Nomination of Joshua Wolson to the United States District Court for the Eastern District of Pennsylvania
Questions for the Record July 18, 2018

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.

   b. Do you believe it is proper for a district court judge to question Supreme Court precedent in an opinion?

   In general, it is not appropriate for a district court judge to question Supreme Court precedent in an opinion. There could be a rare circumstance where a district court might point out that Supreme Court precedent dictates a certain outcome but that that outcome seems at odds with other precedent or law, but even the circumstances permitting such commentary will be few and far between.

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

   District courts are bound by precedents of the Supreme Court and the Circuit Court where the district court sits but not by decisions of other district courts. Although decisions from other district court judges are not binding, it is ordinarily preferable for lower courts to decide cases in a manner that is consistent with other, non-binding district court cases. Other factors, however, such as particular facts or intervening controlling precedent, could cause a district court to reach a result different than a prior decision by the same court.

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

   The Supreme Court has identified factors that it takes into account, such as reliance interests, workability, and the doctrinal bases for a decision, when considering whether to overturn its own precedent. Beyond that, it would not be appropriate for me, as a district court nominee, to offer any view on when it may be appropriate for the Supreme Court to overturn its own precedent.

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"?

All binding Supreme Court precedent, including the decision in *Roe v. Wade*, is binding on district courts. It would not be appropriate for me to characterize, rank, or categorize the relative precedential value of any Supreme Court case. If confirmed, I will faithfully follow and apply all binding Supreme Court precedent.

b. Is it settled law?

Roe v. Wade is binding precedent of the United States Supreme Court and is therefore settled from the perspective of a district court judge.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry.

a. Is the holding in *Obergefell* settled law?

Obergefell is binding precedent of the United States Supreme Court and is therefore settled from the perspective of a district court judge.

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?

It would not be appropriate for me, as a district court nominee, to offer any view or opinion regarding Justice Stevens' dissent in *Heller*. If confirmed, I would faithfully apply *Heller* and all binding Supreme Court precedent.

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

In *Heller*, the Supreme Court explained 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 buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). This passage indicates that, under *Heller*, some regulation of guns is permissible.

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 *Heller* and the prior case law in this area. Moreover, the lengthy discussions about the meaning and scope of the Second Amendment before and after *Heller*, as well as in the *Heller* opinions themselves, demonstrate that there are ongoing debates on this subject. Therefore, it would not be appropriate as a district court nominee to offer any views on this subject.

5. On May 19, 2016, you were interviewed on the Dom Giordano show on CBS Radio. During that interview, you discussed the list of potential Supreme Court nominees that was assembled for then-candidate Donald Trump by two outside conservative groups, the Heritage Foundation and the Federalist Society. You said that you were not aware that the Federalist Society "as an organization" helped assemble the list, but said you "would hope that the Trump campaign was talking to some other members of the Federalist Society, and suspect they were."

a. Why did you hope that the Trump campaign was talking with members of the Federalist Society in assembling a list of potential Supreme Court nominees?

The Federalist Society is an organization comprised primarily, though not exclusively, of lawyers, and its focus is almost entirely on legal issues. Its membership is voluntary, meaning that its members have opted to spend their time focused on those legal issues. Therefore, in my view, its members have particular knowledge and expertise on which a Presidential candidate—particularly one who is not a lawyer—can draw in identifying candidates for court appointments.

b. As a member of the Federalist Society—or in any other capacity—did you have any conversations with anyone serving on or affiliated with the Trump campaign regarding the so-called "shortlist" of potential Supreme Court nominees, or whether to suggest any names for inclusion on that list? If so, describe in detail the content of those conversations, the date of those conversations, and the other participants in those conversation.

No.

c. Did you ever discuss the "shortlist" or the inclusion of any specific names on that list with any other members of the Federalist Society? If so, describe in detail the content of those conversations, the date of those conversations, and the other participants in those conversation.

I have had many casual conversations with friends about the "shortlist," and I am sure that some of the people who participated in those conversations were members of the Federalist Society. I do not have any specific recollection of any of those conversations. I have never had a conversation about the "shortlist" with other members of the Federalist Society as part of a formal Federalist Society program or under the auspices of the Federalist Society.

d. Please explain how it is appropriate for groups outside of government to assemble lists from which the selection of Supreme Court Justices is made.

Any private organization has a right under the First Amendment to petition the Executive Branch on matters of public policy, including recommendations for judicial nominations. The decision to nominate any particular individual as a Supreme Court Justice is one that our Constitution entrusts to the Executive Branch. The particular process that any president employs to select judicial nominees, including Supreme Court nominees, is a political question on which it would be inappropriate for me to comment.

6. In a February 1, 2017 radio interview, also with Dom Giordano, you praised President Trump's nomination of then-Judge Gorsuch to fill Justice Scalia's seat. You also discussed the response you expected Democrats in the Senate to have to Judge Gorsuch's nomination, saying that Democrats would claim the seat was "stolen." You also spoke favorably of Senator McConnell's decision not to allow consideration of President Obama's nominee to the Supreme Court, Judge Merrick Garland, saying: "The circumstances of this election with a vacancy and given what Mitch McConnell did which was in many respects to make the election in no small part about the Supreme Court, it made it more important and more, not just more important from the standpoint of letting the voters know, but voters were really

   focused on it, I think, in a way that they might not have been if it was just an abstraction to say, 'if there's a vacancy during my term, here's who I might nominate."

   a. Why did you support Senator McConnell's decision to refuse to consider President Obama's nominee to the Supreme Court, Judge Merrick Garland?

   I did not say that I supported or opposed Senator McConnell's decision. I pointed out that the consequence of his decision was, in my opinion, to focus voters on the Supreme Court, given the vacant seat.

7. In a December 7, 2016 blog post for the Federalist Society, you wrote favorably about

Justice Scalia's approach to statutory interpretation, which focused principally on the text of the statute. You wrote: "With some luck, and hard work by those who think Justice Scalia's approach was the right one, there will be more decisions that evidence this consensus approach to statutory interpretation."

a. Please explain how Justice Scalia's approach to statutory interpretation is a "consensus approach."

As I pointed out in the blog entry in question, the Supreme Court's decision in *Apple v. Samsung* was an 8-0 decision. In the blog entry, I expressed my view that the Supreme Court had employed Justice Scalia's approach to statutory interpretation by focusing exclusively on the text of the statute in question. The Court's 8-0 decision demonstrated to me that the approach was one of consensus. Moreover, I viewed that outcome as consistent with Justice Kagan's view, expressed in a 2015 lecture at Harvard Law School, that "we're all textualists now."

8. In a June 10, 2009 Tweet, you sent out a link to a film called "The Third Jihad: Radical Islam's Vision for America" along with the comment, "Everyone should see this film. Very important." The film has been widely criticized for its representations of the Islamic faith and of Muslims, generally. The nation's largest Muslim civil rights and advocacy organization, the Council on American-Islamic Relations (CAIR), described the film as "depict[ing] Muslims as inherently violent and seeking world domination.

At your nomination hearing, Senator Durbin asked you about why you had tweeted what you did, and you said the following: "[M]y position was not so much about the film. It was spurred by an article, I think, that had been written that was condemning the film, and my concern was that at the time, I think, that people ought to view it for themselves and form their own decision rather than just take the word for a press account about it."

a. Please provide a copy of the article that "spurred" your Tweet.

At the hearing, I was testifying about my memory of the events that led to the tweet in question. It is my recollection that, while on Twitter shortly before the tweet, I saw one or more articles about the movie. At least one of the articles was critical of the movie. However, I have only a general memory about seeing the article. I do not have a copy of the article and cannot say with certainty exactly what article I saw.

b. At the time you tweeted a link to the film and encouraged everyone to see it, were you aware of concerns expressed by CAIR or other groups that the film depicted "Muslims as inherently violent and seeking world domination"? If so, why did you nevertheless encourage others to see the film?

I do not recall if I knew that CAIR or any other specific organization had criticized the movie, but I was aware that there had been criticism of the film. I

also was aware that there had been some praise for the film. I encouraged others to see the movie because I felt it was important for people to view the movie for themselves and decide whether or not they agreed with it, rather than taking the word of media outlets either way.

c. You tweeted that the film was "very important." In what way was the film "very important"?

From my perspective, the film appeared to be about an important topic and to feature individuals knowledgeable on that topic. For instance, I was aware that the film was narrated by a Muslim-American doctor who served in the U.S. Navy and included interviews with well-respected U.S. national security experts, including former Senator Joe Lieberman, former Department of Homeland Security Secretary Tom Ridge, former CIA Director James Woolsey, and former New York City Police Commissioner Ray Kelly, as well as former FBI officials and others. In sending the tweet, I was therefore trying to say that it was important for people to view the film and make up their own minds about its content.

9. On December 21, 2014, you tweeted about joining a radio host from southern New Jersey to talk about the constitutionality of one of President Obama's executive orders. Your Tweet did not specify which executive order you were going to discuss, and according to your Questionnaire, you contacted the radio station that aired the interview and the station no longer has a copy of your interview.

a. Which executive order did you discuss in this interview?

I have only a general memory of this interview. I do not believe that we discussed any particular executive order. Instead, I believe that the interview covered executive orders in general and whether and when such orders could violate the separation of powers by intruding on Congress's power under Article I of the Constitution. I also recall that, in general terms, we discussed the role of judicial review in evaluating both Congressional action and executive orders. During that discussion, I explained the important role of the judiciary in reviewing the constitutionality of legislative and executive enactments under *Marbury v. Madison*.

b. What did you say about the executive order?

Please see my answer to Question 9.a.

10. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 2009 and have served as President of the organization's Philadelphia Lawyers Chapter since 2015. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have

dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I did not write that description and am not familiar with the ideology that is referenced. In my experience, the Federalist Society provides a forum for debate on, discussion of, and education about a wide range of legal topics. These include live programs that the Philadelphia Lawyers Chapter hosts, teleconferences on a wide range of legal topics, and written materials. All of those programs and materials are open and available to the public. I do not recall any particular discussion of an "orthodox liberal ideology" during any of those programs or in any of the written materials.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

I am not aware of any particular effort that the Federalist Society makes to reorder priorities within the legal system. As noted above, from my perspective, most of the Federalist Society's activities consist of providing a forum for debate on, discussion of, and education about a range of legal topics. It is possible that those debates will contribute to changes in the legal system, but I am not aware of any specific, concerted effort to effect such change.

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

I am not aware of any particular traditional values on which the Federalist Society places a premium. Instead, as explained above, from my perspective, it provides a forum for debate on, discussion of, and education about a range of legal topics.

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

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

No.

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

No.

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

Although I have litigated cases that presented questions of administrative law and deference to administrative agencies, I do not have any general views on administrative law. I am aware that, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that if a court concludes that a statute is silent or ambiguous as to a specific issue, then a court analyzing any agency's interpretation of such a statute should only determine "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842-43. If I am 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 deference.

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

In interpreting any statute, a court's job is to give effect to the will of Congress, which is expressed through statutory language. Thus, a judge cannot consider legislative history when a statute's language is clear, and legislative history cannot be used to create an ambiguity where none exists in the statute. When a statute's language is not plain on its face, a court can consider the language in the larger context or structure of the statute in which it is found. As part of the effort to discern Congress's intent, a judge may resort to legislative history as an aid or cross-check. *See United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89, 95 (3d Cir. 2018). That is, legislative history can "play a confirmatory role in resolving ambiguity when statutory language and structure support a given interpretation." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 621-22 (3d Cir. 2015).

13. 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.

I have not had any such discussions.

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

I received these questions on July 18, 2018. After receipt, I did research and prepared responses. I shared draft responses with representatives of the Department of Justice's Office of Legal Policy. After receiving comments, I finalized my answers. While I have authorized the Office of Legal Policy to submit these answers to the Committee on my behalf, each of the answers provided in response to these and questions from other members of the Committee is my own.

Nomination of Joshua Wolson
United States District Court
For the Eastern District of Pennsylvania
Questions for the Record
Submitted July 18, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

1. Since 2016, have you been in contact with the Judicial Crisis Network? If so, please explain the nature and extent of your involvement with the group.

   No.

2. 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. Both an umpire and a judge should be impartial arbiters with no stake in the outcome other than ensuring that all parties follow the rules and that the proceedings are fair to all participants.

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

      A judge should not consider the practical consequences of a particular ruling unless controlling law directs the judge to do so. For example, in ruling on a motion for a preliminary injunction, a judge must consider several practical consequences, such as whether the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief, [whether] the balance of equities tips in his favor, and [whether] an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

3. 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 cannot supersede a judge's obligation to follow the law, but it can play a role in making decisions for which the law gives the judge discretion. For example, a judge can be empathetic in exercising his or her discretion in setting court dates and schedules to avoid an unfair burden on the parties, counsel, 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's experience, including the judge's knowledge, education, and training, can aid the judge's ability to respect all persons and to treat them with respect and dignity, to have an open mind to all arguments, and to communicate effectively with and relate to the people in the judge's courtroom, including parties, witnesses, lawyers, and jurors.

4. 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, it is not.

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

The Federal Rules of Civil Procedure mandate that judges administer all cases to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. This rule requires judges to consider all aspects of each case in order to ensure all parties, including parties with fewer resources, have a meaningful opportunity to present their arguments. In general, doing so will require the judge to engage in active case management. Throughout my career, I have had the opportunity to represent large companies, smaller companies facing the prospect of litigation against larger opponents, and individuals litigating against each other and against companies. I have also litigated in a number of federal courts around the country and seen different approaches to managing litigation. Those experiences have given me perspective on the types of concerns smaller litigants can have and on ways to manage litigation to ensure all parties a fair hearing.

6. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

Unfortunately, discrimination exists in parts of our society. If confirmed, I would do everything within my power to ensure that there is a fair and equal application of the law in my chambers and in all proceedings before me.

Nomination of Joshua Wolson to be a
United States District Court Judge for the Eastern District of
Pennsylvania Questions for the Record
Submitted July 18, 2018

QUESTIONS FROM SENATOR COONS

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

   In the first instance, I would look to decisions of the Supreme Court and the Third Circuit to determine if either of those courts has determined that a particular right is fundamental and protected under the Fourteenth Amendment. If there is no binding decision, then I would look to the framework that the Supreme Court has established, in cases such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), as well as decisions of the Third Circuit that expound on that framework such as *Holland v. Rosen*, -- F.3d --, 2018 WL 3340930 (July 9, 2018).

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

      Yes, as required by Supreme Court precedent in this area.

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

      Yes. I would look to the types of sources that the Supreme Court has used in making these determinations, such as historical practice under common law, practice in American colonies, history of state and territorial laws and judicial decisions, and long-established societal traditions.

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

      If the Supreme Court or Third Circuit has previously recognized a particular right as fundamental and protected, then any such precedent would be binding on me. I would look to decisions of other courts of appeals for their persuasive value.

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

      Yes. If confirmed, I would be bound not only to follow specific holdings but also to apply faithfully the essential reasoning of all binding Supreme Court and Third Circuit precedent.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. As binding Supreme Court precedent, I would follow and faithfully apply both *Planned Parenthood v. Casey* and *Lawrence v. Texas.*

f. What other factors would you consider?

Please see my answer to Question 1.

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

The Supreme Court has held that the Equal Protection Clause requires heightened scrutiny for gender-based classifications and for race-based classifications. *See, e.g., United States v. Va.*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 170 (1976).

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

I have not had occasion to consider whether the Equal Protection Clause of the Fourteenth Amendment was intended to extend to gender-based discrimination. If confirmed, the issue will be a moot one for me given applicable Supreme Court precedent.

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

Decisions interpreting the Fourteenth Amendment establish what that amendment has meant since it was enacted. I have not studied the history of litigation about the applicability of the Fourteenth Amendment's Equal Protection Clause, and I do not have any information as to why the *Virginia* litigation was not filed until 1990 or why the protection was first recognized in 1996.

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

The Supreme Court has held in *Obergefell* that the Fourteenth Amendment prevents states from barring same-sex couples from marriage on the same terms accorded to couples of the opposite sex. The extent to which the Fourteenth Amendment prohibits discrimination based on sexual orientation in contexts other

than marriage is a subject of ongoing litigation. It therefore would not be appropriate for me to comment. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

The extent to which the Fourteenth Amendment prohibits discrimination based on transgender status is an unsettled question that could come before me as a judge. Accordingly, it would not be appropriate for me to comment. *See* Code of Conduct for United States Judges, Canon 3(A)(6).

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

The Supreme Court has recognized such a right.

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

In *Roe v. Wade*, the Supreme Court recognized such a constitutional right to privacy, and it has subsequently reaffirmed *Roe's* central principle.

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

The Supreme Court has recognized such a right.

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

Not applicable.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
   a. When is it appropriate to consider evidence that sheds light on our

changing understanding of society?

The Supreme Court has at times, in cases such as *Obergefell* and *Virginia,* considered changing understandings of society. In other cases, such as *District of Columbia v. Heller* and *Crawford v. Wash.*, the Court has focused more on understandings prevailing at the time of the founding. I would consider evidence about changing understandings of society when appropriate in light of Supreme Court and Third Circuit precedent.

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

In general, scientific and social science evidence is adduced through expert witnesses pursuant to Fed. R. Evid. 702 and the standards that the Supreme Court established in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 173 (1999).

5. You are a member of the Federalist Society, which advocates for an originalist understanding of the constitution. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93.
   a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

   I have not studied the original meaning of the Fourteenth Amendment to be able to offer a view as to whether the decision in *Brown* was consistent with originalism. I am aware that some commentators have studied the issue and concluded that the decision in *Brown* was consistent with originalism, while others have disagreed.

   b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited July 17, 2018).

   Although determining the original public meaning of a constitutional provision can be difficult in the first instance, if confirmed I would not be interpreting any of these terms on my own. Instead, my interpretation of these terms would follow the decisions of the Supreme Court and the Third Circuit and be guided by decisions of other District Courts.

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

The public's understanding of a constitutional provision could be dispositive if the Supreme Court or Third Circuit has said that it is dispositive.

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

The public's understanding of the scope of a constitutional provision could constrain its application if the Supreme Court or the Third Circuit has said that such an understanding constrains the application of the provision.

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

I would in the first instance apply binding precedent of the Supreme Court and the Third Circuit. Moreover, even in the absence of a specific holding about the provision in question, if the essential reasoning of a binding Supreme Court or Third Circuit decision compelled a certain outcome, I would faithfully apply that reasoning. In the absence of such guidance from a controlling court, I would look to persuasive opinions of other circuit courts, scholarly commentary, and the text and context of the relevant provision. I would also look to historical sources bearing on the original public meaning of the provision at issue.

6. In law school you served as a research assistant to professors Louis Kaplow and Steven Shavell in connection with a paper entitled "Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy." The article argued that "[w]hen choice of legal rules is influenced by notions of fairness, individuals are often made worse off."

a. How and when should a federal district court judge consider notions of fairness?

A paramount role for a judge is to ensure that all litigants have a full and fair opportunity to be heard. Thus, a judge should consider notions of fairness in managing the courtroom to ensure such an opportunity. This can include a wide range of tools, ranging from exercising schedules and court dates to be fair to all parties, employing tools available under applicable statutes, and applying rules to ensure fairness (*e.g.*, enforcement of the proportionality standard in discovery disputes and enforcement of time limits to ensure all parties receive a hearing as promptly as possible, and offering extra leeway to *pro se* parties). In addition, in some circumstances the law mandates that a judge consider the fairness of a ruling. For example, in ruling on a motion for a preliminary injunction, a judge must consider several practical consequences, such as whether the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief, [whether] the balance of equities tips in his favor, and [whether] an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In such circumstances, a judge not only should but must consider notions of fairness.

b. Does the consideration of fairness make individuals worse off in your view?

I did not write the article in question and did not have editorial input into its contents. I have not studied the issue and do not recall the basis on which Professors Kaplow and Shavell reached the conclusion that they did.

7. In June 2009, you tweeted out a link to a film called "The Third Jihad: Radical Islam's Vision for America," which has been criticized by the Council on American-Islamic Relations, the nation's largest Muslim civil rights organization, as "depict[ing] Muslims as inherently violent and seeking world domination."
   a. Why did you say that "everyone should see this film" in your June 2009 tweet?

   From my perspective, the film appeared to be about an important topic and to feature individuals knowledgeable on that topic. For instance, I was aware that the film was narrated by a Muslim-American doctor who served in the U.S. Navy and included interviews with well-respected U.S. national security experts, including former Senator Joe Lieberman, former Department of Homeland Security Secretary Tom Ridge, former CIA Director James Woolsey, and former New York City Police Commissioner Ray Kelly, as well as former FBI officials and others. In sending the tweet, I was therefore trying to say that it was important for people to view the film and make up their own minds about its content.

   b. During your hearing, you stated that your tweet was not so much about the film but a reaction to press accounts concerning the film. You stated that you wanted people to form their own thoughts about it. What thoughts did you form about the film?

   Upon viewing the film, I felt that it tackles an important issue, and it bases its discussion on certain factual information, statistics, and interviews with well-respected figures. At the same time, the movie is one-sided and does not seek a response from anyone with an opposing viewpoint, which means that it lacks balance and some level of nuance. I felt that the factual information discussed and questions raised are important for our country and worthy of further discussion, but that this film does not answer those questions and should not be viewed as an authoritative factual source itself.

   c. Do you believe Muslims are "inherently violent"?

   I do not believe that Muslims are inherently violent or that Islam is inherently violent. I have great respect for the religion of Islam and for Muslims. In my legal practice, I have proudly represented clients who are Muslim and businesses that are Muslim-owned, including a Jordanian company, an Afghan company, and a prominent Muslim author. I believe that discrimination against Muslims and other religious believers is fundamentally wrong and contrary to the bedrock American principle of religious liberty, and it has no place in our society.

Questions for the Record for Mr. Joshua Wolson
Submitted by Senator Richard Blumenthal
July 18, 2018

1. In a tweet, you encouraged people to view a film entitled "The Third Jihad: Radical Islam's Vision for America." This film has been widely criticized for stoking islamophobia through its depictions of Muslims as inherently violent and seeking world domination.

   - **Do you believe that Muslims are inherently violent? Do you believe Islam is inherently violent?**

     I do not believe that Muslims are inherently violent or that Islam is inherently violent. I have great respect for the religion of Islam and for Muslims. In my legal practice, I have proudly represented clients who are Muslim and businesses that are Muslim-owned, including a Jordanian company, an Afghan company, and a prominent Muslim author. I believe that discrimination against Muslims and other religious believers is fundamentally wrong and contrary to the bedrock American principle of religious liberty, and it has no place in our society.

   - **Do you stand by your endorsement of this film?**

     I did not intend to endorse the film when I sent the tweet, and I do not endorse the film now. I only intended to encourage people to view the film for themselves and make up their own minds about it. The film appeared to be about an important topic and to feature individuals knowledgeable on that topic. For instance, I was aware that the film was narrated by a Muslim-American doctor who served in the U.S. Navy and included interviews with well-respected U.S. national security experts, including former Senator Joe Lieberman, former Department of Homeland Security Secretary Tom Ridge, former CIA Director James Woolsey, and former New York City Police Commissioner Ray Kelly, as well as former FBI officials and others.

   - **Why should Muslim litigants seeking justice in your court trust you to treat them fairly?**

     In my view, all people have value and should be treated with respect. I conduct myself that way in my personal life, and I would conduct myself that way on the bench if I am confirmed. Indeed, I consider it a paramount role of the Judge to ensure that all litigants feel as though they were heard and that they had a fair opportunity to present their position. Moreover, in my career, I have a history of representing a number of people from various backgrounds. Among other things, I have represented clients who are Muslim or businesses that are Muslim-owned, including a Jordanian company, an Afghan company, and a prominent Muslim author. My advocacy on behalf of those clients has been every bit as zealous as it has for any other client. Finally, litigants can look to the bipartisan process that led to my nomination, including a bipartisan selection panel and support from both Senators Toomey and Casey, to have confidence that they will be treated fairly in my courtroom.

Nomination of Joshua Wolson
United States District Court for the Eastern District of Pennsylvania
Questions for the Record
Submitted July 18, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

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

    I have not studied this issue in depth, but it would not surprise me if parties within the criminal justice system act at times with implicit biases. The administration of criminal justice must be fair and impartial without regard to race. A judge must ensure fairness, equality, and impartiality in the proceedings, including approaching each case with mindfulness and awareness of potential implicit biases.

    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.

    I have at various times read news articles that reference discussions about implicit racial bias in the criminal justice system, but have I have not studied the issue.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

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

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

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

    Please see my response to Question 2.a.

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

    Yes.

4. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.[7]

    a. Do those statistics alarm you?

    Any data that suggests potential bias in outcomes in capital punishment cases (or any cases) warrants additional study to ensure that the administration of justice is fair and impartial without regard to race.

    b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

    It would be inappropriate for me to answer this question. Issues relating to the constitutionality and use of the death penalty are often the subject of litigation. The Code of Conduct for United States Judges prohibits me from commenting on

[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[6] *Id.*

[7] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited June 13, 2018).

litigation that is pending or impending anywhere in the country. *See* Code of Conduct for United States Judges, Canon 3(A)(6). If confirmed and assigned a case involving the death penalty, I would do everything in my power, as set forth in applicable statutes and rulings of the Supreme Court and the Third Circuit, to ensure the fair and impartial administration of justice without regard to race.

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

In general, charging decisions in criminal cases are within the power of the Executive Branch. I will evaluate each case before me on the facts and the law after those charging decisions are made. To the extent that there is a suggestion that racial bias has impacted any proceeding before me, especially a capital case, I would use all of the tools that Congress, the Supreme Court, and the Third Circuit give me to eliminate any such bias. In addition, to the extent that the law and applicable ethical rules permit a district court judge to confer with officials of the Executive Branch regarding charging decisions to make them aware of a statistical disparity and the potential erosion of public confidence that such a disparity could cause, I would consider doing so.

Questions for the Record from Senator Kamala D. Harris
Submitted July 18, 2018
For the Nominations of

Stephen Clark, to the U.S. District Court for the Eastern District of Missouri

John O'Connor, to the U.S. District Court for the Northern, Eastern, and Western Districts of Oklahoma

Joshua Wolson, to the U.S. District Court for the Eastern 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?

    I would make an individualized assessment based on the facts and arguments presented. To do so, I would follow the process set forth in Fed. R. Crim. P. 32 and 18 U.S.C. § 3553, and I would carefully study relevant materials, such as the Presentence Investigation Report and the recommendation of the probation officer, arguments of counsel, letters and other materials submitted in support of the defendant, and any victim impact statement or other related materials, and any allocution of the defendant. With that information, I would follow the three steps set forth in *Gall v. United States*, 552 U.S. 38 (2007). First, I would calculate the guidelines range. Next, I would formally rule on any departure motions and state how those rulings affect the guidelines range. Finally, I would consider the statutory factors in 18 U.S.C. § 3553(a) to evaluate the individual circumstances of each defendant. Throughout that process, I would give arguments of counsel meaningful consideration by acknowledging and responding 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) (quote omitted).

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

    I would follow the steps outlined in my answer to Question 3.a. In addition, I would avail myself of available sentencing data for comparative convictions, as needed.

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

    Although the Sentencing Guidelines are no longer mandatory, a district judge must carefully consider the advisory Guidelines calculation in every case. A district judge may determine that a departure from the Guidelines is warranted

based on the facts and circumstances presented in a particular case as informed by 18 U.S.C. § 3553(a) and (b).

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?

As a district court nominee, it would not be appropriate for me to express any view with respect to the wisdom of having or efficacy of using mandatory minimum sentences because those issues are political questions and policy choices within the purview of the elected branches of government. *See* Code of Conduct for United States Judges, Canons 2.A., 5. I would follow the law, including for mandatory minimum sentences, that Congress establishes, regardless of my personal views.

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

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

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

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

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

1. Describing the injustice in your opinions?

I do not believe it is appropriate for me to commit to doing so at this time.

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

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[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

In general, charging decisions are entrusted to the Executive branch. To the extent applicable case law and ethical rules permit me to discuss charging policies with members of the Executive branch, I would consider doing so under certain, limited circumstances where the policies 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 as a judge, I would consider all options, including alternatives to incarceration for first offenders not convicted of violent or otherwise serious offenses, in fashioning an individualized sentence that is sufficient but not greater than necessary to achieve the sentencing purposes as defined by Congress.

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.

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

Although I have not studied this issue in depth, I am aware of statistics from a number of sources, including from the United States Sentencing Commission, indicating that the rate of incarceration is higher for black men than for white men and that sentences imposed on black men are longer than sentences imposed on white men. If confirmed, I will do everything in my power to guard against racial disparities in cases that come 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 that it is important to have a diverse staff and law clerks?

Yes.

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

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