Nomination of Jennifer Philpott Wilson to the United States District Court for the Middle District of Pennsylvania
Questions for the Record
June 12, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

   It is never appropriate for a lower court to depart from Supreme Court precedent.

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

   A district court judges should always faithfully apply Supreme Court precedent. There may be rare circumstances in which a district court judge may comment in an opinion on conflicts among courts or uncertainty regarding the application of Supreme Court precedent in order to facilitate Supreme Court review of a confusing issue.

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

   In the event that a district court issues a precedential opinion that is the controlling authority on an issue (*i.e.* there is no intervening precedential authority from a higher court), the decision whether to overturn such precedent would be guided by the factors identified by the Supreme Court. For example, in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2478-79 (2018), the Supreme Court noted that it considers the "quality of [the case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."

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

   Any decision to overturn Supreme Court precedent is determined exclusively by the Supreme Court. The Supreme Court has identified factors that it considers in determining whether to overturn one of its own precedents, such as reliance interests, workability of the rule established, and developments since the decision was made.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator

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

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

For district court judges, all Supreme Court precedent is binding precedent that must be followed. If confirmed, I will faithfully apply the precedent established by the Supreme Court in *Roe v. Wade* and all subsequent, related cases.

b. Is it settled law?

Yes. *Roe v. Wade* is binding Supreme Court precedent and is therefore settled for inferior courts. If confirmed, I will faithfully apply the precedent established by the Supreme Court in *Roe v. Wade* and by the Supreme Court and the Third Circuit Court of Appeals in all subsequent, related cases.

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

Yes. *Obergefell* is binding Supreme Court precedent and is therefore settled for inferior courts. If confirmed, I will faithfully apply the precedent established by the Supreme Court in *Obergefell* and by the Supreme Court and the Third Circuit Court of Appeals in all subsequent, related cases.

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

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

I am aware of Justice Stevens' dissent in *Heller*. If confirmed, I would be bound by the Supreme Court precedent and would be obligated to follow the majority opinion in *Heller*. As a judicial nominee, it would not be appropriate for me to express my personal view on Justice Stevens' dissent in *Heller* or any other justice's opinion in *Heller*. If confirmed, I will faithfully apply the precedent established by the Supreme Court in *Heller*.

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

Yes. The Supreme Court indicated in *Heller* that some regulation of firearms is permissible. In *Heller*, the Supreme Court stated that the rights secured by the Second Amendment are not "unlimited" and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government building, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

I have not had the opportunity to study Second Amendment jurisprudence in depth. In any event, it would not be appropriate for me to express a personal view on the *Heller* opinion as there is a reasonable likelihood that the scope of the Second Amendment will continue to be litigated. If confirmed, I will faithfully apply the precedent established by the Supreme Court and the Third Circuit on this subject.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

In *Citizens United v. FEC*, 558 U.S. 310, 342 (2010, the Supreme Court stated that "First Amendment protection extends to corporations." As a judicial nominee, it would not be appropriate for me to express an opinion about whether a corporation's First Amendment rights are equal to individuals' First Amendment rights. If the resolution of a case or controversy presented to me as a district court judge requires this analysis, I would examine all relevant Supreme Court and Third Circuit precedent.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

The protection of individual speech rights under the First Amendment is an important issue, and the subject of numerous Supreme Court and Third Circuit opinions. As a judicial nominee, it would not be appropriate for me to indicate how I would resolve a potential conflict between the First Amendment rights of an individual and a corporation. However, I would analyze the issue by relying upon all relevant Supreme Court and Third Circuit precedent in order to make such a determination.

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), held that closely held corporations have rights under the Religious Freedom Restoration Act of 1993. As a judicial nominee, it would not be appropriate for me to express a personal view about whether a corporation has a right to freedom of religion under the First Amendment. However, if called upon to make this determination in a case, I would analyze the issue by relying upon all relevant Supreme Court and Third Circuit precedent in order to make such a determination, including but not limited to, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

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

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

    I do not recall being asked any question about my views on administrative law.

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

No.

c. What are your "views on administrative law"?

I do not have any general views on administrative law. However, I am aware that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is a foundational case in administrative law. In *Chevron*, the Supreme Court held that if a court concludes that a statute is silent or ambiguous on an issue, then a court analyzing an agency's interpretation of that statue should only determine "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 842-43. If confirmed, I will faithfully apply the Supreme Court's decision in *Chevron* and subsequent cases from the Supreme Court and the Third Circuit dealing with administrative law.

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

The Supreme Court has held that if the text of a statute is clear, the analysis generally stops there (provided there is no binding precedent that controls how a statute should be construed.) If a statute is ambiguous, there are a variety of tools courts can use to construe a statute, including legislative history, which the Supreme Court has used to interpret statutes.

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

No.

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

I read your questions carefully after I received them on June 12, 2018. I consulted reference materials as needed in order to prepare my responses. I then drafted answers to the questions, and solicited feedback on my answers from members of the Office of Legal Policy at the United States Department of Justice. Finally, I revised my answers to some extent upon consideration of the feedback. While I have authorized the Office of Legal Policy to submit these answers to the Committee on my behalf, each of the answers to these questions and questions from other members of the Committee is my own.

Written Questions for Jennifer Philpott Wilson
Submitted by Senator Leahy
June 12, 2019

1. While in law school in 2001, you co-authored *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation* and referred to lawsuits by public entities against the tobacco and handgun industries as "legalized blackmail" and "an abuse of the judicial process." **Do you stand by this assessment?**

   I would not use the same language today. I co-wrote that law review article almost 20 years ago while I was a student. I had never practiced law, and I was writing an academic commentary. The term legalized blackmail was not my own term, but rather was quoted from several cited sources in the article. Since co-writing that article, I have served as a law clerk for two federal judges - one district court judge and one circuit court judge - and practiced law as a litigator in private practice and at the U.S. Department of Justice. With the benefit of that experience, I have developed a more balanced perspective on the litigation process. I have also learned that such colorful rhetorical language is not well-suited for legal briefs and judicial opinions. In fact, I have expressed that view in the legal writing course that I developed and taught for second and third year law students at the Penn State Dickinson School of Law, entitled Written Advocacy and Judicial Opinions.

   The ultimate conclusion of my co-written law review article was that the public entity lawsuits against tobacco companies and handgun manufacturers that were analyzed in the article were used to achieve legislative effects. While I do stand by that conclusion, it would have no application to my decision-making as a judge, if I am confirmed. As a judge, I would faithfully adhere to the judicial oath of office in 28 U.S.C. § 453, set aside my personal views, and apply controlling precedent.

2. You have significant experience as a defense attorney. Every person deserves competent counsel, and attorneys who put aside any personal qualms to defend the accused — even, and perhaps especially, those accused of terrible crimes — deserve great credit.

   (a) Do you believe that the ability to set personal beliefs to one side, which you displayed as a defense attorney, is equally as important as a judge? Will you display the same level of impartiality you displayed as a defense attorney?

   I believe that my demonstrated ability to set aside my personal beliefs in order to defend those accused of serious, and sometimes heinous, crimes will be equally as important if I am confirmed as a district court judge. If I am so fortunate, I will display the highest degree of impartiality in fulfilling my oath of office.

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

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

(a) Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

Yes. I will follow the instruction of the Supreme Court that when interpreting statutory text, it is important to consider the words in the broader context of the statute as a whole.

4. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

The independence of the federal judiciary is a crucial aspect of our constitutional framework. Article III of the Constitution provides certain protections to protect judicial independence including life tenure and irreducible salaries. These protections are intended to enable federal judges to make decisions without concern about criticism that may follow.

(b) While anyone can criticize the merits of a court's decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?

It has never been my practice to criticize the legitimacy of a judge or court even though I may have disagreed with a decision.

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

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

I am not aware of such a constitutional provision or Supreme Court precedent. Supreme Court precedent provides that courts can review

decisions made by the President, including during times of war or other armed conflict. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

6. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders.

(a) If this president, any future president, or any other executive branch official refuses to comply with a court order, how should the courts respond?

If confirmed, and if such a scenario would be presented in my court, I would carefully examine the pertinent authorities including, but not limited to, Federal Rule of Civil Procedure 37. Generally speaking, district courts have procedures to address situations where any litigant or third party fails or refuses to comply with an order of the court.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

The Constitution assigns powers over war and foreign affairs to the President and Congress. When evaluating conflicts between the two branches in this area, the Supreme Court has considered Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). If confirmed, I will apply all applicable precedents that may bear on the respective branches' exercise of authority in a time of war.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution?

The Supreme Court stated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that even in a time of war, the President's authorities are not unfettered and are, in fact, at their lowest ebb when they run contrary to a law passed by Congress. If confirmed, I would faithfully apply Supreme Court

and Third Circuit precedent and any relevant constitutional or statutory provisions.

(c) Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

Please see my response to Question 7(b).

8. How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?

When evaluating any challenge to Executive action, including an action involving a national security matter, a court must consider all relevant precedent, constitutional provisions, and any pertinent statutory provision. The contours of judicial review of Executive action are outlined in cases such as *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

9. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(a) Do you agree with that view? Does the Constitution permit discrimination against women?

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Equal Protection Clause applies to laws that make distinctions on the basis of gender, and that the government must demonstrate an "exceedingly persuasive justification" for gender-based classifications. I will faithfully follow this precedent and all other relevant precedent from the Supreme Court and the Third Circuit.

10. Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"

I would not characterize the Voting Rights Act that way. Rather, I would characterize the Voting Rights Act based on Supreme Court precedent. The Supreme Court has stated that the Voting Rights Act has helped to remedy the disenfranchisement of African Americans and that its accomplishments are "undeniable." *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193 (2009). If confirmed, I will faithfully apply all Supreme Court and Third Circuit precedent concerning the Voting Rights Act.

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

Article I, Section 9 of the Constitution states: "And no Person holding any Office or Profit of Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

12. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

(a) When is it appropriate for a court to substitute its own factual findings for those made by Congress or the lower courts?

An appellate court considers the record that has been developed in the district court. Established standards of review govern an appellate court's review of factual findings made in the district court.

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

These Amendments reflect a constitutional commitment to counteracting racial discrimination following the Civil War. Each of these Amendments provides that Congress has the power to enforce them "by appropriate legislation." U.S. Const. art. XIII, § 2; U.S. Const. art. XIV, § 5; U.S. Const. art. XV, § 2.

14. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

a. Do you believe the Constitution protects that personal autonomy as a fundamental right?

The Supreme Court has held in a number of cases, such as *Lawrence v. Texas*, that the Constitution protects the right to personal autonomy in numerous situations. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). These decisions are binding Supreme Court precedent, and if confirmed, I will faithfully apply them and all other Supreme Court and Third Circuit precedent.

15. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

The Supreme Court has stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991). It is never appropriate for lower courts to depart from Supreme Court precedent. If confirmed as a district court judge, I will faithfully apply the precedent of the Supreme Court and the Third Circuit.

16. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

I will determine whether to recuse by reference to the standards in 28 U.S.C. § 455, Canon 3 of the Code of Conduct of United States Judges, as well as any other applicable rules, opinions, or ethical guidance. I will also, as necessary and appropriate, consult with judicial colleagues and

ethics officials within the judicial system. I anticipate that there will be matters from which I will need to recuse, including all cases in which I have appeared as counsel, cases where I have a financial interest, and, for an appropriate period of time, cases in which my law firm is involved.

17. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

    (a) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

    Courts play an important role in protecting constitutional rights through the impartial application of the law and fidelity to the rule of law. If confirmed, I would fulfill that role and faithfully apply the Supreme Court's decision in *Carolene Products* and all Supreme Court and Third Circuit precedent.

18. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

    (a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

    Yes.

19. Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?

I have not had occasion to study this issue. If confirmed, and if a case before me presents this issue, I will identify and faithfully apply all relevant precedent from the Supreme Court and the Third Circuit**.**

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

The Constitution provides Congress with limited and enumerated powers. The Supreme Court has addressed the scope of Congress's power under the Commerce Clause in many cases, including but not limited to, *Wickard v. Filburn*, 317 U.S. 111 (1942), *United States v. Lopez*, 514 U.S. 549 (1995), and *NFIB v. Sebelius*, 567 U.S. 519 (2012). The Supreme Court has addressed the scope of Congressional authority under Section 5 of the Fourteenth Amendment in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

21. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

The decision in *Trump v. Hawaii* is Supreme Court precedent, and I will faithfully apply this and all other relevant Supreme Court and Third Circuit precedent. As a judicial nominee, it would not be appropriate for me to comment further on this question because it relates to matters that are currently pending in the federal courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

22. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The Supreme Court has held that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an

abortion impose an undue burden on that right." *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotations omitted). If confirmed, I will faithfully apply this and all other relevant precedent from the Supreme Court and the Third Circuit in order to determine whether a regulation imposes an "undue burden."

23. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

    (a) Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?

    There is Supreme Court precedent on the extent of the doctrine of qualified immunity, and the balancing of interests. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In *Pearson* the Supreme Court stated: "Qualified immunity balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." As the Supreme Court indicated the doctrine of qualified immunity takes into account both of these interests. If confirmed, I will faithfully apply this and all other relevant Supreme Court and Third Circuit precedent.

24. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted "seismic shifts in digital technology," such as the "exhaustive chronicle of location information casually collected by wireless carriers today."

    (a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?

    The Supreme Court has recognized that new technological developments implicate Fourth Amendment concerns. *See, e.g., Carpenter v. United*

States, 138 S. Ct. 2206 (2018); *Riley v. California*, 573 U.S. 373 (2014). As these cases demonstrate, the Supreme Court has applied the requirement to obtain a warrant in new technological situations. If confirmed, I will faithfully apply these and all other relevant Supreme Court and Third Circuit precedent when addressing the application of the Fourth Amendment to new technologies.

25. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

(a) With the understanding that you cannot comment on pending cases, are there situations in which you believe a president can lawfully allocate funds for a purpose previously rejected by Congress?

I have not had the opportunity to study this issue. In any event, as a judicial nominee, it would not be appropriate for me to comment on this question because it relates to matters that may arise or that are currently pending in the federal courts. *See* Code of Conduct for U.S. Judges, Canon 3A(6).

26. Can you discuss the importance of judges being free from political influence or the appearance thereof?

This is an issue of fundamental constitutional importance. The principle of an independent judiciary requires that judges remain free from political influence. This requirement is confirmed in Canons 1 and 5 of the Code of Conduct for U.S. Judges. The independence of our judiciary from political or other influences enables judges to render a decision based solely on the law and the facts of the case without regard to any outside influence.

Nomination of Jennifer Philpott Wilson
to the United States District Court for the Middle District of Pennsylvania
Questions for the Record
Submitted June 12, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Last year, you were found to have rendered ineffective assistance of counsel for the defendant in *United States v. Mentzer* by the U.S. District Court for the Middle District of Pennsylvania – the same court for which you are now nominated. How can you assure this Committee that you would faithfully discharge your duties as a district court judge?

   In *United States v. Mentzer*, I was privately retained in 2015 by a criminal defendant (Mentzer) after he was charged by federal prosecutors with multiple serious felonies for producing, distributing, and possessing child pornography. He produced child pornography in his home by engaging in and recording sex acts with a minor boy. The maximum prison sentence for these charges was 80 years. After I was retained, I zealously advocated on behalf of my client. I successfully negotiated a plea agreement that enabled him to plead one count of the multi-count indictment. As a result, the maximum prison sentence he faced dropped from 80 years to 30 years. During the sentencing phase of his case, I successfully argued for him to receive a sentence of 20 years, which was well below the statutory maximum, and in the middle of the advisory guideline range.

   Immediately after his sentencing hearing, I advised my client of his right to appeal, and the time frame permitted for filing a notice of appeal, as I do with all my clients when they have a right to appeal. Because he did not direct me to file an appeal during that conference, I told him that I would wait to hear from him about whether he wanted to file a notice of appeal. I explained that I would file a notice of appeal on his behalf, if he asked me to do so even though I did not perceive any potentially meritorious issue upon which to base an appeal. During the time frame for filing a notice of appeal, I received a letter from my client. It made no mention of filing an appeal. At no point did my client direct me to file an appeal, and I did not file an appeal on his behalf. If he had told me he wanted to appeal, I certainly would have filed a notice of appeal.

   In 2017, eight months after his sentencing Mentzer alleged that I had been ineffective by not filing a notice of appeal in his case. After reviewing the issue, a district court judge ruled that I was ineffective in this instance, because I did not follow through with ascertaining whether the client wanted to file an appeal. The district court reinstated his right to a direct appeal, and he filed an appeal challenging his sentence. I did not serve as Mentzer's attorney for his appeal. After considering his appeal, the U.S. Court of Appeals for the Third Circuit affirmed his sentence. I appreciate the opportunity provided by the district court to my former client to have his day in court on appeal, even though his sentence was affirmed.

In my career, I have learned something new about the law, best practices, and/or the rules of procedure from every case, and this case was no exception. I subsequently revised my post-judgment communication with clients to ensure that I ascertain whether they want to file an appeal if they do not communicate a decision to me, rather than risking a mis-communication.

I can assure this Committee that I will faithfully discharge my duties as a district court judge, if confirmed, based on my deep commitment to public service, the rule of law, and the equal and fair administration of justice. I have demonstrated this commitment throughout my legal career, during which I have served as a law clerk for two federal judges (one district court judge and one circuit court judge) and served as a trial attorney at the U.S. Department of Justice and in private practice. These professional experiences have prepared me well to tackle the duties of a district court judge. The federal judges for whom I clerked taught me that a judge must be hard working, careful, and fair in discharging his or her judicial duties in every case. At the Department of Justice and in private practice, I have zealously and diligently advocated for my clients, which have included the United States government, individuals, and large and small organizations, through all stages of the civil and criminal litigation process. In private practice, I have assisted the judiciary and my community by accepting numerous court appointments from state and federal courts to represent individuals in need of legal assistance, including the indigent, in difficult criminal and family law cases. If confirmed as a district court judge, I will diligently uphold the rule of law and faithfully adhere to the oath of office in 28 U.S.C. § 453.

2. Recent reporting in the Washington Post ("A conservative activist's behind-the-scenes campaign to remake the nation's courts," May 21, 2019) documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

    a. **Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?**

        Prior to receiving these questions, I had not read the article or listened to the recording. However, upon your request, I have now reviewed both.

    b. **Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.**

        I have no personal knowledge of anonymous or opaque spending related to federal judicial nominations. I believe that due process demands judicial impartiality and the separation of powers requires judicial independence. These are bedrock concepts in our system of government.

Canon 1 of the Code of Conduct for federal judges states: "An independent and honorable judiciary is indispensable to justice in our society."

c. **Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?**

This is not a view that I share. The federal judicial appointment process is generally established in Article II, Section 2 of the United States Constitution, and is dedicated to the legislative and executive branches of government. The question of whether the judicial selection process should be changed is a political question or policy decision committed to the coordinate branches of government. *See* Code of Conduct for United States Judges, Canons 2.A. and 5.

d. **Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.**

I do not have any such knowledge.

e. **As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country [that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?**

I have no knowledge of Mr. Leo's beliefs other than as indicated in the statement in the audio recording published by the Washington Post . I believe that the role of a judge is to faithfully adhere to the oath of office in 28 U.S.C. § 453, ensure due process, carefully consider the parties' arguments, identify and apply the controlling precedent to the facts of each case, and provide open-minded, fair, and equal administration of justice to all persons.

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

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

Yes. The role of a district court judge is generally similar to the role of a baseball umpire in the sense that both are neutral and impartial with no stake in the outcome. The role of both is limited to ensuring that the established rules are followed and there is a level and fair "playing field" regardless of personal preferences.

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

When rendering a decision, a judge generally should not consider practical consequences unless required to do so by controlling precedent. In the context of ruling on a motion for a preliminary injunction, for example, a judge should consider practical consequences such as whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, among other considerations. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

4. 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 trial judge to make a subjective determination?

Federal Rule of Civil Procedure 56(a) provides that "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A court must determine, based on controlling precedent, whether the movant is entitled to judgment as a matter of law. The determination of whether there is a genuine dispute as to a material fact is a process that is outlined in sections (c), (d), and (e) of Rule 56, and involves a combination of objective fact-finding and subjective decision-making to be guided by the factors set forth by the Supreme Court. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

5. 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?

   Empathy can not override a judge's obligation to follow the law in making substantive legal decisions. However, a judge can be empathetic in exercising his or her discretion with respect to scheduling or other

logistical issues in order to avoid unduly burdening counsel, litigants, witnesses, victims, or jurors.

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

A judge should never allow his or her personal life experience to impact the decision-making process to the extent that it may impair the judge's impartiality. A judge must follow the law, and not render decisions based on personal preference. However, a judge's personal life experience, including his or her knowledge, education and training, can assist the judge in treating all people appearing in court with dignity and respect. A judge's personal life experience may enable a judge to relate and communicate comfortably with parties, counsel, witnesses, jurors, and court personnel, which ultimately enhances effective court proceedings and the credibility of the court.

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?

If confirmed, I will continue to treat all persons with dignity and respect on the bench as I have in practice and in my personal life. I have lived and practiced law in different parts of the country ranging from rural Pennsylvania, to suburban Philadelphia, to Memphis, Tennessee, to New York City, to Washington, D.C. I have represented clients from different demographic backgrounds, ranging from large corporation counsel to small business owners, children and parents in the midst of difficult family situations, and numerous individuals who are young, old, middle-aged, male, female, African-American, Hispanic, Asian-American, Caucasian, gay, abused, mentally or physically ill, and disabled. I have represented clients who are not citizens as well as clients who do not speak English, and I have worked with foreign language and American Sign Language interpreters. To the extent that I can appropriately employ empathy in managing court proceedings (see my answer to question 5.a.), I believe that these life experiences will enable to me be relatable, and communicate effectively with all manner of persons who may appear in my courtroom.

6. 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.

7. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the jury play in our constitutional system?

The right to a jury trial in all criminal prosecutions is enshrined in the Sixth Amendment, and is incorporated to the states through the Fourteenth Amendment. The right to a jury trial in certain common law suits is guaranteed by the Seventh Amendment in federal courts, although this right has not been incorporated to the states. In criminal and civil trials, the jury is the finder of fact and renders a verdict based on the application of the law, as provided by the judge, to the facts as determined by the jury.

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

I have not encountered this issue in practice. If an issue is presented in a case wherein there may be a tension between the enforcement of a pre-dispute arbitration clause and the Seventh Amendment right to a civil jury trial, I would faithfully follow the Supreme Court and Third Circuit precedent in order to resolve the issue for the litigants.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my answer to question 7.b.

8. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

If confirmed, I will follow Supreme Court and Third Circuit precedent to determine the appropriate level of deference to afford to congressional fact-finding in legislation expanding or limiting individual rights. As a starting point, I would examine the precedent in Supreme Court cases including, but not limited to, *City of Boerne v. Flores*, 521 U.S. 507 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000), as well as the authorities cited by the parties.

9. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

Yes. Prior to attending or participating in any educational seminar or program, I will give careful consideration to all of the factors discussed in Advisory Opinion No. 116, as well as the prior Advisory Opinions (which include Advisory Opinion Nos. 67, 87, 93, and 105), and each of the Canons of the Code of Conduct for federal judges referenced in this opinion.

ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

Please see my response to question 9.b.1.

iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

Please see my response to question 9.b.1.

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

Please see my response to question 9.b.1.

v. **Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.**

Please see my response to question 9.b.1.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to question 9.b.1.

Questions for the Record for Jennifer Philpott Wilson
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

    a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

    No.

    b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

    No.

Nomination of Jennifer Philpott Wilson
United States District Court for the Middle District of Pennsylvania Questions for the Record
Submitted June 12, 2019

QUESTIONS FROM SENATOR BOOKER

1. According to your Questionnaire you "have accepted numerous court appointments in Perry and Juniata Counties to represent indigent clients at an hourly rate that is approximately one-third of my private hourly rate."[1] You also said you have accepted court appointments as a Guardian ad Litem, to represent 20 parents in child welfare matters, and served as conflict counsel for public defenders.[2] The American Bar Association says that "all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public."[3]

   a. **Can you provide the Senate Judiciary Committee with a breakdown or estimate of the number of matters that you work on per year without fee or expectation of fee? Please factor into your breakdown/estimate whether those matters are court-appointed or not.**

   I have accepted two cases in my practice without any fee, including the *pro bono* representation of a church when I was an associate at Chadbourne & Parke, and more recently the *pro bono* representation of a not-for-profit community theater group as a partner at Philpott Wilson LLP.

   As a partner at Philpott Wilson LLP, I have completed numerous cases for private clients who were unable to pay the full cost of my services. I estimate that I have represented at least three clients privately each year for the past 10 years without expectation of payment in full for my services.

   I have accepted federal court appointments as a member of the Criminal Justice Act panel in the Middle District of Pennsylvania, and I am compensated for my representation of these criminal defense clients at the hourly rate established by Congress for CJA panel members. Although the number of cases varies by year, I have accepted more than 60 court appointments in ten years, or approximately 6 cases per year. I devote approximately 40% of my practice, in terms of hours, to these matters.

   I have accepted state court appointments on a regular basis in criminal and family law matters. I am compensated for my representation of these clients at a rate established by the County Commissioners in Perry and Juniata Counties in Pennsylvania. Although the number of cases varies by year, I have accepted more than 200 appointments total in ten years, or approximately 20 cases per year. I devote approximately 30% of my practice, in terms of hours, to these matters.

2. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[4] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[5] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[6] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[7]

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

Yes, I understand that implicit racial bias unfortunately exists in our criminal justice system.

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

Yes.

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

Several years ago, I attended a Continuing Legal Education program for federal criminal defense attorneys that included a session on the issue of implicit bias, and I read the written materials supplied by the presenter. However, I did not retain copies and I can not recall the titles or authors of the materials supplied. I have at times read news and scholarly articles about the issues of implicit racial bias and racial disparity in our criminal justice system from personal interest, but I am not able to provide a listing of publications reviewed as I have not studied the issue for academic or professional purposes.

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[1] SJQ at p. 25.
[2] *Id.*
[3] AMERICAN BAR ASSOCIATION, *A Guide Explanation to Pro Bono Services* (July 26, 2018) https://www.americanbar.org/groups/legal_education/resources/pro_bono/.
[4] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[5] *Id.*
[6] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[7] *Id.*
[8] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER*

REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research- publications/2017/20171114_Demographics.pdf.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of19.1 percent longer.[8] Why do you think that is the case?

Although I have reviewed numerous reports prepared by the United States Sentencing Commission as a federal criminal defense lawyer, I do not recall reading the specific report referenced in this question. Without reviewing this specific report, I am unable to offer an opinion about the reason or reasons for the disparity in sentencing that is identified in the report. If confirmed, I will review any and all reports of the United States Sentencing Commission that are referenced by parties in criminal cases, and for purposes of my general awareness and understanding of federal sentencing issues.

e.

According to an academic study, black men are 75 percent more likely than similarly situated white men are to be charged with federal offenses that carry harsh mandatory minimum sentences.[9] Why do you think that is the case?

I have not read the academic study referenced in this question. Without reviewing the study, I am unable to offer an opinion about the reason or reasons for the disparity in charging that is identified in the report.

f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

A judge must ensure fairness, equality, and impartiality in all criminal proceedings, and must approach each case with mindfulness and vigilance with respect to potential implicit biases of any kind. If confirmed, I will continue to treat all persons fairly, respectfully, and equally, just as I have done in practice and in my personal life.

3. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[10] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[11]

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

I have not studied this issue, and have no basis to opine as to whether there is a direct causal link, a statistical correlation, or other factors at play.

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

I have not studied this issue, and have no basis to opine as to whether there is a direct causal link, a statistical correlation, or other factors at play.

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

Yes.

5. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I do not consider myself by reference to any label. If confirmed, I will faithfully abide by the oath of office in 28 U.S.C. § 453. My judicial philosophy will be to fairly apply the rule of law, and my goal will be to decide all cases and controversies within my jurisdiction fairly and impartially by following precedent. If called upon to interpret the Constitution in a matter of first impression, I would begin my analysis with the text of the Constitution. I would research whether any persuasive or analogous precedent exists to guide my analysis, particularly with respect to the interpretive method to be utilized. I would also consider the original public meaning of the text as it was understood at the time of ratification, as well as all other arguments and authorities presented by the parties in order to resolve the issue.

6. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

I do not consider myself by reference to any label. If confirmed, I will faithfully abide by the oath of office in 28 U.S.C. § 453. My judicial philosophy will be to fairly apply the rule of law, and my goal will be to decide all cases and controversies within my jurisdiction fairly and impartially by following precedent. If called upon to interpret a statutory provision in a matter of first impression, I would begin my analysis with the text of the statute. I would research whether any persuasive or analogous precedent exists to guide my analysis, particularly with respect to the interpretive method to be utilized. If the meaning of the statutory provision is clear and unambiguous, then I would apply the plain language of the statutory provision to the facts of the case. If the meaning of the statutory provision is ambiguous, I would consider all pertinent canons of statutory construction, reliable legislative history, and any other arguments or authorities presented by the parties to resolve the ambiguity.

7. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

Yes, under the circumstances described in my answer to question 6.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it

reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Yes, under the circumstances described in my answer to question 6.

8. Would you honor the request of a plaintiff, defendant, or witness in your courtroom, who is transgender, to be referred in accordance with their gender identity?

Yes. If confirmed, I will strive to ensure that all persons who appear in my courtroom are treated with dignity and respect.

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[9] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

[10] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates
-continue-to-fall.

[11] *Id.*

9. Do you believe that *Brown v. Board of Education*[12] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, I believe that *Brown v. Board of Education* was correctly decided. This landmark decision ended the fiction of "separate but equal" in our nation's public education. *Brown* was an enormously consequential decision for our nation because it enabled African American integration in public schools and then all other aspects of American life. This decision furthered the promise of equality in the 14th Amendment. These unique qualities of the *Brown* decision, combined with the fact that I am not aware of any pending or impending challenge in the courts to the core holding of *Brown*, enable me to answer your question directly. If confirmed, I will faithfully follow and apply *Brown* and all other Supreme Court and Third Circuit precedent.

10. Do you believe that *Plessy v. Ferguson*[13] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, I do not believe that *Plessy v. Ferguson* was correctly decided. As the Supreme Court held in *Brown*, the precedent in *Plessy* was wrong, and it was reversed. If confirmed, I will faithfully follow and apply *Brown* and all other Supreme Court and Third Circuit precedent.

11. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

I have received input on this subject from officials from the Office of Legal Policy in the Department of Justice. The only instruction I received was to answer all questions truthfully. I have completed my own research by reviewing the Code of Conduct for federal judges, as well as several articles discussing the practices of prior judicial nominees, including Supreme Court nominees, about offering opinions in public about whether past Supreme Court decisions were correctly decided. My answers to all questions from the Committee are my own.

12. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[14] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

If confirmed, I would carefully consider the issue of recusal under the Code of Conduct for federal judges and 28 U.S.C. § 455. I will recuse from any case in which I had a role, or in which my family members or law firm are involved or in which there is a financial interest. In all other instances, I will consider recusal on a case-by-case basis,

based on applicable authority and ethical guidance, with appropriate regard for all real or potential conflicts or financial interests as well as any appearance of impropriety. Since every case is unique, I can not speculate about to the appropriateness of recusal in hypothetical situations for other judges. However, I can assure the Committee that, if confirmed, I will examine recusal issues with great care. Generally speaking, I would not anticipate recusing from a case based on race or ethnicity alone.

13. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[15] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that every litigant is entitled to fair treatment in our courts, and that immigrants, including undocumented immigrants, possess due process rights protected by the U.S. Constitution. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Plyler v. Doe*, 457 U.S. 202, 210 (1982). If confirmed, I will faithfully apply the Supreme Court and Third Circuit precedent on this issue, and all others.

[12] 347 U.S. 483 (1954).
[13] 163 U.S. 537 (1896).
[14] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict*,' WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.
[15] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump
/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted June 12, 2019
For the Nomination of

Jennifer P. Wilson, to the U.S. District Court for the Middle District of Pennsylvania

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

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

   If confirmed, I will exercise my discretion in sentencing each defendant who appears before me with careful consideration. Before imposing sentence, I will make an individualized assessment for every defendant based on the facts specific to the defendant and his or her offense, and the arguments presented. I will follow the sentencing procedure set forth in Fed. R. Crim. Pro. 32 and 18 U.S.C. § 3553. I will review and consider all relevant materials, including but not limited to: the Presentence Report; the recommendation made by the probation officer; the sentencing memoranda submitted by the parties and any authorities or exhibits referenced by the parties; statements by victims and the defendants' family members; testimony and exhibits presented at any sentencing hearings; arguments of counsel; and the allocution of the defendant.

   Upon consideration of this information and argument, I will then follow the three steps set forth in *Gall v. United States*, 552 U.S. 38 (2007) and *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006). In accord with this process, I will first calculate the guideline range, ruling on all objections to the Presentence Report. Second, I will formally rule on all departure motions and state how that ruling affects the guidelines calculation. Finally, I would consider the sentencing factors in 18 U.S.C. § 3553, and any requests for variance. I will give meaningful consideration to all arguments of counsel, and will respond to "any properly presented sentencing argument which has colorable legal merit and a factual basis." *United States v. Flores-Mejia*, 759 F.3d 253, 256 (3d Cir. 2014) (en banc).

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

   I would follow the process described in response to Question 1.a. In addition, I would consider available sentencing data to avoid unwarranted sentencing disparity, as well as studies and reports published by the United States Sentencing Commission.

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

The Sentencing Guidelines list various grounds that may justify a departure in Chapter 5, Part K, and I would consider granting departures where warranted based on the facts of the case. In addition, a departure may be warranted when there are aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and where necessary to ensure that the sentence is "sufficient, but not greater than necessary." See 18 U.S.C. § 3553(a)(2), (b)(1); Guidelines § 5K2.0(a). I would also consider requests for variance in addition to potential grounds for departure.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

i. Do you agree with Judge Reeves?

If confirmed, I will follow the law established by Congress, including mandatory minimum sentences, regardless of my personal opinion. As a district court nominee, it would not be appropriate for me to express my opinion about the efficacy or wisdom of mandatory minimum sentences because those are policy choices committed to the coordinate branches of government. *See* Code of Conduct for United States Judges, Canons 2.A. and 5.

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

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

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

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

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

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose html

efforts to address the injustice, including:

1. **Describing the injustice in your opinions?**

   I do not believe it is appropriate for me to commit to doing so at this time. However, if confirmed, I will make a determination of what commentary may be appropriate depending on the circumstances of the case and the defendant before me.

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

   In general, charging decisions are entrusted to the Executive branch. To the extent applicable law and ethical rules permit me to discuss charging policies with members of the Executive branch, I would consider doing so where the policy at issue appears to undermine confidence in the justice system.

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

   Please see my response to Question 1.d.iv.2.

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

If confirmed, I will consider all sentencing options, including alternatives to incarceration, in order to fashion an individualized sentence for each defendant that is sufficient, but not greater than necessary, to achieve the sentencing purposes as defined by Congress in 18 U.S.C. § 3553.

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

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

Yes. In fact, the oath of office for district court judges, in 28 U.S.C. § 453, requires a judge to swear or affirm to "administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all duties . . . under the Constitution and laws of the United States."

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

   Yes. I am aware of sentencing data from a variety of sources, including the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men, and that on average the sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I will be on guard to avoid unwarranted disparities in sentencing the defendants who appear before me.

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

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

      Yes.

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

      If confirmed, I intend to make staffing decisions on a case-by-case basis. In doing so, I will look for opportunities to hire and promote qualified minorities and women.