
53. Does Article III's Diversity Clause enable federal question jurisdiction suits against states?

54. Under what circumstances may federal question jurisdiction suits be brought against states in federal court?
55. Can a foreign country sue a state directly under the Eleventh Amendment?
56. How does Congress validly abrogate state sovereign immunity?
57. May the Supreme Court instruct Congress how to abrogate state sovereign immunity in federal question jurisdiction suits?
58. What are the three exceptions to the Anti-Injunction Act?
59. Is a state court violating a federal right considered impairing jurisdiction?
60. What are the reasons for the abstention doctrine?
61. Does abstention promote respect for federalism?
62. Should federal courts invoke *Younger* abstention in cases with parallel federal and state proceedings?
63. Should federal courts invoke *Younger* abstention in cases with two private plaintiffs?

64. In *Ford Motor Co v. Montana Eighth Judicial District Ct.* (2021), the opinion defines the personal jurisdiction test as to “require only that the suit arise out of or relate to the defendant’s contacts with the forum.” Does “arise out of or relate to” mean the same thing?
65. In class action litigation, what is commonality? What kind of situation suffices?
66. Does there need to be common answers to go with the common questions necessary to meet Federal Rule of Civil Procedure 23(a)(2)?
67. Are class action requirements a form of pleading standards?
68. Can procedural interpretations affect a party’s substantive rights?
69. What is the Adequate and Independent state ground test?
70. Does this test respect federalism?

V. General Constitutional Questions

1. Does the President possess the power to remove officers of independent agencies?
2. Does the President have removal power over the entire

executive branch?

3. In *Humphrey's Executor v. FTC*, the Supreme Court held the President does not have "illimitable power of removal." This decision was justified at the time because the Federal Trade Commission (FTC) was a body created by Congress to perform quasi-legislative and judicial functions.
4. Does the FTC enforce antitrust laws?
5. Is law enforcement an inherently executive function?
6. If the FTC possesses executive power, shouldn't the President have power to remove officers who exercise executive power?
7. What is meant by "the executive power"?
8. Is any executive power not vested solely in the President?
9. What does the vesting clause vest in the President?
10. Is the vesting clause a grant of power to the President?
11. Is the phrase "shall be vested" an express declaration of the mandatory location of certain powers?
12. What does the Take Care Clause mean?
 - a. *E.g.*, is it a grant of discretionary power or a duty to the President?

13. Is the President's executive power defeasible by Congress?
14. Do you agree with Justice Breyer about the constitutionality of the death penalty?
15. Is the President or Congress preeminent for the area of foreign affairs?
16. *Clinton v. N.Y.* (1998) struck down the Line Item Veto Act. Is there a way for Congress to confer discretion upon the executive to withhold appropriated funds, even funds appropriated for a specific purpose?
17. Who is an "officer of the United States"?
18. Is a better standard to use the original public meaning, which suggests that an "officer" encompasses any government official with responsibility for an ongoing governmental duty?
19. Are tax collectors, disaster relief officials, customs officials, and administrative judges "officers" of the United States?
20. Is the Appointments Clause a safeguard against the "diffusion of accountability" the Framers feared?
21. Does Article II create a unitary executive?
22. Can the President remove "officers" at will?

23. Does Congress have constitutional authority to impose a deadline for a constitutional amendment?
24. What constitutional amendments apply abroad?
25. If you list any, please explain why do some amendments apply abroad and not others?
26. Does Section 1 of the Twenty Third Amendment prevent D.C. statehood?
27. What is the *Marks* rule?
28. Does the *Marks* rule shift costly interpretive burdens to later courts, privilege outlier views among the Justices, and discourage desirable compromises?

VI. Substantive Due Process

1. Should rights be viewed through a broad level of generality or a narrow level of generality?
2. What constitutional rights do felons retain?
3. Doesn't due process just mean a fair process or procedure?
4. How can substantive rights spring from the words "due process"?

5. Isn't it distorting to the original meaning of "liberty" in the Due Process Clause by stretching its meaning beyond the matter of deprivation of liberty by imprisonment?
6. Aren't *Lochner* and *Griswold* the same judicial activism involving substantive due process?
7. Doesn't the Fourteenth Amendment protect only the rights listed in the Constitution?
8. Should the Constitution be read to embody a "presumption of liberty"?
9. Is the Ninth Amendment a source for unenumerated rights?
10. How can you tell what is an unenumerated right?
11. What level of scrutiny does an unenumerated right draw?
12. Is the Ninth Amendment an ink blot?
13. What is a fundamental right?
14. How can we tell what is or is not a fundamental right?
15. How do we tell a principle of justice so rooted in the traditions and consciences of our people as to be deemed fundamental?

16. Does the judicial creation of a fundamental right violate separation of powers principles by codifying judicial policy preferences?

17. What is the theory of “reverse incorporation”?

VII. Criminal Procedure

1. What are the goals of our criminal procedure system?

2. What does the word “unreasonable” mean in the Fourth Amendment?

3. When does a defendant on direct review get the benefit of retroactivity?

4. When does a defendant on collateral review get the benefit of retroactivity?

5. Regarding the *Katz* test, should the subjective prong remain?

6. If the subjective prong is taken seriously, can the government eliminate privacy expectations and render the 4th Amendment inapplicable by simply announcing its intention to conduct Orwellian surveillance?

7. Do non-governmental intrusions undermine our right to be free of governmental intrusions? *E.g.*, a private technology company maintains personal location information voluntarily shared by customers that it analyzes for government purposes such as in *Carpenter*.
8. For the objective prong of *Katz*, if society is not prepared to recognize an expectation of privacy as “reasonable,” does this neuter the *Katz* test or Fourth Amendment protections?
9. Is the *Katz* test descriptive or normative?
 - a. *E.g.*, did it ask, “What privacy expectations do people actually have” or “what expectations should they have”?
10. Should internet users have a reasonable expectation of privacy in their browsing history?
11. Is a reasonable expectation of privacy ubiquitous? Are there areas where there is no expectation of privacy?
 - a. If there are no areas where there is an expectation of privacy, please list those areas.
12. Is there a distinction between actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents?

13. Does Fourth Amendment protection turn on whose property was searched/seized since the Amendment reads “individuals to be secure from unreasonable searches of their persons, houses, papers, effects”?
14. Is bailment theory a better way to protect Fourth Amendment papers/effects because bailment does not eliminate protections because the papers/effects are shared with third parties because bailment law can show a property interest?
15. Explain the expectation of privacy in *Bond v. United States* (2000)? Was this reasonable?
16. Did *Kyllo* strengthen the warrant requirement by negating the use of technology for investigatory purposes?
17. What are the requirements for a warrant?
18. What is probable cause?
19. What is the totality of circumstances for determining probable cause?
20. How are claims of excessive force evaluated?
21. Is reasonableness of force determined without regard to whether officers violated the Fourth Amendment before applying the force?

22. Does this protect police officers?
23. Is the awareness of the suspect required for the hot pursuit doctrine to apply?
24. How do courts determine a suspect's subjective mindset?
25. Why are pervasively regulated industries in the special needs doctrine permitted to be searched without a warrant but similar industries still require a warrant before being that searched?
26. Was the Bill of Rights explicit as to remedies for violations of the Fourth Amendment?
27. If no, should Congress or judges provide the remedy?
28. What is the constitutional basis for the "Exclusionary Rule"?
29. Does it promote judicial integrity to allow evidence in that allows the justice system to reach a true verdict?
30. Doesn't society benefit when wrong-doers are convicted for their wrong-doing?
31. Does the exclusionary rule deter police misconduct?
32. How does standing apply to Fourth Amendment violations?
33. Does attenuation allow introduction of evidence that otherwise would be fruit of the poisonous tree?

34. How does the attenuation doctrine work?
35. What is the test for the independent source doctrine?
36. What is the test for the inevitable discovery doctrine?
37. What are possible alternatives to the exclusionary rule?
38. Does *Kastigar* immunity bar the government from all prosecutions?
39. When does *Miranda* apply?
40. Under *Miranda*, what is custody?
41. Under *Miranda*, what is an interrogation?
42. What are alternatives to the *Miranda* rule?
43. What is the Ker-Frisbie doctrine?
44. Is the role of the Supreme Court to only decide cases and controversies that come before it or to ensure the government behaves lawfully?
45. What is the Payton rule in Fourth Amendment jurisprudence?
46. Can a Terry stop be used to search for evidence?

47. Do officers need probable cause and a warrant to search a phone prior to arrest?
48. Are there legitimate government interests to prevent remote wiping of data?

VIII. Regarding academic publications, articles, public statements, and editorial pieces.

1. Can you walk me through your writing process?
2. Have you shared your personal views in any of these writings?
3. If you have shared personal views, do you use this same philosophy to review cases and publish opinions?
4. Do you believe that Supreme Court Justices should share their personal views to the public?
5. If no, do you think it was wrong for Justice Breyer to make various public statements stating that the issue of capital punishment should be revisited?
6. As a federal judge one of your main roles is to write and publish court opinions. Can describe your writing process when it comes to drafting court opinions?

7. You wrote various opinions as a District Court Judge. How does your process for writing the District and Circuit Court Opinions differ?

IX. Professional Interactions

1. Can you provide an instance when you had to confront another judge or colleague to resolve a predicament?

X. Transparency

1. Do you believe in transparency in the court? Why or why not?

2. Do you believe that federal judges and Supreme Court Justices should be able to own and trade stock?

3. Do you commit to recusing yourself from any cases that may have connections to the stocks you own?

XI. Safe Injection Sites

1. Do you believe that Safe Injection Facilities like the one in New York are shielded from legal action?
2. Do you think that these sites violate Section 856 of the Controlled Substance Act, 21 U.S.C. 856?
3. If a case challenging the legality of injection sites comes before you, what precedent will you use to review and rule on the case?
4. As you are probably aware, the Supreme Court is currently hearing oral arguments of two cases: *Ruan v. United States* and *Kahn v. United States*. Both doctors were convicted of unlawful drug distribution. Mr. Ruan and Kahn both petitioned for a writ of certiorari to the Supreme Court, which were granted.
 - a. What factors will you take into consideration when reviewing petitions for a writ of certiorari?
 - b. Would you review previously granted writs of certiorari when evaluating new cert petitions?

XII. Precedent

1. Do you believe that Supreme Court can overrule a longstanding Supreme Court decision?
2. If confirmed as a Justice, what process would you take when reviewing on whether to overturn a previous decision by the Supreme Court?
3. Do you believe that *Roe v. Wade* was rightfully decided?
4. What level of consideration should be given to precedent when considering an abortion case before the Supreme Court?
5. Do you use the “**open minded**” philosophy when reviewing abortion cases?
6. COVID-19 has and continues to impact health care delivery across the country. Like many, I’ve advocated for making a majority of the temporary telehealth flexibilities and waivers.

The Supreme Court ruled 6 to 3 in January 2021 *FDA v. American College of Obstetricians and Gynecologists, et al.* that women who want to be prescribed abortion pills must complete an in-person consultation with a physician while the Fourth Circuit reviewed the case.

However, in December 2021, the Biden Administration and the Food and Drug Administration (FDA) announced plans to permanently remove the long-standing in-person dispensing

requirement of abortion pills that had been temporarily waived due to the pandemic.

- a. What procedure should agencies have to follow when rescinding or changing a rule disseminated by a previous administration?
- b. Do you believe that dispensing abortion pills like mifepristone impose an undue burden on women?
- c. Do you believe that a doctor or pharmacy that dispenses abortion pills via online consultations rather than in person can be held legally liable for any harm?

7. Two of the primary roles of a Supreme Court Justice are to uphold the Constitution and interpret the law as it has been written. What precedent would you use to review a case that challenges dispensing of abortion pills without medical consultation?

8. In *McCullen v. Coakley*, the Supreme Court unanimously struck down as unconstitutional an amended version of the Massachusetts law that you had supported. In that case the court held that the amended Massachusetts law burdened pro-life advocates' free speech rights substantially more than was necessary to further the government's interest in maintaining

public safety. Do buffer zone laws burden pro-life speech more than permitted?

9. Isn't allowing pro-life protestors the ability to engage in conversation and leafleting on public streets and sidewalks, exactly the transmission of ideas the First Amendment is meant to protect?
10. Are enumerated First Amendment free speech rights greater than unenumerated abortion rights?

XIV. Intellectual Property

1. Under present patent law, in your opinion do you think that inventorship and ownership rights should be extended to a non-human artificial intelligence?
2. Under present copyright law, in your opinion do you think that a non-human artificial intelligence system should be granted authorship and ownership status?
3. Should materials created by a non-human artificial intelligence system be eligible for copyright protection?
4. In light of artificial intelligence-related inventions, in your opinion, is there any need for new forms of intellectual property protections – e.g., *sui generis* rights for datasets or

databases used to train artificial intelligence or for trained artificial intelligence models?

a. As part of your answer, please explain the current protections afforded under various types of intellectual property law, and why they are or are not sufficient?

5. To what extent can or should any of these legal protections be supported by technical measures?

6. In your opinion, what factors should be taken into account when determining whether technical measures used to support certain legal rights potentially impinge upon other rights?

Incentivizing U.S. innovation is vital to the prosperity of our country and specifically our economic growth. Central to this is securing intellectual property, via patents, trademarks, copyrights, and the like.

7. In the case of patents, in your opinion, how do you foresee ensuring certainty and predictability for patent holders in light of current patent eligibility?

8. What are the defined judicial exceptions to patentable eligibility?

It's imperative to protect U.S. intellectual property from theft by other countries and maintain strong domestic patent rights.

9. What are your thoughts regarding anti-suit injunction, especially its potential to negatively impact the litigation of patent rights domestically?
10. In your view, are copyrights a form of property to which the Takings Clause applies?
11. Are patents a form of property to which the Takings Clause applies?
12. Does the Constitution's recognition of Congress's authority to grant these exclusive rights to Authors and Inventors under Article 1, Section 8, instead of under the Bill of Rights, merit different treatment of this right from other enumerated rights? Why or why not?

Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the appropriate use of digital content and technologies.

13. What experience do you have with copyright law?
14. How many cases have you heard where copyright law was an issue in the case? What was the outcome in these cases?

15. Could you explain when a state action would be subject to express preemption under Section 301(a) of the Copyright Act and when it may be subject to review under conflict preemption?

16. Under what circumstances do courts find that copyright law preempts state regulatory schemes?

The American Law Institute (ALI), of which you are an elected council member, has undertaken efforts to develop a Restatement of Copyright law. I have expressed concern that these Restatements have traditionally focused on areas of common law because judicial rulings across different jurisdictions may vary and ALI's interpretations are predisposed to assembly, to analysis, and summaries. While I agree that copyright law must be modernized to be more responsive to current technologies, copyright markets, and business practices, such reforms should take place in a transparent manner that accounts for different perspectives – not behind closed doors with limited public input.

17. What weight have you placed on Restatements in your career?

18. Do you believe that federal laws that preempt state laws require restating in the same way that common laws do?

Statutory damages have become increasingly important in cases of online copyright infringement, where it may be difficult to determine the scope of harm or actual damages.

19. What factors do you think are most important when calculating statutory damages?
20. Should awards be calibrated to some type of actual harm?
21. Should deterrence be a factor in the courts calculation?
22. Should there be a punitive calculation, especially for willful infringement?
23. Should judges be permitted to waive statutory damages in certain cases?

The fair use doctrine has been described as “a fundamental linchpin of the U.S. copyright system.”

24. Could you explain why it is so important and outline the four fair use factors?
25. In general, do certain factors “count” more than others?

Some say that there is a hidden fifth “fair use” factor – whether the judge likes you or your case.
26. Is impartiality and lack of bias important to you?
27. How do you ensure that your views are perceived as impartial and fair when issuing decisions?

Justice Breyer’s *Google v. Oracle* decision took a novel approach to fair use analysis by first presuming copyrightability of computer code, then looking to the “nature of the work” as a dominant factor in the courts decision that in this particular fact-intensive inquiry, Google’s actions were fair use.

28. What impact do you think this decision has had and will have on how courts interpret copyright questions relating to software and fair use?

29. What impact do you think this decision has on other types of works?

30. Should computer code be treated differently from other types of works, whether as part of a fair use analysis or otherwise?

Over time the number of copyright takedown notices has skyrocketed. Some have raised concerns about fraudulent and abusive notices that may restrain fair use, free speech, or misuse the notice-and-takedown process. Others have noted that courts interpretation of the “good faith” requirement to send notices may preclude automated notice sending, placing too great a burden on rightsholders.

31. In an increasingly automated world, how can courts appropriately evaluate concepts like “good faith” or “bad faith” that apply to machine-driven actions?

32. Do you have experience addressing free speech and intellectual property issues, including copyright?

33. How should courts resolve the ideological tension between whether information should be free or whether commoditizing information provides the incentives and resources for it to be generated in the first place?

The legislative history of the Digital Millennium Copyright Act shows that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory provisions and created a “high bar” for “red flag knowledge, effectively removing it from the statute...” It also reported that courts have made the traditional common law standard for “willful blindness” harder to meet in copyright cases.

34. In your opinion, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?

35. What experiences do you have addressing intermediary liability for online service providers?

XV. Antitrust

1. Do you agree that reliable, predictable, intellectual property rights promote vigorous, dynamic competition to the benefit of consumers?
2. Do you agree that universities, companies and small inventors that commit time, resources and capital to engage in risky R&D activities to develop the next generation of standards and that seek to be rewarded for their successful innovations to obtain fair and adequate compensation for the use of their patented technologies should be allowed and encouraged to assert their IP rights in good faith without being labeled as “patent trolls” or chilled by threats of antitrust enforcement action or private antitrust litigation?

The Supreme Court in *Trinko* stated that “[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise,” since this risks the court “assum[ing] the day-to-day controls characteristic of a regulatory agency.” 540 U.S. 398, 415 (2004).

3. Do you think that worldwide injunctions on issues involving patents or patent licenses issues are appropriate? Why or why not?
4. In light of *Trinko*, is it appropriate to relegate to a national regulatory authority parties’ extraterritorial contract negotiations?

5. Outside of FRAND cases, would you agree that it is rare for national courts to seek to reform or create private contractual arrangements that extend beyond their national borders? What about with respect to patents that are outside the courts' jurisdiction?
6. What role does international comity have in such injunctive or decisions regarding patent licensing outside the United States?
7. What are your thoughts on the best way to analyze patent licensing issues?

Recent antitrust bills, stemming from a House Antitrust staff report, are premised on the concept that big tech platforms act as “gatekeepers” and thus require new legislation targeting their conduct and providing access at a reasonable price.

8. Please explain the essential facilities doctrine in antitrust jurisprudence.
9. Should this doctrine extend to private, unregulated facilities (in contrast to public sector or private regulated facilities)?
10. Can restraints of trade be reasonable, even if it may be anticompetitive, because it reflects an important property right?

11. Should courts view property rights—including common law unfair competition, trademark, patents, or copyrights—as restricting or enhancing competition?

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court relied on economic reasoning, marking a turning point in antitrust jurisprudence where the court turned to economic theory to inform its interpretation and application of the Sherman Act.

12. What experience do you have deciding antitrust cases?

13. What role does or should economic theory have in your judicial decision making?

14. Please describe the consumer welfare standard.

15. What other avenues are there for courts to consider when administering the antitrust laws?

XVI. Technology

1. What role do you think technology should have in the judicial administration system?

2. How have you seen technology change the practice of law over your career?

3. In what ways do you think it will evolve in the future?

4. What role do you think artificial intelligence, machine learning, and other technologies should play in the judicial system?
5. What are some of the pros and cons of such technologies?
6. Do you think such technologies should play a role in a judge's decision making, including sentencing?
7. To the extent that technologies do already play a role, where do you draw the line between where they stop augmenting your work on the case and where your human judgment begins?
8. Do you have concerns that biases in the technologies could directly or indirectly impact your decision making to achieve outcomes that you wouldn't have desired?
9. Do you have any personal experience with biases based on technologies that you can share?

XVII. Second Amendment

The Founders felt so strongly about protecting our individual rights that they passed the Bill of Rights to enshrine our individual rights into the Constitution.

The Second Amendment was added to ensure that our individual right to bear arms “shall not be infringed” by an overbearing federal government. There are long-standing, well-coordinated

efforts by liberal activists to strip away our Second Amendment rights.

But, since they cannot get their gun control agenda through Congress, they have instead focused on getting federal judges confirmed who will chip away at the Second Amendment.

Multiple organizations praised your nomination as a win for their cause. While I recognize you may not associate yourself with every group that supports you, I am also concerned that organizations who advocate for taking away our Second Amendment rights are so actively supportive of your nomination.

1. What in your judicial and professional career do you think has led these organizations to believe that you will side with their restrictive views of the Second Amendment?
2. What is the holding in *District of Columbia v. Heller*? Do you believe this case was rightly decided, and does it do enough to protect Americans' Second Amendment rights?
3. What kind of weapons qualify as “dangerous and unusual” under *Heller*?
4. There are some who view our Second Amendment rights as “second-class right[s].” Do you agree that our Second Amendment rights are equal to all others provided in the Constitution?

5. Is the Second Amendment a “constitutional orphan” as described by Justice Thomas?
6. What level of scrutiny should govern Second Amendment cases?
7. Does the Constitution enshrine a right to carry a gun for self-defense?
8. Is it ever constitutional for a court to deprive an individual of their Second Amendment rights, without due process, and confiscate their firearms? If so, what level of due process is required?
9. Is the point of a constitutional right that an American citizen does not have to satisfy a government official with a good reason before exercising constitutional right?
10. What is the constitutional authority that allows local sheriffs to require permits for certain types of firearms but not others? Do these types of laws unduly infringe the Second Amendment?
11. What is the constitutional authority by which the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) may regulate the exercise of Second Amendment rights? In what ways is the ATF limited in its rulemaking or its agency guidance due to the fundamental nature of our Second Amendment rights?

12. In *Baisden v. Barr*, you granted summary judgment against an individual seeking to purchase a firearm in part because the individual did not have a specific plan to purchase a firearm. Can you please elaborate why standing is available for an individual with a specific plan to purchase a firearm, but not to one with a general interest in owning a firearm? How specific does one's plan have to be in order to trigger an injury under the Second Amendment and Supreme Court precedence?

XVIII. Court Packing

The legitimacy and independence of the judicial branch is of utmost importance. That's part of why I view my role vetting judicial nominees to be one of my most important responsibilities as a Senator, and why I am deeply concerned about proposals to expand the Court.

As a sitting member of the Court, Justice Breyer called expanding the Supreme Court "risky." While serving as a justice, Justice Ginsburg said that expanding the court would "make the court look partisan," and that "[n]ine seems to be a good number."

1. Do you agree with Justice Ginsburg that the Supreme Court should not be expanded, but instead remain at nine justices?
2. Do you share the concerns of Justice Ginsburg that expanding the Supreme Court would "make the court look partisan?" Why or why not?

3. Would court packing encourage people's faith in an independent judiciary?
4. Do you believe we have Obama judges or Trump judges, Bush judges or Clinton judges in the federal judiciary?
5. If not, and all we have is "an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." *E.g.*, an independent judiciary that we should all be thankful for, then why would we need court packing?
6. Wouldn't court packing by one party encourage a future president of the other party to ignore its rulings because he considered them invalid?
7. Isn't court packing the dangerous game that both Justices Breyer and Ginsburg warned us about?

XIX. Election Law

As Speaker of the North Carolina House, I led legislation which instituted common sense reforms to our election system. This included efforts to improve integrity in our elections and provide peace of mind to North Carolinians that our elections are conducted fairly. As a result of my experience, I strongly believe that election laws should primarily be set by the states.

In recent years, a false narrative of voter suppression has been leveled against Republicans who have pursued election integrity measures, and who have pushed back against efforts to have a federal takeover of our elections.

1. Under Article I, Section 4, what is the appropriate balance between the federal government and the states as it relates to administration of elections?
2. Do you believe that the Court's current jurisprudence strikes the correct balance between state and federal control over elections?
3. When does the "*Purcell* principle" permit federal courts to intervene in election-related challenges?
4. Do you agree that voter ID is a reasonable measure for states to enact to ensure the integrity of their elections?

XX. Campaign Finance

1. What was the holding of *Citizens United*?
2. Was *Citizens United* correctly decided?
3. In what ways does the First Amendment right to free speech extend to political contributions?

4. Should those who make political contributions be provided with privacy to express their political views?
5. Shouldn't individuals have the right to freely express their political views without threat or intimidation?

XXI. Redistricting.

North Carolina has the distinction of appearing before the Supreme Court in each of the past four decades regarding redistricting. Much of the case law regarding redistricting under the Voting Rights Act is the result of cases brought against North Carolina maps.

Most recently, the Supreme Court ruled in *Rucho v. Common Cause* that claims of improper partisan redistricting are political questions, meaning that federal courts cannot intervene. Instead, these decisions must be left up to the American people and their elected representatives.

In February, the North Carolina Supreme Court struck down congressional and state legislative maps based on provisions in the state constitution.

Just two weeks ago, the Supreme Court declined to hear an appeal of the North Carolina Supreme Court ruling that struck down those maps. The case left unanswered new questions about the role of state courts in redistricting.

1. Please describe your understanding of the justiciability of political questions.
2. What factors do federal courts currently determine whether an issue is a political question or not?
3. Do you agree with the current jurisprudence of the political question doctrine?
4. What is your understanding of the current state of the political doctrine question as it relates to congressional redistricting?
5. What is the current rule for whether or not a congressional redistricting plan is unconstitutional as an impermissible political gerrymander?
6. What is the current rule for whether or not a congressional redistricting plan is unconstitutional as an impermissible racial gerrymander?
7. Please describe your understanding of the ruling in *Common Cause v. Rucho*.
8. Do you believe that *Common Cause v. Rucho* was correctly decided? Why or why not?
9. Does the Constitution grant power to state courts to draw congressional districts?

10. What is the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections?
11. If a State Supreme Court finds that a congressional redistricting plan violates a provision of the state constitution, under what circumstances may the US Supreme Court consider the constitutionality of that congressional plan?

XXII. Law Enforcement

In recent years, there have been calls to defund and to abolish the police. This rhetoric is not only irresponsible, it is downright dangerous. Our brave men and women in blue put their lives on the line each and every day, not knowing if they'll return to their loved ones, so that we can stay safe.

I'm deeply concerned about the anti-police views that have become common place in our country today, and I am committed to doing everything I can to support the brave men and women in blue who protect and serve our communities.

I have introduced legislation which would increase penalties for those who assault and kill, or attempt to assault and kill, a law enforcement officer.

In reviewing your record, I noted several cases where a criminal assaulted a law enforcement officer, but where you granted lower sentences.

1. For example, in *United States v. Jenkins*, a criminal pleaded guilty to assaulting a law enforcement officer, which was his third conviction for assaulting law enforcement officers. The government recommended a 30-month sentence, and the criminal requested a 21-month. You decided to go even lower, and sentence this repeat offender to 18 months in prison. Can you please explain your reasoning for this sentence?
2. In another case, *United States v. Weeks*, you sentenced a criminal with a prior conviction for assaulting a police officer. During sentencing, the government requested a 24-month sentence, in part due to his conviction for assaulting an officer. You sentenced the criminal to 12 months despite this prior conviction. Can you please explain your reasoning for this sentence?
3. How does your experience as a district court judge shape your views of how we punish those who assault and kill law enforcement officers? Do you believe that federal law sufficiently punishes those who assault and kill law enforcement officers?
4. What is an appropriate sentence for an individual who assaults a law enforcement officer? What about an individual who kills a law enforcement officer?

XXIII. Qualified Immunity

In order to do their job properly, the law enforcement community must continue to have qualified immunity. Removing the legal protections provided by qualified immunity risks undermining law enforcement and making our communities less safe. This is even more important as we continue to face rising crime across the country.

The anti-police movement in this country has cried loudly to eliminate qualified immunity. This would leave our brave law enforcement officers without legal protection in the face of anti-police activists and their eager trial lawyers.

Removing qualified immunity would make us less safe, and would disrespect the sacrifice of our law enforcement community.

1. Please describe the current state of Supreme Court precedent as it relates to qualified immunity for law enforcement officials.
2. What is the process by which you determine whether a constitutional right is “clearly established” for the purposes of a qualified immunity claim?
3. Do you believe that the current state of the law provides sufficient legal protection for our brave, hardworking men and women in blue who put their lives at risk each and every day?

4. In how many district court cases did you grant qualified immunity to law enforcement officials? In how many district court cases did you deny qualified immunity to law enforcement officials?
5. Of your district court rulings on qualified immunity, how many were reversed at the appellate level?

XXIV. Freedom of Religion

Religious liberty and free exercise of religion are foundational to the United States. Many of those who immigrated to America in our earliest days came to this country so they could freely practice their faith.

Despite this foundational commitment to free exercise of religion, there are those who would force people of deeply held religious beliefs to violate their conscience. It is important that we have a justice on the court who will respect our religious liberties, and who will defend the First Amendment.

1. Does the First Amendment serve as a restraint solely on government endorsement of religion, or does it affirmatively protect the religious practice and belief of Americans of faith?
2. What is your understanding of the current jurisprudence of cases related to the ministerial exemption for employees of religious institutions? What level of protection is currently

afforded to religious entities to employ those who best represent their values?

3. What was holding of *Fulton v. City of Philadelphia*?

4. Do you believe that *Fulton* was correctly decided? Why or why not?

5. What does *Fulton* mean for free exercise of religion and the ability of religious-affiliated organizations to practice their deeply held religious beliefs? How will you apply this case if you are confirmed and confronted with a case involving free exercise of religion?

XXV. Sanctuary Cities and Immigration Enforcement

In recent years, state and local jurisdictions across the country have embraced dangerous policies where they will refuse to cooperate with federal officials to enforce our immigration laws. By declining to comply with a detainer request, or even communicate with federal immigration authorities, these sanctuary city policies represent a threat to our communities.

The Trump Administration attempted to put a stop to this by withholding certain grants from state and local governments that enacted sanctuary city policies.

I have introduced two pieces of legislation to stop sanctuary city policies, the Justice for Victims of Sanctuary Cities Act and the

Immigration Detainer Enforcement Act.

I feel strongly that those who choose to ignore federal immigration law are placing our communities in danger.

1. Does the Constitution place authority for immigration policy with the federal government or the States?
2. Can state and local governments to defy federal immigration law? Why or why not?
3. When does a condition placed on federal grant funding trigger the anti-commandeering doctrine?
4. What is the extent of executive authority to set immigration policy in the absence of explicit congressional authorization?
5. To what extent may the executive branch broadly limit the enforcement of immigration law, such as de-prioritizing certain individuals for removal?
6. Is it permissible for the executive branch to issue parole to broad populations? How does a grant of parole for broad populations comply with the statute's requirement that parole only be available on a case-by-case basis?
7. Under current precedent, how long may the federal government detain an individual who is eligible for removal, but whose home country refuses to accept them? Is their continued

detention better characterized as a due process violation or an enforcement of immigration law?

XXVI. Dark Money

Judge Jackson have you ever had any interaction with the following groups or entities? If you so, please fully detail your involvement or interaction with said entity.

- a) Arabella Advisors
- b) Tides Foundation
- c) 1630 Fund
- d) North Foundation
- e) People for the American Way
- f) Unrig the Courts
- g) 51 for 51
- h) Demos Action
- i) Take Back the Court
- j) Demand Justice
- k) Indivisible
- l) People's Parity Project
- m) Stand Up America
- n) Just Democracy Coalition

XXVII. Patent Eligibility

1. Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?

2. How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.
 - a. *ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?

 - b. *FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?

- c. *HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?
- d. *BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?
- e. *Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?
- f. A business methods company, *FinancialServices Troll*, specializes in taking conventional legal transaction methods or systems and implementing them through a computer

process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?

g. *BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?

h. Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?

- i. *Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?
 - j. *Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?
3. Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?

XXVIII. Patent Venue

1. In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or

litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.

- a. Do you see “judge shopping” and “forum shopping” as a problem in litigation?
- b. If so, do you believe that district court judges have a responsibility not to encourage such conduct?
- c. Do you think it is *ever* appropriate for judges to engage in “forum selling” by proactively taking steps to attract a particular type of case or litigant?
- d. If so, please explain your reasoning. If not, do you commit not to engage in such conduct?

2. In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.

- a. What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?
- b. Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?

3. When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?
 - a. If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?
 - b. To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?
4. Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.
 - a. If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?

b. Would five mandamus reversals be sufficient? Ten?
Twenty?