

**Nomination of Jodi Warmbrod Dishman to the United States District Court for the
Western District of Oklahoma
Questions for the Record
Submitted October 2, 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?

Supreme Court precedent is binding on a district judge so long as it remains good law. I have not been a judge before, but I could envision that there might be circumstances where it might be okay for the district judge to follow the precedent of the Supreme Court and Tenth Circuit but point out gaps in the law, circuit conflicts, or where there is a deficiency for the legislative branch to address, all the while still following Supreme Court precedent.

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

A district court should consider each case on its own facts, law, arguments, and merit and should follow Supreme Court and Tenth Circuit precedent. No two cases are exactly the same, so I struggle to identify a situation where a district court is creating its own precedent. This is consistent with what the Supreme Court has noted about district court decisions. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011).

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

The Supreme Court has the “prerogative alone to overrule one of its precedents.” *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). It is not up to me, as a district court nominee, to offer views on when the Supreme Court exercises its prerogative.

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”?**

Roe v. Wade and its progeny is Supreme Court precedent that binds all lower courts. If confirmed, I will fully and faithfully apply it and all other precedents.

- b. **Is it settled law?**

Yes.

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.

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?

As a district court nominee, under Canons 1, 2, 3, and 5 of the Code of Conduct, it is inappropriate for me to comment on my views regarding Justice Stevens's dissent. If confirmed, I will be bound to follow *Heller*, like all other Supreme Court and Tenth Circuit precedent that has not been overturned or modified.

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

In *Heller*, the Supreme Court stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited[,]” making *Heller* not inconsistent with the “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.” 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?

As a district court nominee, under Canons 1, 2, 3, and 5 of the Code of Conduct, it is inappropriate for me to offer personal views on *Heller*. If confirmed, I will be bound to follow *Heller*, like all other Supreme Court and Tenth Circuit precedent that has not been overturned or modified.

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*, the Supreme Court explained “that First Amendment protection extends to corporations.” 558 U.S. 310, 342 (2010) (citations omitted). If confirmed, I will be bound to follow *Citizens United*, like all other Supreme Court and Tenth Circuit precedent that has not been overturned or modified. Beyond this, as a district court nominee, under Canons 1, 2, 3, and 5 of the Code of Conduct, it is inappropriate for me to offer personal views on *Citizens United*.

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

In *Citizens United*, the Supreme Court explained “that First Amendment protection extends to corporations.” 558 U.S. 310, 342 (2010) (citations omitted). If confirmed, I will be bound to follow *Citizens United*, like all other Supreme Court and Tenth Circuit precedent that has not been overturned or modified. Beyond this,

as a district court nominee, under Canons 1, 2, 3, and 5 of the Code of Conduct, it is inappropriate for me to offer personal views on *Citizens United*.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that “person” under the Religious Freedom Restoration Act included “corporations.” 573 U.S. 682, 707-08 (2014). If confirmed, I will be bound to follow *Hobby Lobby*, like all other Supreme Court and Tenth Circuit precedent that has not been overturned or modified. Beyond this, as a district court nominee, under Canons 1, 2, 3, and 5 of the Code of Conduct, it is inappropriate for me to offer personal beliefs on issues of pending or impending litigation.

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?

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?

As disclosed in my questionnaire, I applied for a district court position back in January 2017 and again in January 2019. I interviewed with advisory committees in Oklahoma over the course of this process. To the best of my knowledge and belief, these committees are not affiliated with any society or foundation of any kind. I do not recall being asked a specific question on administrative law by the advisory committees in my interviews. If I were, I would have indicated what I have indicated throughout this process, which is that I will follow the governing precedent of the Supreme Court and Tenth Circuit on the issue.

c. What are your “views on administrative law”?

If confirmed, I am committed to following the law, including the Administrative Procedure Act and all Supreme Court and Tenth Circuit precedent. *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

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

I have not studied this issue and am not an expert in climate change. To avoid prejudicing my ability to hear cases on climate change that might come before me, I do not think it would be appropriate to express my personal beliefs in this area under Canons 1, 2, 3, and 5 of the Code of Conduct.

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

It is appropriate to consider legislative history in construing a statute when the Supreme Court or Tenth Circuit precedent says to do so, such as when the language of the statute is ambiguous. *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567-71 (2005).

9. 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.

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

I drafted my answers to these questions and then solicited feedback on my answers from the Office of Legal Policy at the Department of Justice. I revised my answers in light of that feedback, but each answer to each question is my own.

Written Questions for Jodi Warmbrod Dishman
Submitted by Senator Patrick Leahy
October 2, 2019

1. You recently sent some letters in support of certain nominees for judgeships in Oklahoma. One of those letters that you signed was in support of Charles Goodwin for the U.S. District Court for the Western District of Oklahoma in 2017. You signed that letter *after* the ABA had rated Judge Goodwin “Not Qualified” for the position.

(a) Were you aware of the ABA’s rating at the time?

On behalf of the Oklahoma City Chapter of the Federal Bar Association, I signed a letter dated October 11, 2017, in support of the nomination of Judge Charles Goodwin. If I was aware of the ABA’s rating at that time, it would have been through press coverage and not based on the ABA’s explanation for its rating, as the explanation came by letter dated December 12, 2017, which postdated my letter. Regardless, I have known Judge Goodwin for an extended period of time, first when he was an attorney in private practice at Crowe & Dunlevy and then through his work as a United States Magistrate Judge. As a Magistrate Judge, he handled a settlement conference on a matter where I was lead counsel. Thus, my personal experience with Judge Goodwin and my leadership role in the Oklahoma City Chapter of the FBA led me to sign in support of his nomination to the district court.

(b) Do you believe the ABA provides a valuable service to the Judiciary Committee in evaluating judicial nominees? Do you believe its process is thorough and fair?

Given the remarks at the September 25, 2019 hearing by numerous senators about the ABA process, this question appears to touch on matters for which it would be inappropriate for me to express an opinion under Canon 5 of the Code of Conduct. I can speak to only my personal experience with the ABA, and the ABA process as to me and my nomination was thorough and fair.

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

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

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

The Supreme Court has instructed that in statutory interpretation, it is proper to consider the words of a provision within the broader context of the statute as a whole. *See, e.g., Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent on statutory interpretation.

3. 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?

Judicial independence is enshrined into our constitutional structure and is foundational to our system of government. Judges protect this independence by acting within their role in our constitutional framework, which maintains the public’s confidence in the integrity of the judiciary. Under Canons 1, 2, 3, and 5 of the Code of Conduct, it is improper for me to further comment on political statements.

(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?

The First Amendment’s guarantee of freedom of speech has no carve out for criticism of the judiciary or any other branch of government. Beyond that, I would refer to and incorporate my response to Question 3(a).

4. 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?

The Supreme Court has reviewed presidential actions taken during military conflict or for national defense. *See, e.g., Hamdam v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

5. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders. And after the President’s first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

As a district court nominee, and under Canons 1, 2, 3, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on how a court

should respond to enforce an order or a judgment in response to a hypothetical. If confirmed and an issue like this is before me, I will fully and faithfully follow all Supreme Court and Tenth Circuit precedent.

6. 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?**

Both the legislative and executive branches have constitutional powers that might be implicated in a time of war. If confirmed, I will fully and faithfully apply the laws, including the Constitution, any relevant statutes, and all Supreme Court and Tenth Circuit precedent, should a challenge to legislative or executive authority come before me.

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

As a district court nominee, and under Canons 1, 2, 3, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on how a court should respond to a hypothetical on the interaction between the executive and legislative branches, as these areas are the subject of pending or impending litigation. If confirmed, I will fully and faithfully apply the laws, including the Constitution, any relevant statutes, and all Supreme Court and Tenth Circuit precedent, should a challenge to legislative or executive authority come before me.

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

A court must fully and faithfully apply the laws, including the Constitution, any relevant statutes, and all Supreme Court and Tenth Circuit precedent, should a challenge in the national security context come before it.

8. 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, 531 (1996), the Supreme Court stated that under the Equal Protection Clause, “[p]arties who seek to

defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent on cases involving discrimination.

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

I am not familiar with this characterization. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent on the Voting Rights Act.

10. 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, Clause 8, of the Constitution provides: “No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

11. 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 the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

For a factual record in an appeal, an appellate court is generally limited to the factual record developed at the district court. Standards of review then govern the appellate court’s review of factual findings made in the district court. If confirmed, I will fully and faithfully follow and apply all Supreme Court precedent, including *Shelby County v. Holder*, 570 U.S. 529 (2013).

12. 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 provide that Congress has “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.

13. 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?

In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Supreme Court held that the Texas statute at issue “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent, including *Lawrence*.

14. 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?

As a district court nominee, I will be bound to fully and faithfully follow Supreme Court and Tenth Circuit precedent regardless of the type of question before me. I cannot envision a scenario, however, where a district court creates precedent. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (internal quotation and citation omitted)).

15. 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.

If confirmed, I anticipate that for at least some period of time I will recuse myself from all cases where McAfee & Taft (the law firm where I am currently a shareholder) represents a party or has a role, and cases involving USAA and Hartford. I also will recuse myself in any litigation where I have ever played any role. My husband’s employment might also create recusal issues for which I will need to evaluate. If I have questions about potential conflicts-of-interest, I will consult federal law, the Code of Conduct for United States Judges, and all other laws, rules, and practices. To the extent

there is not a definitive answer on a potential conflict-of-interest, I will follow the local court's guidance, precedent, and best practices and will lean toward recusal if there is any legitimate doubt or legitimate question about my ability to be fair and impartial. I will evaluate real and potential conflicts, as well as any relationship that could give rise to the appearance of a conflict, on a case-by-case basis to determine the appropriate action.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. 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."

- (b) 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?**

Footnote 4 states in part: "It is unnecessary to consider now whether 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." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). While courts must protect constitutional rights under the rule of law through the fair and impartial application of the law, I do not believe it is proper to discuss how this footnote would play out in pending or impending litigation under Canon 1, 2, 3, and 5 of the Code of Conduct. I will fully and faithfully follow and apply all Supreme Court and Tenth Circuit precedent.

17. 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 and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

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

Yes.

18. **Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

The Constitution provides in relevant part that the President “shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” U.S. Const. art. II, § 2. As a district court nominee, it is inappropriate for me to further comment on the scope of a president’s pardon power, as this is a matter of ongoing political discourse, and the scope of presidential pardon power is an issue that might come before the courts.

19. **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 scope of congressional power under the Commerce Clause and the Fourteenth Amendment is the subject of extensive case law and doctrine. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent concerning the scope of congressional powers.

20. 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? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? 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 binding Supreme Court precedent that I will be bound to fully and faithfully apply, along with all other Supreme Court precedent on the weight of factual findings on immigration and constitutional issues. Beyond that, as a district court nominee, and under Canons 1, 2, 3, and 5 of the Code of Conduct, I do not think it is appropriate for me to offer my beliefs or comment on hypotheticals examining the analysis by the Supreme Court in this case, as those issues might come before me and they strike me as political in nature.

21. **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 addressed whether laws constitute an undue burden under *Casey* before, including in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In that case, the Supreme Court held that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” 136 S. Ct. at 2309 (quotations and citation omitted). If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent on what constitutes an undue burden. Beyond that, I cannot provide specific examples that would prejudice my ability to hear and decide cases, under Canons 1, 2, 3, and 5 of the Code of Conduct.

22. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. 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 similar cases.

(a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?

The qualified immunity doctrine is subject to ongoing academic debate and public discourse and is the subject of pending and impending litigation on its scope and requires a factual and legal intensive analysis on a case-by-case basis. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent on the doctrine of qualified immunity. Beyond that, I do not think it is appropriate for me to offer my personal views on the doctrine, which might prejudice my ability to hear and decide cases involving the qualified immunity doctrine, under Canons 1, 2, 3, and 5 of the Code of Conduct.

23. 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 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?**

In *Carpenter v. United States*, the Supreme Court acknowledged that “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Thus, even with modern technological advances, the Court has sought to safeguard the protections enshrined in the Fourth Amendment. If confirmed, I will fully and faithfully apply the law, including Supreme Court and Tenth Circuit precedent on the Fourth Amendment’s protections against unreasonable search and seizure. Under Canons 1, 2, 3, and 5 of the Code of Conduct, it would be inappropriate for me to offer analysis on these issues, as they likely will be the subject of arguments in pending or impending litigation before me.

24. 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 the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

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

I have not studied this issue in depth but would follow precedent and the law. Moreover, given the scenario above and under Canons 1, 2, 3, and 5 of the Code of Conduct, I do not think I can comment on areas that are the subject of pending or impending litigation regarding the intersection between legislative and executive authority.

25. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political

groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?

Judicial independence is enshrined into our constitutional structure and is foundational to our system of government. Judges protect this independence by acting within their role in our constitutional framework, which maintains the public's confidence in the integrity of the judiciary. Judges and nominees also protect this independence by following the Code of Conduct. If confirmed, I will fully and faithfully follow my judicial oath of office. I will treat all cases and litigants before me with dignity and respect and fairly and impartially.

**Nomination of Jodi W. Dishman
to the United States District Court for the Western District of Oklahoma
Questions for the Record
Submitted October 2, 2019
QUESTIONS FROM SENATOR WHITEHOUSE**

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) 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?

I had not previously but have in response to your request above.

- 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.

Under Canons 1, 2, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on this issue.

- 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?

Under Canons 1, 2, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on this issue.

- 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.

- 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?

Under Canons 1, 2, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on this issue.

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?

To me, this metaphor means that a judge should not be an advocate for either party and should be impartial and fair like one expects of an umpire, which is a fair description by the Chief Justice on the proper role of a judge.

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

To the extent governing Supreme Court or Tenth Circuit precedent or statutes instruct a district judge to consider consequences of a particular ruling in her decision-making process, then a district judge should fully and faithfully apply that law in rendering a decision.

3. 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?

The Supreme Court has stated that “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This calls for a district court to apply an objective standard. I will fully and faithfully apply Supreme Court and Tenth Circuit precedent regarding when summary judgment is proper under Federal Rule of Civil Procedure 56.

4. 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?

A judge should treat each party before her with dignity and respect, and fairly and impartially. If I am confirmed, I will work hard on the business of the courts and to uphold these standards.

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

My personal life experience is important to me, and it helps me relate to people. If confirmed, however, my personal life experience will not alter my oath in performing the duties of my office, as set forth in 28 U.S.C. § 453.

5. 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.

6. 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 role of the jury is important and occupies an important role in history and jurisprudence. The Supreme Court examines the content of the right to a jury under the Seventh Amendment by historical standards. *See Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) (“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”) (citations omitted).

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

Under Canons 1, 2, 3, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on this issue, as this issue might come before me. I will fully and faithfully apply Supreme Court and Tenth Circuit precedent on these issues.

- 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?

Under Canons 1, 2, 3, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on this issue, as this issue might come before me. I will fully and faithfully apply Supreme Court and Tenth Circuit precedent on these issues.

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

I will fully and faithfully apply Supreme Court and Tenth Circuit precedent to determine what deference congressional fact-finding is afforded on legislation expanding or limiting individual rights.

8. 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.

I will follow applicable ethical rules before participating in any educational seminars or conferences.

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

I will follow applicable ethical rules before participating in any educational seminars or conferences.

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

I will follow applicable ethical rules before participating in any educational seminars or conferences.

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

I will follow applicable ethical rules before participating in any educational seminars or conferences.

- 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.

I will follow applicable ethical rules before participating in any educational seminars or conferences.

- 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?

I commit that I will follow applicable ethical rules before participating in any educational programs.

Nomination of Jodi Warmbrod Dishman
United States District Court for the Western District of Oklahoma
Questions for the Record
Submitted October 2, 2019

QUESTIONS FROM SENATOR BOOKER

1. According to your Senate Judiciary Questionnaire (SJQ), your legal career has not focused on criminal matters.¹
 - a. A district court judge handles a vast array of criminal matters. Given your lack of experience in this area of law, please elaborate on why you are qualified to serve as a district court judge.

I served as a law clerk on the heels of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). My clerkships afforded me the opportunity to assist the court and two judges with a large volume of criminal matters involving sentencing issues, many of which were matters of first impression. As a law clerk, I also worked on appeals concerning criminal defendants' constitutional rights, including issues requiring an examination of the Fourth, Fifth, and Sixth Amendments and applicable Supreme Court and Fifth Circuit precedent.

As part of my litigation practice, I have handled a number of civil cases involving criminal procedural and evidentiary issues, including the impact of criminal matters on civil proceedings, such as the assertion of the Fifth Amendment privilege against self-incrimination in civil matters and whether plea agreements are admissible in civil proceedings. Additionally, I assisted a defendant, Frederico Gonzalez, in his appeal to the Fifth Circuit regarding his plea agreement and his sentence imposed pre-*Booker*. As part of this pro se representation, I spent approximately 300 hours researching and briefing Mr. Gonzalez's criminal appeal.

These experiences have prepared me to serve as a district judge. I also believe these experiences formed part of the basis of the "unanimously Well Qualified" rating I received from the American Bar Association. The current breakdown of case load in the district for which I am nominated is approximately 70% civil and 30% criminal matters. If confirmed, I will work hard and diligently on all matters before me.

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

I have not served as a judge before and have been focused on being a practitioner. If confirmed, I will follow Supreme Court and Tenth Circuit precedent and will use

concepts and methodologies used by those courts in interpreting the Constitution on particular issues.

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

I have not served as a judge before and have been focused on being a practitioner. If confirmed, I will follow Supreme Court and Tenth Circuit precedent and will use concepts and methodologies used by those courts in interpreting statutes on particular issues.

4. 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?

I will follow Supreme Court and Tenth Circuit precedent regarding consulting and citing legislative history.

- 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?

I will follow Supreme Court and Tenth Circuit precedent regarding consulting, citing, and evaluating relevant arguments about legislative history in cases that come before me.

5. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes. To me, judicial restraint means that a district judge should decide only the dispute before her, testing constitutional and prudential doctrines first to determine if the case is justiciable, and then narrowly deciding the dispute under the law or determining if there is a genuine dispute of material fact for the jury to decide.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.² Was that decision guided by the principle of judicial restraint?

As a district court nominee, and under Canons 1, 2, 3, and 5 of the Code of Conduct, I think it would be inappropriate for me to comment on a Supreme Court decision. I will fully and faithfully apply Supreme Court and Tenth Circuit precedent to cases before me.

¹ SJQ at p. 17.

² 554 U.S. 570 (2008).

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.³ Was that decision guided by the principle of judicial restraint?

As a district court nominee, and under Canons 1, 2, 3, and 5 of the Code of Conduct, I think it would be inappropriate for me to comment on a Supreme Court decision. I will fully and faithfully apply Supreme Court and Tenth Circuit precedent to cases before me.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁴ Was that decision guided by the principle of judicial restraint?

As a district court nominee, and under Canons 1, 2, 3, and 5 of the Code of Conduct, I think it would be inappropriate for me to comment on a Supreme Court decision. I will fully and faithfully apply Supreme Court and Tenth Circuit precedent to cases before me.

- 6. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁵ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁶

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not had occasion to study this issue and am not an expert on this issue. Because litigation involving these issues is likely pending or impending, it would not be appropriate to comment under Canon 3 of the Code of Conduct.

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

I have not had occasion to study this issue and am not an expert on this issue. Because litigation involving these issues is likely pending or impending, it would not be appropriate to comment under Canon 3 of the Code of Conduct.

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I have not had occasion to study this issue and am not an expert on this issue. Because litigation involving these issues is likely pending or impending, it would not be appropriate to comment under Canon 3 of the Code of Conduct.

7. 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.⁷ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁸ 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.⁹ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁰

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

I have not had occasion to study this issue and am not an expert on this issue. However, I have read articles that state implicit racial bias unfortunately exists in our criminal justice system.

³ 558 U.S. 310 (2010).

⁴ 570 U.S. 529 (2013).

⁵ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁶ *Id.*

⁷ 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>.

⁸ *Id.*

⁹ 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>.

¹⁰ *Id.*

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

I have read articles stating that they are.

- 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 not studied this issue in depth, but I have reviewed articles through my law firm's subscription to Law360, some of which discuss racial disparities in our criminal justice system. *See, e.g.,* U.S. District Chief Judge Patti Saris, *The First Step Act Is a Major Step for Sentencing Reform*, Law 360, Apr. 28, 2019.

- 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 of 19.1 percent longer.¹¹ Why do you think that is the case?

I have not studied this issue and am not familiar with this report.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹² Why do you think that is the case?

I have not studied this issue and am not familiar with this study.

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

A federal district judge should treat all people before her with equality, dignity, and respect.

8. 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.¹³ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁴

- 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 am not an expert in this issue.

- 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 am not an expert in this issue.

9. 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.

10. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes, I will respect and treat with dignity all persons who come before me.

¹¹ 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.

¹² Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹³ 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>.

¹⁴ *Id.*

11. Do you believe that *Brown v. Board of Education*¹⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

12. Do you believe that *Plessy v. Ferguson*¹⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

13. 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?

No.

14. 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.”¹⁷ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Recusal and disqualification issues are governed by 28 U.S.C. § 455, and any governing precedent. Beyond that, as a district court nominee, and under Canons 1, 2, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment on a political matter.

15. 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.”¹⁸ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Litigants are entitled to due process and fair adjudication of their claims under the law. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”) (citations omitted). Beyond that, as a district court nominee, and under Canons 1, 2, and 5 of the Code of Conduct, I do not think it is appropriate for me to comment further.

¹⁵ 347 U.S. 483 (1954).

¹⁶ 163 U.S. 537 (1896).

¹⁷ 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>.

¹⁸ 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 October 2, 2019
For the Nomination of

Jodi W. Dishman, to the U.S. District Court for the Western District of Oklahoma

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?**

Sentencing is one of the most important and solemn roles for a district judge, and it is a responsibility I will not take lightly. I will look to 18 U.S.C. § 3553 and the factors Congress has outlined for the court to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of [§ 3553(a)].” I will follow federal statutes and Supreme Court and Tenth Circuit precedent on sentencing, consult the advisory Sentencing Guidelines and perform the required guideline calculation, study the presentence investigation report, consider the arguments of the parties, and review proper evidence, statements, and any allocution before me on sentencing.

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

I will determine what constitutes a fair and proportional sentence using the law and framework outlined in my answer above. Additionally, I will follow new laws and look to guidance from the Sentencing Commission on how district judges are to implement reforms from recent criminal justice reform in federal sentencing.

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

Under *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are advisory in nature and are not binding on a district judge. While not mandatory, the Sentencing Guidelines remain important to a district judge to assist in providing certainty and fairness in sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. *See id.* at 264-65; *see also Rita v. United States*, 551 U.S. 338, 347-48 (2007) (discussing the complementary roles of the sentencing court and the U.S. Sentencing Commission in federal sentencing). Thus, in determining the appropriate sentence in a particular case, the district judge should consider the properly calculated guideline range, the grounds for departure authorized by governing authority, and the factors under 18 U.S.C. § 3553(a).

- 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?**

Mandatory minimum sentences are up to Congress. If confirmed, I will apply sentencing laws enacted by Congress regardless of my views. As a judicial nominee, I do not think it would be appropriate for me to provide any personal views on mandatory minimums under Canons 1, 2, 3, and 5 of the Code of Conduct.

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

Mandatory minimum sentences are up to Congress. If confirmed, I will apply sentencing laws enacted by Congress regardless of my views. As a judicial nominee, I do not think it would be appropriate for me to provide any personal views on mandatory minimums under Canons 1, 2, 3, and 5 of the Code of Conduct.

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

Mandatory minimum sentences are up to Congress. If confirmed, I will apply sentencing laws enacted by Congress regardless of my views. As a judicial nominee, I do not think it would be appropriate for me to provide any personal views on mandatory minimums under Canons 1, 2, 3, and 5 of the Code of Conduct.

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 efforts to address the injustice, including:**

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

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>

If confirmed, I will impose sentences on a case-by-case basis and with thoughtful consideration to my ethical obligations under the Canons of the Code of Conduct.

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

If confirmed, I will impose sentences on a case-by-case basis and with thoughtful consideration to my ethical obligations under the Canons of the Code of Conduct.

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

If confirmed, I will impose sentences on a case-by-case basis and with thoughtful consideration to my ethical obligations under the Canons of the Code of Conduct.

- 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?**

Yes.

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

I have not studied this issue, but I have reviewed articles that discuss racial disparities in our criminal justice system. *See, e.g.,* U.S. District Chief Judge Patti Saris, *The First Step Act Is a Major Step for Sentencing Reform*, Law 360, Apr. 28, 2019.

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?**

Yes.