Nomination of Charles Goodwin to the Western District of Oklahoma
Questions for the Record
December 20, 2017

QUESTIONS FROM SENATOR FEINSTEIN

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

I have not adopted any labels insofar as my approach to questions of constitutional interpretation. In general, I believe that a judge asked to interpret any provision of the United States Constitution or other law should begin with the text of the provision at issue and then evaluate that text in a manner consistent with relevant and precedential decisions of the United States Supreme Court and the appropriate circuit court.

2. 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?

Never. Only the Supreme Court has the "prerogative . . . to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016).

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

Both federal district judges and circuit court judges are bound to follow Supreme Court precedent regardless of personal belief. This requirement makes expression of disagreement with such precedent almost always immaterial and inappropriate for a circuit court judge and even more so for a district judge.

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

Like other circuits, the Court of Appeals for the Tenth Circuit has issued decisions concerning when a decision of a panel of that court may be overturned. *See, e.g.*, *United States v. Brooks*, 751 F.3d 1204, 1209-10 (2014) (referencing en banc consideration and an intervening decision by the Supreme Court as grounds for failing to adhere to precedent). As a sitting federal magistrate judge and nominee to be a federal district judge, it would not be fitting for me to comment on the reasoning and correctness of those decisions.

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

The Supreme Court has issued decisions concerning when that Court may overturn its own precedent. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (discussing "a series of prudential and pragmatic considerations designed . . . to gauge the respective costs of reaffirming and overruling a prior case"). As a

sitting federal magistrate judge and nominee to be a federal district judge, it would not be fitting for me to comment on the reasoning and correctness of those decisions.

3. 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?"

   As a magistrate judge, I have treated every holding of the United States Supreme Court as completely binding. I would do the same as a district judge.

   b. Is it 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 sitting federal magistrate judge and nominee to be a federal district judge, I do not believe that it would be appropriate for me, under the Code of Conduct for United States Judges, to comment on the reasoning and correctness of any opinion of the Supreme Court or any concurring opinion or dissent by a member of that Court.

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

   The Supreme Court in *Heller* stated that its decision did not preclude prohibitions on the possession of firearms by felons, the possession of firearms by persons who are mentally ill, or the carrying of firearms in sensitive places like schools and government

buildings. *See District of Columbia v. Heller*, 554 U.S. 570, 625-26 (2008). Whether other, similar prohibitions are constitutional is a question that could come before me as a judge and, as a sitting federal magistrate judge and a nominee to be a federal district judge, I am obligated by the Code of Conduct to not comment.

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

The Supreme Court in *Heller* stated that its holding was not inconsistent with precedent as the issue addressed had not previously presented itself. *See District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). As a sitting federal magistrate judge and nominee to be a federal district judge, I do not believe that the Code of Conduct allows me to comment on the reasoning or correctness of the Supreme Court's opinion.

5. 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.

6. At your nomination hearing, you were asked about your rating by the American Bar Association's (ABA) Standing Committee on the Federal Judiciary. The ABA rated you "Not Qualified," and in a letter to the Committee, the Chair of the Standing Committee explained the rating as follows: "The Standing Committee's concerns centered upon Magistrate Judge Goodwin's work ethic and availability to perform judicial duties. . . . Magistrate Judge Goodwin's work habits, including his frequent absence from the courthouse until mid-afternoon, raised doubt for a majority of the Standing Committee's members with respect to Magistrate Judge Goodwin's ability to fulfill the demands of a federal judge appointed under Article III of the United States Constitution."

In addressing this rating, you stated the following: "What we're talking about is that I sometimes work from home. I have a home office and I will work remotely in the mornings when I don't have court hearings and when I'm focused on written opinions. And my job, we do a lot of legal writing and then periodically you will have criminal duty. On days that I [am] just . . . working on the writing, I find it extremely beneficial to work from home to be able to focus in solitude on writing."

a. Is it your testimony that you believe the ABA's rating is based on an inaccurate understanding of your work habits, and the only reason for your "frequent absence from the courthouse until mid-afternoon" is due to the fact that you work remotely some mornings?

As a magistrate judge, I regularly work 10 to 12 hours per day. On days when I am focused on written opinions and have no hearings or conferences, I

sometimes will work from my home office in the morning and then—typically mid- to late-morning and occasionally immediately after lunch—transition to the courthouse to work for the remainder of the day, often staying until 7:00 or 8:00 in the evening. I have not had a regular practice as far as when I work from my home office, but I vary which office I am working from based on scheduled court proceedings and the work I am doing on any particular day. To the extent that the majority of the ABA Standing Committee based its rating on an understanding other than the above, it is incorrect.

b. Do other magistrate or district court judges in the Western District of Oklahoma regularly work remotely?

Yes.

c. As a magistrate judge, while working from home, how have you ensured that you are accessible to your judicial clerks, other magistrate judges, and court administrative staff?

When at my home office, I am available through a fixed-line telephone, a cellular telephone, a computer with VPN access to the court network and/or web-based access to email, and email and calendar applications on my cellular telephone. My law clerks and court staff have my telephone number and email address, as do the other magistrate and district judges of the court. Further, I have provided my cellular telephone number and email address to the Office of the United States Attorney for the Western District of Oklahoma and to the United States Probation Office for the Western District of Oklahoma. Additionally, my law clerks and court staff maintain a presence in my chambers during typical business hours and receive and route calls or messages to me as needed. I have noticed no practical difference in accessibility when working from my home office as opposed to my chambers.

d. According to your description of your role as a magistrate judge in the Western District of Oklahoma, you have presided over a number of pretrial proceedings in felony criminal matters. These pretrial proceedings include initial appearances, preliminary hearings, and detention warrants. How have you balanced your work from home with the need to be present in the courthouse to preside over these pretrial proceedings?

I regularly schedule conferences, hearings, and other court proceedings in both the mornings and the afternoons, and I am present in the courthouse for all such proceedings. I only work remotely when I do not have any conferences, hearings, or other proceedings scheduled. In particular, I rarely work from home during the rotating periods in which I have "criminal duty," and then only on those mornings when I have no proceedings that require my presence in the courthouse.

e. **According to your Questionnaire, you also regularly "hear applications for search and seizure warrants and for electronic communications data warrants." How are you able to hear these applications while working from home? Do you only hear and, by extension, grant applications for warrants in the afternoon? Or—if you usually grant these applications remotely during weekdays—do other judges in your district commonly do the same?**

Please see my answer to Question 6(d). During the rotating periods in which I have "criminal duty," I regularly review and approve (as appropriate) applications for warrants in my courthouse chambers in the mornings and in the afternoons. I handle warrant proceedings in person in my chambers during regular business hours.

f. **If confirmed, will you continue to work remotely in the mornings? If so, how do you plan to account for the increased time and resource demands that will flow from being a federal district court judge?**

Although I had not heard any criticism of my working remotely prior to the question being asked by an ABA investigator in August 2017, I still chose at that time to discontinue working from my home office during typical business hours. If I were confirmed as a district judge, I would continue that practice due to the greater public role and frequency of trials and hearings that come with that position.

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

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

Without disclosing specific advice by any attorneys, I understood that I was required to disclose responsive material completely, truthfully, and to the best of my ability.

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

No.

c. Have you ever maintained a public blog or public social media account, including on Facebook or Twitter? If so, during what time period? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.

No.

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

No.

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

No.

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

A judge asked to interpret any provision of law should begin with the text of the provision at issue and then evaluate that text in a manner consistent with relevant and precedential decisions of the Supreme Court and the appropriate Court of Appeals. The Supreme Court has stated that if the meaning of a term is ambiguous, contemporaneous legislative history is one source that a court may consult to determine what legislators understood the term to mean. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

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

On December 20, 2017, the Department of Justice's Office of Legal Policy forwarded the questions to me. I drafted responses to the questions, returned them to the Office of Legal Policy, received suggestions, and finalized my responses for submission.

Nomination of Charles B. Goodwin to the Western District of Oklahoma
Questions for the Record
December 20, 2017

QUESTIONS FROM SENATOR DURBIN

For questions with subparts, please answer each subpart separately.

Questions for Charles Goodwin

1. You have received a majority "not qualified" rating by the American Bar Association as a result of their confidential peer review process. In its letter to the Committee, the ABA mentioned your "frequent absence from the courthouse until mid-afternoon" as a key reason for concern. **Do you feel that the ABA's review was thorough and fair?**

   Although I respect the right of the ABA Standing Committee to express its opinion, I was disappointed in the ABA's process and did not find it to be thorough or fair. I am aware that the Chief District Judge of the U.S. District Court for the Western District of Oklahoma has taken the unusual step of writing the Senate Judiciary Committee to note his and other judges' disagreement with the ABA's findings and conclusion. I also am aware that the current Oklahoma representative to the ABA House of Delegates, as well as past Oklahoma delegates and officers for the ABA, have written the ABA to express their belief that the ABA Standing Committee's investigation in this instance was not a fair and open one, and that its result was incorrect.

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

   The Judicial Crisis Network has also spent money on advertisements supporting a number President Trump's Circuit Court nominees, including Joan Larsen, David Stras, and others.

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

      I have no knowledge of donations being made to the Judicial Crisis Network or any other organization in an effort to support my nomination. As to whether such donations are problematic, the Code of Conduct for United States Judges prevents me—as a sitting federal magistrate judge and nominee to be a federal district judge—from commenting on questions of political debate. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

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

If confirmed to serve as a district judge, I will review all cases assigned to me to determine if any actual or perceived conflicts of interest are present and—following the guidance of the Code of Conduct and any pertinent advisory opinions—recuse as required. Beyond that, I must note that the question posed implicates matters of political debate and, therefore, I may not comment. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

c. **Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?**

Please see my response to Questions 2(a) and 2(b).

3.

a. **Is waterboarding torture?**

Pursuant to 18 U.S.C. § 2340, waterboarding would constitute torture to the extent it was "intended to inflict severe physical or mental pain or suffering" upon a detainee. Waterboarding also may constitute "cruel, inhuman, or degrading treatment" within the meaning of 42 U.S.C. § 2000dd. Whether a particular act falls within these statutes, or other potentially relevant statutes or policies, is a question that could come before me as a judge and, as a sitting federal magistrate judge and a nominee to be a federal district judge, I am obligated by the Code of Conduct to not comment. *See* Canon 3(A)(6), Code of Conduct for United States Judges (requiring that judges and judicial nominees refrain from "public comment on the merits of a matter pending or impending in any court").

b. **Is waterboarding cruel, inhuman and degrading treatment?**

Please see my response to Question 3(a) above.

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

Please see my response to Question 3(a) above.

4. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on "political questions"?**

With respect, I am bound by the Code of Conduct for United States Judges both as a sitting federal magistrate judge and as a nominee to serve as a federal district judge. In my hearing,

and in responding to questions for the record, I have answered the questions that I am permitted to answer and declined to answer those that I may not.

5. **Do you agree, as a factual matter, with President Trump's claim that 3 to 5 million people voted illegally in the 2016 election?**

   The Code of Conduct for United States Judges prevents me—as a sitting federal magistrate judge and nominee to be a federal district judge—from commenting on questions of political debate.

6.
   a. **Can a president pardon himself?**

   b. **What answer does an originalist view of the Constitution provide to this question?**

   c. **If the original public meaning of the Constitution does not provide a clear answer, to what should a judge look to next?**

   With respect, these questions present—in whole or in part—issues that could come before me as a judge. As a sitting federal magistrate judge and nominee to be a federal district judge, the Code of Conduct for United States Judges prevents me from responding.

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

   Pursuant to 18 U.S.C. § 3553, the sentencing of a person convicted of a crime requires a judge to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Thus, a judge must strive deeply to understand both the defendant's motives in violating the law and the effects of the defendant's actions on a victim and the community. Empathy for others is an important aspect of assessing their motivations and who they are. However, a judge must be able to fairly apply the law regardless of personal sympathy for a defendant or a victim. More specifically, a judge "should perform the duties of the office fairly, impartially[,] and diligently" and "should not be swayed by partisan interests, public clamor, or fear of criticism." Canons 3, 3(A)(1), Code of Conduct for United States Judges.

Nomination of Charles B. Goodwin to the
United States District Court for the
Western District of Oklahoma
Questions for the Record
Submitted December 20, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
    a. Do you agree with Justice Roberts' metaphor? Why or why not?

    In my opinion, Chief Justice Roberts' metaphor is a good illustration of the judge's role in fairly applying the law, including the obligation to accept a duly enacted law as written regardless of any personal view toward that law. More specifically, a judge "should perform the duties of the office fairly, impartially[,] and diligently" and "should not be swayed by partisan interests, public clamor, or fear of criticism." Canons 3, 3(A)(1), Code of Conduct for United States Judges.

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

    Some judicial decisions, such as criminal sentencing, are inherently about practical consequence. Others, such as the approval of a request for injunction, require a judge to consider the impact a course of action would have on a party or the community. That said, a judge must fairly apply the law to the facts at issue in the case before him or her without regard to the judge's personal view of the outcome that will result from that ruling.

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

    No.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
    a. What role, if any, should empathy play in a judge's decision-making process?
    b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

    Some judicial decisions, such as sentencing a convicted criminal, require a judge to understand a person's motives or the effect that a person's actions had on others. Empathy for others, particularly people who have a different background than oneself, is an important aspect of assessing their motivations and who they are. However, a judge must be able to fairly apply the law even while being empathetic to the people that appear before the judge as litigants.

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

   No.

4. 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 judicial oath requires judges to "administer justice without respect to persons . . . do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon me." 28 U.S.C. § 453. That is the standard I have followed as a federal magistrate judge and the standard I would follow if I were to be confirmed as a district judge. I believe that the hallmark of my service as a practicing attorney and as a judge is that I have treated all parties with kindness and respect. As a lawyer, I represented parties who were economically disadvantaged, including chicken farmers in Southeast Oklahoma, but also represented parties with substantial financial resources. As a magistrate judge, I have insisted that criminal defendants who are unable to afford counsel be provided able counsel to represent them and an adequate opportunity to consult with counsel, but also insisted that federal prosecutors be afforded a full and fair opportunity to present their arguments. I have ruled on the issues that have come before me as a judge without regard to how my decision would benefit any category of litigant. I would do the same as a district judge.

   a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

   As an experienced civil litigator and now a federal magistrate judge, I am aware of the important role that a skilled and careful judge can play in curbing abusive pretrial litigation tactics. I have overseen, and would continue to oversee, civil cases with the goals of ensuring a level playing field for all litigants and efficiently and expeditiously reaching the right result under the law. Further, as Chair of my Court's Local Civil Rules Committee, I have followed closely the recent changes to Rules 16 and 26 of the Federal Rules of Civil Procedure and the resulting greater emphasis that is being placed on active case management by magistrate and district judges as a tool to address unnecessarily expensive and disproportionate discovery. I would implement those procedures in my civil case docket.

Nomination of Charles Barnes Goodwin, to be United States District Judge for the Western District of Oklahoma
Questions for the Record Submitted
December 20, 2017

QUESTIONS FROM SENATOR COONS

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

   If I were to be confirmed as a District Judge for the United States District Court for the Western District of Oklahoma, I would follow all relevant and precedential decisions of the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit, and specifically base any determination of whether a right is fundamental and protected under the Fourteenth Amendment on those decisions and any "factors" or considerations set forth in those decisions.

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

      Please see my response to Question 1 above. I agree that those decisions require consideration of whether a right is expressly enumerated in the United States Constitution.

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

      Please see my response to Question 1 above. I agree that those decisions require consideration of whether a right is "objectively, deeply rooted in this Nation's history and tradition ... and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *See Kitchen v. Herbert*, 755 F.3d 1193, 1208-09 (10th Cir. 2014) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

   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 outside your circuit?

      Please see my response to Question 1 above. Decisions of a court of appeals other than the Tenth Circuit would not be precedential in the Tenth Circuit. However, I would consider any such decision to the extent I found it to be persuasive.

   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?

Please see my response to Question 1 above.

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

Please see my response to Question 1 above.

f. What other factors would you consider?

Please see my response to Question 1 above.

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

The Equal Protection Clause as set forth in the Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws to all persons. In precedential decisions that would be binding on me as a district judge, the United States Supreme Court has recognized that this guarantee applies to gender classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (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?

Please see my response to Question 2 above. Whatever reasons might exist for the history of the Supreme Court's jurisprudence in this or any area, my obligation would be to faithfully follow the holdings of the Supreme Court, as well as those of the Tenth Circuit Court of Appeals. This is what I have done as a federal magistrate judge and what I would do if I were to be confirmed as a federal district judge.

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?

Please see my response to Question 2 above. Whatever reasons might exist for the history of the Supreme Court's jurisprudence in this or any area, my obligation would be to faithfully follow the holdings of the Supreme Court, as well as those of the Tenth Circuit Court of Appeals. This is what I have done as a federal magistrate judge and what I would do if I were to be confirmed as a federal district judge.

c. Does the Fourteenth Amendment require that states treat gay and lesbian

couples the same as heterosexual couples? Why or why not?

If I were to be confirmed as a district judge, I would faithfully follow all relevant and precedential decisions of the Supreme Court and the Tenth Circuit Court of Appeals. Beyond that, I must note with respect that the question posed implicates issues that could come before me as a judge and, as a sitting federal magistrate judge and a nominee to be a federal district judge, I am obligated by the Code of Conduct to refrain from "public comment on the merits of a matter pending or impending in any court." Canon 3(A)(6), Code of Conduct for United States Judges.

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

If I were to be confirmed as a district judge, I would faithfully follow all relevant and precedential decisions of the Supreme Court and the Tenth Circuit Court of Appeals. Beyond that, I must note with respect that the question posed implicates issues that could come before me as a judge and, as a sitting federal magistrate judge and a nominee to be a federal district judge, I am obligated by the Code of Conduct to refrain from "public comment on the merits of a matter pending or impending in any court." Canon 3(A)(6), Code of Conduct for United States Judges.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

a. 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 that the liberty prong of the Due Process Clause guarantees a right to privacy in a variety of ways. In particular, the Supreme Court has recognized, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that the right to privacy encompasses a woman's right to use contraceptives. If I were to be confirmed as a district judge, I would faithfully follow those precedents and any other relevant and precedential decisions by the Supreme Court and the Tenth Circuit Court of Appeals.

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

The Supreme Court has recognized such a right in, among other decisions, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If I were to be confirmed as a district judge, I would faithfully follow those precedents and any other relevant and precedential decisions by the Supreme Court and the Tenth Circuit Court of Appeals.

c. 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 in *Lawrence v. Texas*, 539 U.S. 558 (2003). If I were to be confirmed as a district judge, I would faithfully follow that precedent and any other relevant and precedential decisions by the Supreme Court and the Tenth Circuit Court of Appeals.

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

Please see my responses to Questions (3)(a), (b), and (c) above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (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 evidence that should be considered in any particular case depends upon the claims and defenses presented, the facts at issue, and the applicable laws and rules of evidence. Similarly, the facts that should be considered by a judge in determining the application of any law depends upon a wide variety of factors. If faced with a question regarding the admissibility of sociology-based evidence, I would faithfully follow the Federal Rules of Evidence and any other relevant and precedential decision of the United States Supreme Court and the Tenth Circuit Court of Appeals.

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

   Please see my response to Question 4(a).

5. 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?

To the extent that there is an academic debate as to whether the Supreme Court's decision in *Brown v. Board of Education* represents an "originalist" interpretation of the Fourteenth Amendment, I have not had occasion to research and determine any personal opinion. If I were to be confirmed as a district judge, I would faithfully follow *Brown* and all relevant and precedential decisions of the Supreme Court and the Tenth Circuit Court of Appeals.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-pages/democratic- constitutionalism (last visited December 19, 2017).

I have not read this article or had occasion to research and determine any personal opinion about the points discussed.

6. A majority of the American Bar Association's Standing Committee on the Federal Judiciary rated you not qualified because of your "work ethic and availability to perform judicial duties." Specifically, the report noted your "frequent absence from the courthouse until mid- afternoon."

a. How long has it been your practice not to arrive at the courthouse until mid-afternoon since assuming the position of magistrate judge?

I respectfully disagree with the premise of the question that it is my "practice not to arrive at the courthouse until mid-afternoon." As a magistrate judge, I regularly work 10 to 12 hours per day. On days when I am focused on written opinions and have no scheduled hearings or conferences, I sometimes will work from my home office in the morning and then—typically mid- to late-morning and occasionally immediately after lunch—transition to the courthouse to work for the remainder of the day, often staying until 7:00 or 8:00 in the evening. I have not had a regular practice as far as when I work from my home office, but I vary which office I am working from based on court proceedings and the work I am doing on any particular day. In general, I have maintained a home office since assuming the position of magistrate judge, but largely discontinued working from that office (except on nights and weekends) in August 2017.

b. Had you adopted this practice at any of your previous positions of employment?

As a civil litigator for 13 years at a large firm in Oklahoma, most of my work was done at the firm's main office due to the demands of that particular job. I did, however, maintain a home office and sometimes worked remotely based on my schedule, as did many other firm attorneys.

c. Have any of your past employers noted lack of in-person appearance at work in any formal or informal reviews? If yes, please provide a summary of what you were told and any actions you took in response.

No.

d. Do you agree that, if confirmed as a district court judge, it will be important for you to be physically at the courthouse during business hours on a regular basis?

Yes.

e. How do you plan to combat the perception of your work ethic that was outlined by the American Bar Association?

As an initial matter, I do not believe that any such perception by the ABA Standing Committee is accurate or widely shared. Even so, I take it seriously and would address any concern by continuing to work hard and to be highly productive. And, as I have been doing since August 2017, I would work regularly from my courthouse chambers and not my home office.

As to accuracy, I would point to my record of outstanding productivity as a practicing lawyer and a magistrate judge. As a partner in one of Oklahoma's largest law firms, I regularly worked 1800 or more billable hours per year. As a magistrate judge, I have ably and efficiently overseen: (1) a large civil docket, (2) a criminal misdemeanor docket, and (3) regular rotations on "criminal duty," which required me to preside over initial felony proceedings and approve or deny applications for warrants and criminal complaints. According to data collected by the U.S. Administrative Office of the Courts, in every year that I have served as a magistrate judge I have disposed of civil cases at a rate that is 33 to 44 percent higher than the national average for magistrate judges. Additionally, the Civil Justice Reform Act ("CJRA") requires that the Administrative Office of the Courts report, for each federal magistrate and district judge, any motions that have been pending for more than six months and cases that have been pending for more than three years. These reports show that in every period following my first six months in office I have had no or almost no such reportable motions and cases, and that my number of such reportable motions and cases has been lower than the average for the magistrate and district judges in my district, my circuit, and nationally. Chief Judge Joe Heaton of the U.S. District Court for the Western District of Oklahoma has taken the unusual step of writing the Senate Judiciary Committee to note his "surprise" and "disagree[ment]" with the ABA Standing Committee, stating that he has reviewed and rejected the criticism of my productivity and that I have "the full confidence of the district judges" of that

Court.

As to whether such a perception exists (even if unfair), I had not heard any criticism on that point prior to the issue being raised by an ABA investigator. And that view appears to be an isolated one: seventeen past presidents of the Oklahoma Bar Association, three former United States Attorneys, the local chapter of the Federal Bar Association (comprised of over 500 attorneys who practice regularly in the U.S. District Court for the Western District of Oklahoma), and many other judges and attorneys prominent in the legal community in Oklahoma have written the ABA Standing Committee and/or the Senate Judiciary Committee to state their strong disagreement with the ABA's majority opinion and express their belief that I am well qualified. That said, I believe firmly in the obligation of a federal judge to represent a fair and productive system of justice. When the issue was raised by the ABA investigator, I immediately chose to discontinue working from my home office except on nights and weekends. If I were fortunate enough to be confirmed as a district judge, I would continue to work from my chambers during typical business hours due to the greater public role and the frequency of trials and hearings that come with that position.