

**Nomination of Bernard Maurice Jones, II to the United States District Court for the
Western District of Oklahoma
Questions for the Record
Submitted November 6, 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?

No. A district judge is required to fully and faithfully apply all binding Supreme Court precedent. There are rare occasions, however, where a district judge may identify gaps in law or conflicts among the circuit courts.

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

District courts should consider the law and facts of every case and render judgment consistent with Supreme Court and Tenth Circuit precedent.

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

The decision to overturn Supreme Court precedent lies squarely with the Supreme Court. As a lower court judge and judicial nominee, I do not believe it appropriate for me to opine on when the Supreme Court should overturn its own precedent.

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

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

Roe v. Wade is Supreme Court precedent of which all lower courts are bound. If

confirmed, I will fully and faithfully apply it.

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 sitting judge and district court nominee, I believe it is inappropriate for me to comment on my views regarding Justice Stevens's dissent. If confirmed, I will be bound to follow *Heller* and any Supreme Court or Tenth Circuit precedent interpreting the same.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626 (2008). The Court went on to state that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms in sensitive places such as schools and government buildings." *Id.* at 626-37.

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

Please refer to my response to Question 4(a) above.

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 held that "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). As a sitting judge and district court nominee, I believe it is inappropriate for me to offer personal views about whether a corporation's First Amendment rights are equal to those of individuals. If confirmed, like all other Supreme Court precedent, I will be bound to follow *Citizens United*.

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

Please see my response to Question 5(a) above.

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 sitting judge and district court nominee, it is inappropriate for me to offer personal views on this matter.

6. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

As a sitting judge and district court nominee, I believe it is inappropriate and inconsistent with Canons 1, 2, 3, and 5 of the Code of Conduct for United States Judges, for me to offer personal beliefs on issues of pending or impending litigation.

7. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

Please refer to my response to Question 6 above.

8. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please refer to my response to Question 6 above.

9. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

No.

10. 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?

No.

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

If confirmed, I will follow Supreme Court and Tenth Circuit precedent involving the interpretation or application of administrative law.

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

I have not studied the issue. I also believe I am precluded from opining on the matter by Canons 1, 2, 3 and 5.

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

The Supreme Court has opined that legislative history may be considered when the text of a statute is ambiguous. *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567-71 (2005).

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

No.

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

I read the questions, reviewed my Senate Judiciary Questionnaire, and considered relevant legal sources before submitting drafts responses to the Office of Legal Policy at the Department of Justice for comment, prior to authorizing submission by the Department of Justice.

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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?

Yes.

- 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.

In accordance with Canons 1, 2, and 5 of the Code of Conduct for United States Judges, I do not believe it appropriate for me to opine 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?

Please refer to my response to Question 1(b) above.

- 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.

No.

- 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?

Please refer to my response to Question 1(b) above.

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?

I agree. Judges should make decisions based on a principled interpretation of the law and its application to the facts before the court.

- 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 authority exists permitting the consideration of practical consequences, then such considerations should be factored into the judge's analysis. In the absence of such authority, the judge's decisions making should be based on the facts and law relevant to the matter at hand.

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?

No, it is an objective standard. As the Supreme Court has stated, "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). If confirmed, this standard will govern my analysis.

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?

As a judge, I believe it is important to treat every party with dignity and respect, and in a manner consistent with how I would like to be treated were I before the court.

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

My background and commitment to treating people in a manner consistent with how I would like to be treated influence greatly the care and concern I take with respect to the parties and matters before me.

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?

Juries play an important role in our nation's history and constitutional system.

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

All constitutional provisions should be of concern to a judge. If confirmed, I will fully and faithfully follow the law and precedent regarding the Seventh Amendment.

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

Please refer to my response to Question 6(b).

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

Supreme Court precedent exists regarding the deference to be shown to congressional fact-findings on this issue. If confirmed, I will fully and faithfully apply these precedents.

- 8. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct 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.

If confirmed, I will fully and faithfully adhere to applicable ethical rules prior to participating in educational seminars or conferences.

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

Please refer to my response to Question 8(b)(i).

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

Please refer to my response to Question 8(b)(i).

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

Please refer to my response to Question 8(b)(i).

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

Please refer to my response to Question 8(b)(i).

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

Please refer to my response to Question 8(b)(i).

Questions for the Record for Bernard Maurice Jones II
From Senator Mazie K. Hirono

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

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

No.

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

No.

2. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Judges should do whatever it takes to ensure that their courtrooms are free from bias.

b. Have you ever taken such training?

No.

c. If confirmed, do you commit to taking training on implicit bias?

If confirmed, I will ensure that my courtroom is free from bias.

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QUESTIONS FROM SENATOR BOOKER

1. While serving as a Magistrate Judge, you issued a report and recommendation in *Sawyers v. West* where an incarcerated person filed a § 1983 claim “alleging deliberate indifference to his serious medical needs” by “refus[ing] to take him for his scheduled follow-up visit [after back surgery] and periodically den[ying] him pain medication and treatment.”¹ You wrote that “the plaintiff had failed to rebut evidence that he had not submitted proper documentation during the inmate grievance process.”² The District Court disagreed with your recommendation and said the individual’s “allegations created a question of fact as to whether he exhausted his administrative remedies.”³ Why did you believe no question of fact existed in this case?

Plaintiff alleged he exhausted his administrative remedies by submitting a request to staff to Officer Chancellor that was addressed to Captain Ellison. I interpreted this statement as implying that Captain Ellison had received the request to staff. On summary judgment, Captain Ellison provided evidence that he did not receive the document and because Plaintiff had not verified his Amended Complaint or otherwise presented evidence to contradict Captain Ellison, I believed no question of fact existed in the case. The District Court disagreed not with my legal analysis but with my interpretation of the Amended Complaint. That is, the District Court noted that Plaintiff had only alleged he gave his grievance to Officer Chancellor to give to Captain Ellison – not that Captain Ellison had received it. Thus, the District Court believed Defendants had not, through Captain Ellison’s affidavit, conclusively established that exhaustion had not occurred.

2. In 2016, you gave a speech at Langston University—a historically black college in Oklahoma—where you said: “[W]e want others to understand that Black lives matter, yet often one is left wondering whether Black lives matter to Black people. Whether in terms of black-on-black crime, or the squandering of educational opportunity, or even with . . . respect to those who are fortunate to make it yet see no reason to reach back to help his fellow man. This is a different world, and we’ve lost our way and have become complacent to the point [of] necessitating a revival in our approach and commitment to excellence.”⁴

- a. What was the point you were trying to make in this speech?

My grandparents, who were active in the Civil Rights Movement, like many other African-Americans, fought against injustice and for greater opportunities for people of color. My comments were meant to inspire my audience, as individuals and a collective, to leave the same legacy of leadership to the next generation.

- b. What sources, evidence, information, studies or data did you rely upon in making the above listed assertions regarding the black community?

My comments were based on my own experiences as a person of color, a former family court judge, and former chairman of the Board of Directors for the Urban League of Greater Oklahoma City; experiences that helped me to identify and develop solutions for the challenges referenced in my remarks.

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

I understand originalism to mean the Constitution must be interpreted based on the original understanding of its terms at the time of ratification. To that end, in interpreting the Constitution, one must first look to the original understanding or meaning of provisions at the time of enactment. I also believe in adhering to Supreme Court and Tenth Circuit precedent in interpreting the Constitution.

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

I understand textualism to mean that courts are bound by statutory language. In interpreting statutes, I follow the text as written.

5. 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.

¹ Report and Recommendation, *Sawyers v. West*, CIV-17-052-HE (W.D. Okla. Jan. 22, 2018) (SJQ Attachment 13(f) at pp. 306-14).

² SJQ at p. 26.

³ *Id.*

⁴ A Legacy of Leadership,” Speech at Langston University’s Ira D. and Rubye Hibler Hall Endowed Heritage Lecture Series (Mar. 8, 2016) (SJQ Attachment 12(d) at pp. 54-61).

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?

The Supreme Court has opined that legislative history may be considered when the text of a statute is ambiguous. *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567-71 (2005).

- 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?

Please refer to my response to Question 5(a) above.

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 studied the issue. Moreover, as litigation involving these issues is likely pending or impending, it would not be appropriate to comment under Canon 3 of the Code of Conduct for United States Judges.

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

Please refer to my response to Question 6(a) above.

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

Please refer to my response to Question 6(a) above.

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 time to study the issue, but I am aware of studies that have made similar conclusions.

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?

Please refer to my response to Question 7(a) above.

- 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.

No.

- 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?

While vaguely familiar with the statistic, I have studied neither the issue nor the report cited.

- 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?

Please refer to my response to Question 7(d) above.

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

A federal judge should treat people with dignity and respect and should apply the law fairly and uniformly as to all.

- 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 the issue and am unfamiliar with the referenced study.

- 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.

Please refer to my response to Question 8(b).

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.

I believe the judiciary ought to reflect the communities they serve.

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.

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?

I do not believe a judge’s race or ethnicity can be a basis for recusal or disqualification.

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?

In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the Supreme Court made clear that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” If confirmed, I will fully and faithfully follow Supreme Court and Tenth Circuit precedent.

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 November 6, 2019
For the Nomination of**

Bernard Maurice Jones II, to the U.S. District 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?**

The imposition of punishment, upon conviction, is of great import and must be handled with great care and with a desire for leveling punishment that is exact and measured and based upon the facts, circumstances, and applicable law. As a district judge, to ascertain an appropriate sentence, I would rely on the factors as set forth in 18 U.S.C. § 3553. I would also look to the Sentencing Guidelines, precedent, presentencing investigative materials, any allocution by the defendant, and the arguments advanced by the parties.

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

Please refer to my response to Question 1(a).

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

I believe critical to the fair and impartial administration of justice is an independent judiciary that imposes punishment, upon conviction, in a manner it deems appropriate. Sentencing Guidelines are instructive in this regard, yet they are not mandatory. If confirmed, I will look to Supreme Court and Tenth Circuit precedent to determine when appropriate to depart from the Sentencing Guidelines.

- 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 for Congress to decide. If confirmed, I will fully and faithfully follow the law and any precedent. As a sitting judge and judicial nominee, an expression of my opinion about mandatory sentences would not be appropriate under Canons 1, 2, 3, and 5 of the

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

Code of Conduct for United States Judges.

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

Please refer to my response to Question 1(d)(i).

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

Please refer to my response to Question 1(d)(i).

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

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

If confirmed and faced with these circumstances, I will carefully consider the law and facts of each case, as well as my ethical obligations, and render judgment accordingly.

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

Please see refer to my response to Question 1(d)(iv).

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

Please see refer to my response to Question 1(d)(iv).

- 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 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>

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 am aware of statistics with respect to racial disparities in our criminal justice system. As I recall, the rate of incarceration for people of color is much higher as compared to whites.

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

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

Yes.

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

If confirmed, diversity will be a priority, as it has always been.

Nomination of Judge Bernard Jones
United States District Court for the Western District of Oklahoma
Questions for the Record
Submitted November 5, 2019

Senator Mike Lee

- Judge Jones, would you explain your reasoning in the *Oliver* case where you found that the Lindsay Nicole Henry Scholarships for Students with Disabilities Program violated the Oklahoma Constitution's Blaine Amendment and why you reached a different conclusion than the Oklahoma Supreme Court?

In *Oliver*, I was tasked with interpreting the Oklahoma Constitution, including Article II, Section 5, which states that “[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.” The case did not challenge whether that “no-funding” provision of the Oklahoma Constitution violated the federal Constitution; the only question was whether the state voucher program violated that no-funding provision when used to fund education at a sectarian institution. I looked at the language of the constitutional provision and determined that, reading the text on its face, the scholarship program violated the constitutional provision when used to fund education at a sectarian institution.

Oklahoma argued that the program did not violate the “no-funding” provision, because Oklahoma caselaw had carved out certain exceptions to that provision when the state receives consideration for the benefit provided. I reviewed Oklahoma Supreme Court decisions addressing the constitutional provision. In *Board of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963), the court held a school district transporting students to sectarian or parochial schools violated the no-funding provision of the Oklahoma Constitution. On the other hand, in *Murrow Indian Orphans Home v. Childers*, 171 P.2d 600 (Okla. 1946), the court held the state could contract with a sectarian institution to care for orphans. Neither case was directly on point, although I ultimately found the facts in *Oliver* more closely resembled the facts in *Antone*; as the Oklahoma Supreme Court would later acknowledge, this was “a case of first impression.” *Oliver v. Hofmeister*, 368 P.3d 1270, 1275 (Okla. 2016).

I entered an injunction enforcing the state's constitutional prohibition. As I stressed on the record at that hearing, I believed that the voucher program advanced a public purpose and that the state received consideration in the form of educational services provided to students. Had the Oklahoma Supreme Court recognized an exception to the state constitution's no-funding provision in those circumstances, “questions as to the constitutionality of [the voucher] act would have been foreclosed” and I “would ultimately conclude that the [voucher] act is constitutional.” But because I did not read the Oklahoma Supreme Court

caselaw to have interpreted that exception in sufficiently broad terms to save the voucher program, I was forced to enter an injunction. Because I was duty-bound to follow the plain text of the law and the precedents of the Oklahoma Supreme Court, I did not judicially create a new exception to the state constitutional provision. As I stated at the hearing, I “reluctantly” found the scholarship program violated the state constitution, and I stayed my own ruling to allow the Oklahoma Supreme Court to clarify the law regarding the no-funding provision.

On appeal, the Oklahoma Supreme Court recognized that this was a case of first impression. It utilized reasoning from *Murrow* to expand the exception to the state constitution’s no-funding provision.

- In its opinion, the Oklahoma Supreme Court noted that they viewed the issue in *Oliver* as an issue of first impression. Based on the transcript from this case, you seem to have felt bound by the Oklahoma Supreme Court’s 1963 decision in *Antone*¹ while the Oklahoma Supreme Court found its decision in *Murrow*² to be more relevant to this case. Could you compare your reasoning to that of the Oklahoma Supreme Court?

Please refer to my response to the question above.

- Understanding that your decision in *Oliver* preceded the U.S. Supreme Court’s decision in *Trinity Lutheran*, would you explain whether and/or how your evaluation of Oklahoma’s Blaine Amendment might change in light of this decision?

As discussed in my earlier answer, the *Oliver* case centered on the meaning of the state’s Blaine Amendment, not whether that Blaine Amendment satisfies the federal Constitution. Were such a case to come before me, as with any constitutional provision or statute, any future analysis I undertake regarding the Blaine Amendment will depend on the facts of the case. To the extent a party asserts a state law is inconsistent with the United States Constitution and other state laws, my analysis of the facts and the law will be guided by *Trinity Lutheran*, other decisions of the United States Supreme Court, and my deep and abiding respect for the free exercise of religion.

¹ *Board of Education for Independent School District No. 52 v. Antone*, 384 P.2d 911 (Ok. 1963) (concluding that a state-funded busing program providing transportation for students to parochial schools violates Article II, Section 5 of the Oklahoma Constitution).

² *Murrow Indian Orphans Home v. Childers*, 1946 OK 187 (Ok. 1946) (finding that State money paid to a sectarian institution in exchange for the housing and care of orphans and fulfilling the State’s duty to provide for the needy is not a violation of Article II, Section 5 of the Oklahoma Constitution).