Nomination of Eli Jeremy Richardson
to the U.S. District Court for the Middle District of Tennessee Questions for the Record
Submitted December 20, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. In 1998, a federal court in Maryland imposed sanctions on you under Federal Rule of Civil Procedure 11 for filing a case that lacked improper bases in law and purpose.
   Your client's company had a default judgment entered against it for failing to respond to a suit filed by one of your client's employees for sexual harassment, assault and battery, and intentional infliction of emotional distress, based on your client's alleged actions. Thereafter, you filed a Declaratory Judgement Act case in your client's own name—***against*** the person who had alleged sexual harassment—to "vindicate [your client's] name." (Memorandum, *Bronner v. Woods*, July 13, 1998, p. 4.)

   In dismissing the complaint you filed, the court wrote, "This is an improper purpose [of litigation], unfounded in law or fact, that would have allowed [your client] to harass and punish [former employee] for the failure of [your client's] company to respond on time to [former employee's] complaint in the prior litigation."

   a. **Do you agree with the court that allowing your client's case to go forward would have the effect of "harass[ing] and punish[ing]" the former employee after her case had already been adjudicated?**

I respectfully disagree. I understand and respect the court's decision to dismiss the case and its view that the former employee should not (at least as of some point after I filed the complaint) have to litigate the underlying facts in this case and bear the effects that such litigation would have entailed. However, there was no intent to harass or punish the former employee.

Even with the court's dismissal of your client's case, the former employee you filed the suit against still incurred over $12,000 in litigation expenses for the initial stage of litigation. Had you not refused her attorney's offer to contractually commit to not bringing a lawsuit against your client in his personal capacity in the future, she undoubtedly would have faced a much smaller amount.

   b. **Do you agree that forcing a former employee to incur thousands of dollars to defend herself in litigation after her case had already been adjudicated in her favor could serve to "harass and punish" her?**

I am not in a position to comment on hypothetical examples. However, in my client's specific case, the litigation would not have served to harass and punish the former employee. Rather, the declaratory judgment action was filed in good faith an attempt to permit an individual to litigate factual allegations of serious misconduct that he had not previously

been able to contest (because he was not a party to the first lawsuit and those allegations had been deemed established for purposes of liability in the first lawsuit because the individual's company had defaulted). Had I not sought for my client an opportunity to litigate the underlying allegations by presenting a claim for the court's consideration, a question could have been raised as to whether I had discharged what Section 9 to the Preamble of the Model Code of Professional Responsibility calls "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law."

c. Why did you decide to reject the former employee's offer to sign a contract committing not to bring suit against your client in his own name with regard to claims that had already been adjudicated?

Because this incident occurred 20 years ago, I cannot recall the precise thinking of either myself or my client on this issue. However, my recollection is that acceptance of this offer would have conveyed the impression that the matter had been entirely resolved, when in fact my client sought in any event to vindicate his reputation by establishing as a factual matter that he had not engaged in the serious misconduct that had been alleged.

> The Declaratory Judgement Act statute allows parties "[i]n a case of actual controversy" to obtain from a court a declaration of the "rights and other legal relations of the parties." (28 U.S.C. § 2201) In your client's case, the former employee had not sued your client in his personal capacity—she had obtained a default judgement against the company—and she had offered to contractually commit to not bringing a lawsuit against your client in his personal capacity in the future.

d. What was the "actual controversy" between the parties that you based the Declaratory Judgement Act claim upon? What were the "rights and other legal relations of the parties" that you sought from the court that would have allowed your client to "vindicate" his name?

The actual controversy was whether my client had in fact committed the acts of sexual harassment and retaliation as alleged by the former employee in the lawsuit against the company. The legal relations to be declared by the court were whether my client stood in violation of her rights under applicable anti-discrimination and retaliation laws. At least one court had previously determined that the existence of a controversy regarding alleged past violations of such laws supported a declaratory judgment regarding the validity of those allegations to enable the plaintiff to clear her name. *See Fisher v. Dillard Univ.*, 499 F. Supp. 525, 536 (E.D. La.1980); *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) (noting that in *Fisher*, the "court stated that the value of clearing one's name for future employment opportunities justified the award of declaratory relief").

> In imposing sanctions on you, the court wrote, "the seriousness of the violation warrants a significant sanction. Mr. Richardson's purported belief in the correctness

> of his action suggests either willful denial or a dangerous lack of understanding of the purposes of litigation." (Memorandum, *Bronner v. Woods*, Feb. 8, 2000, p. 2.)
>
> At your hearing, you testified that while you respected the court, its decision was "incorrect."

e. What was incorrect in the court's decision dismissing your client's case and imposing sanctions upon you?

In my testimony at the hearing, I meant to express disagreement specifically with the court's imposition of Rule 11 sanctions based on my efforts to pursue the case. I had a good-faith purpose for bringing the case and good-faith belief that the suit could be maintained under the Declaratory Judgments Act. However, I acknowledge that there were strong arguments that justiciability considerations precluded this particular declaratory judgment action from going forward. The court found unequivocally that those arguments prevailed and dismissed the case. However, courts regularly dismiss lawsuits (including claims brought under the Declaratory Judgments Act) unequivocally without also finding that Rule 11 sanctions should be imposed on plaintiff's counsel for pursuing the case in furtherance of his or her client's objectives. I respectfully believe that mine was a case in which the court, while having grounds to dismiss the case, should not have gone further and imposed Rule 11 sanctions. Though the court found that vindication of the CEO's name would not serve to resolve any "actual controversy" and thus could not be pursued via a declaratory judgment action, in my view, that does not mean that the purpose of vindicating the CEO's name was "improper" within the meaning of Rule 11(b)(1).

f. Are there any parts of the court's decision that you now believe are correct?

As noted above, I believe that the court's decision on the motion to dismiss is supportable under the law. Regarding the Rule 11 motion, however, I respectfully believe that the decision to impose sanctions was incorrect. Once that decision was made, however, the subsequent determination of the amount of the sanctions was appropriate, in my view.

> In deciding the amount of sanctions imposed on you, the court acknowledged that you had become an FBI agent and were no longer practicing law. However, the court noted that this fact "does not, as Mr. Richardson suggests, completely eliminate the need for deterrence, as there is no guarantee Mr. Richardson will not decide to resume the practice of law." (Memorandum, *Bronner v. Woods*, Feb. 8, 2000, p. 3.)

g. When did you apply to become an FBI agent? When did you accept an offer to become an FBI agent?

I submitted my initial application to the FBI in the summer of 1996. I accepted an offer in the spring of 1998, and entered the FBI Academy in late May, 1998. I filed no pleadings in the declaratory judgment action after December 30, 1997.

According to your Senate Questionnaire, you were a member of the Georgia Bar during the time the court imposed sanctions. Rule 9.1 of the State Bar of Georgia's Rules of Professional Conduct state that "[m]embers of the State Bar of Georgia shall, within sixty days, notify the State Bar of Georgia of: . . . the imposition of discipline by any jurisdiction other than the Supreme Court of Georgia." Under part (b) of the rule, "the term 'discipline' shall include any sanction imposed as the result of conduct that would be in violation of the Georgia Rules of Professional Conduct." Georgia Rule 3.1 imposes obligations similar to those in Federal Rule of Civil Procedure 11.

h. At the time the court imposed sanctions on you, did you evaluate any of your potential obligations under the State Bar of Georgia's Rules of Professional Conduct? If so, which rules?

I did not evaluate any of my potential obligations under the State Bar of Georgia's Rules of Professional Conduct. It is my understanding that the Georgia Rules of Professional Conduct had not been adopted at the time the court imposed sanctions and did not go into effect until January 1, 2001.

i. Were you required to report the sanction imposed upon you pursuant to Georgia Rule 3.1? If so, did you report the sanctions at the time to the State Bar of Georgia? If not, please explain.

I was not. It is my understanding that the Georgia Rules of Professional Conduct had not been adopted at the time the court imposed sanctions and did not go into effect until January 1, 2001.

j. You became a member of the New York and Tennessee Bars in 2001 and 2004, respectively. In applying to those bars, were you required to disclose past disciplinary matters, including court-imposed sanctions? If so, did you make the required disclosures?

I recall that in applying to the New York bar, I was required to disclose this Rule 11 sanction and that I did so. I do not recall whether, in applying for the Tennessee bar, I was required to disclose this Rule 11 sanction.

As you testified at your hearing, you disagreed with the outcome in your client's case.

k. If you were confirmed as a judge, and facts similar to these were presented to you, would you believe that a case like this should go forward?

In my testimony at the hearing, I meant to express disagreement with the court's imposition of Rule 11 sanctions based on my efforts to bring the case, as opposed to the court's decision to dismiss the case; I have always understood that the court's decision to dismiss the case

was supportable under the relevant law. As to hypothetical cases that might come before me if I am fortunate enough to be confirmed, I am unable to offer an opinion without knowing the exact facts of the case and the relevant law. If I am fortunate enough to be confirmed, I will faithfully apply the law to the facts of every case brought before me as a judge.

l. Do you believe the law permits a lawyer to pursue a case against a victim of sexual harassment—who has had a default judgment entered in her favor on her claims—in order to get a second chance to relitigate the victim's claims?

The answer to the question depends upon the specific facts of the case and the court involved, and I would need to study further any developments in relevant law before applying them to the specific facts of such a case. As a nominee, I am unable to comment on such a hypothetical case. However, if I am fortunate enough to be confirmed, if such a case were brought before me I would evaluate the applicable law and apply it faithfully to that case.

2. 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 attorney advice, it was my understanding that I was required to disclose responsive material 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 not need to disclose certain material, including material "published only on the Internet," as required by Question 12(a) 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.

I have never maintained a public blog, but I do maintain accounts with LinkedIn, Twitter and Facebook. These accounts were not previously disclosed to the Committee because none of them are responsive to the Senate Judiciary Questionnaire.

d. Have you ever maintained a Twitter account with the handle @erichardson15? 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.

Yes. This account was not previously disclosed to the Committee because, as explained above, it is not responsive to the Senate Judiciary Questionnaire.

e. 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.

After diligent search, I am unaware of any such posted commentary that I have not disclosed to the Committee.

f. 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.

3. 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 would not describe my approach to constitutional interpretation with any particular label. My approach to constitutional interpretation would be to apply pertinent precedent as faithfully as I can, and, to the extent that such precedent does not resolve the issue, look to the text of the Constitution.

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

If a judge finds a statute to be ambiguous, a judge may properly consult legislative history. A judge should always be mindful, however, that the text of the statute governs, and its plain meaning should be applied wherever the judge finds the plain meaning to be ascertainable.

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

a. When, if ever, is it appropriate for a district court to depart from Supreme

Court or the relevant circuit court's precedent?

It is never appropriate for a district court to depart from Supreme Court or relevant circuit court precedent.

b. When, if ever, is it appropriate for a district court judge to question Supreme Court or the relevant circuit court's precedent?

It is never appropriate for a district court to question Supreme Court or relevant circuit court precedent, although in rare instances it may be appropriate for a district court to observe that if the precedent were to be revisited by a higher court, the result conceivably could be different.

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

I am aware that seven years ago, a majority of the Supreme Court stated that its own precedent "is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 363 (2010). I accept this statement as the applicable standard for the Supreme Court to overturn its own precedent.

6. 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, as analyzed, affirmed and explained by *Planned Parenthood v. Casey*, is binding precedent and therefore must be followed by district courts.

b. Is it settled law?

I have not been able to review the textbook of Justice Gorsuch or the testimony of Chief Justice Roberts at his confirmation hearing. As a result, I cannot offer informed comment about their respective statements. If I am fortunate enough to be confirmed, I would be required in each case to apply the relevant law to the facts of the case. The precedent of the United States Supreme Court, including *Roe v. Wade*, is the law and is binding on district courts.

7. 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?**

Obergefell v. Hodges is binding law and therefore must be followed by district courts.

8. 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?**

Respectfully, as a nominee for district judge, I do not believe that it would be appropriate for me to comment on whether or I agree with Justice Stevens in this regard. In addition, I believe that my personal views on this topic would not be relevant if I were fortunate enough to be confirmed as a district judge. Like *Roe v. Wade*, *District of Columbia v. Heller* is binding Supreme Court precedent that I would be bound to apply as a district judge.

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

Respectfully, I believe that this question presents questions regarding the hypothetical application of *Heller*, and regulatory policy, upon which it would be inappropriate for me to comment as a nominee for district judge.

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

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

I received these questions on the evening of December 20, 2017 and began working on the responses the next day. In answering them, I consulted both my recollection and, as applicable, the district court's orders in the District of Maryland case referred to herein. I also looked at a few examples of responses to Questions for the Record to get a sense of how past responses have looked. I also accessed my social media accounts to obtain the information requested from them. I then consulted the Department of Justice's Office of Legal Policy regarding my answers and the process of submitting those answers to the Committee.

Senator Dick Durbin
Written Questions for David Stras, Kyle Duncan, and Andre Iancu
December 6, 2017

For questions with subparts, please answer each subpart separately.

Questions for Eli Richardson

1. In 2000 you were sanctioned by a federal court under Rule 11 of the Federal Rules of Civil Procedure. Judge Blake of the Maryland federal district court wrote, in granting sanctions against you, that "the seriousness of the violation warrants a significant sanction. Mr. Richardson's purported belief in the correctness of his action suggests either willful denial or a dangerous lack of understanding of the proper purposes of litigation." **Please explain this incident and what you have learned from it.**

At the end of 1997, a motion for sanctions was filed against me. The motion arose out of a federal case I handled for a company that had been sued in the Northern District of Georgia based on the alleged sexual advances of its CEO upon the plaintiff and his alleged retaliation against her for complaining about those alleged advances. Before I was retained to represent the company, it had failed to timely answer the complaint and suffered entry of default which the court refused to set aside. As a result, by operation of law, both liability and the allegations in the complaint were deemed established without necessity of any proof, and could not be contested, for purposes of the lawsuit. The case proceeded to limited discovery, and then a jury trial, on the issue of damages and other forms of monetary relief. After trial, a monetary judgment was entered against the company.

Thereafter, the CEO, who was not a party to that lawsuit, sought to clear his name with respect to the evidentially unproven allegations of sexual harassment and retaliation. Because his company had defaulted on the lawsuit filed against it, the CEO was effectively branded a sexual harasser at least for purposes of the first lawsuit, regardless of whether the evidence established his culpability. After considerable investigation, I determined that my client's denial of the allegations was factually and evidentially supported. Therefore, I researched the viable legal options available to the CEO to clear the evidentially unproven allegations. I identified a single possible avenue: an action for a declaratory judgment to the effect that the CEO had not engaged in the alleged conduct. I believed a claim for declaratory judgment to be colorable Accordingly, I filed on the CEO's behalf a declaratory judgment action in the District of Maryland, (where the accuser resided), seeking a declaration that the CEO had not in fact engaged in the alleged conduct. The accuser moved to dismiss and for Rule 11 sanctions.

The district court granted the motion to dismiss, but also went further and granted the Rule 11 motion as well. It is with the decision to grant the Rule 11 motion that I respectfully disagree. Even assuming, as the court found, that vindication of the CEO's name would not serve to resolve any pending "actual controversy" and thus could not be pursued via a declaratory judgment action, that does not mean that the purpose of vindicating the CEO's name was "improper" within the meaning of Rule 11(b)(1).

In February 2000, the court issued an order addressing the amount of the sanction. The court imposed a monetary sanction of $3,209.72, which I timely paid. It was in this order that the court made the statement about me quoted in the question above. The comment naturally distresses me and in the 20 years since the Rule 11 motion was filed, I have sought to show through litigating, teaching, writing, and speaking that I very much understand the proper purposes of both civil and criminal litigation.

The Rule 11 motion in this case was filed at the end of 1997, when I was five years out of law school. From that, I have learned several lessons that I have kept in mind in my practice. One is to ensure that no matter how personally supportive you are of your client and his desire for a favorable legal outcome, as counsel you should remain dispassionate. Another is to fully appreciate the importance not only of actually acting with the best of intentions, but also of being correctly perceived as acting with the best of intentions. A related lesson is that it is important for corporate management not only to in fact act without the intention to retaliate against an individual for exercising his or her rights, but also to be correctly perceived as not acting with such retaliatory intent; this is a point I have made repeatedly (in articles I write, presentations I make, and law school classes I teach) in recent years as this issue has become ever more important. A fourth lesson is that what the Model Code of Professional Responsibility calls the duty of zealous advocacy sometimes leaves room for counsel to forgo pursuing aggressive action on the client's behalf.

I have carried these lessons with me throughout my practice and I believe they have contributed to the absence of any even remotely similar incident in my many subsequent years of litigation, including many high-stakes, emotionally-charged cases.

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 never desired that such donations be made, and indeed the thought of any donations in support of my nomination has never even occurred to me. Such donations would be problematic if made in violation of applicable law. Otherwise, the extent to which such donations could be problematic is a policy question on which I believe I should not comment as a nominee for district judge.

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?**

As a nominee for district judge, I have committed myself to not commenting publicly on anything related to my nomination, except for public comment made pursuant to the questions and procedures of the Senate Judiciary Committee. Regarding recusal, if I am fortunate enough to be confirmed I will make appropriate recusal decisions, based on all information to which I am privy, in adherence to the Code of Conduct for United States Judges and other applicable authority.

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

As a nominee for district judge, I have committed myself to not commenting publicly on anything related to my nomination, except for public statements made pursuant to the questions and procedures of the Senate Judiciary Committee.

3.

a. **Is waterboarding torture?**

I am generally familiar with waterboarding, the concerns it raises for opponents of the practice, and the reasons why some refer to it as torture. However, my knowledge is far from complete, and I believe that whether to characterize waterboarding as torture is an issue on which it would be inappropriate to comment as a nominee for district judge.

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

I am generally familiar with waterboarding, the concerns it raises for opponents of the practice, and the reasons why some believe that it is cruel, inhuman and degrading treatment. However, my knowledge is far from complete, and I believe that whether to characterize waterboarding as cruel, inhuman and degrading treatment is an issue on which it would be inappropriate to comment as a nominee for district judge.

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

My understanding is that waterboarding is illegal under U.S. law.

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"?**

The public generally is not well-served when things are mischaracterized as something other than what they are. Thus, the public is not well-served when simple factual questions are characterized as something other than simple factual questions. Thus, if in fact it is truly a

simple factual question that is portrayed as a "political" question, the public is not well-served by this portrayal.

5. **Was President Trump factually accurate in his claim that 3 to 5 million people voted illegally in the 2016 election?**

I do not know how many people voted illegally in the 2016 election

6.

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

I am unaware of any case law directly addressing this specific issue, and as a nominee for district judge I do not believe that it would be appropriate for me to express an opinion on this issue.

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

I am unaware of any single "originalist" view on this issue

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

A district judge should always look to, and apply, relevant Supreme Court and Court of Appeals precedent.

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?**

To my understanding, empathy refers to putting oneself "in the shoes" of another in order to understand how the other person is feeling. Thus defined, empathy does not have a proper role in judges' consideration of criminal cases, because the judge must be impartial and thus not put himself or herself "in the shoes" of any defendant, any victim, or any loved ones of a defendant or victim. On the other hand, the judge should endeavor always to fully understand and consider the positions of defendants and victims in criminal cases, including relevant factual assertions concerning their circumstances. For example, under 18 U.S.C. § 3553(a), in sentencing a defendant a judge must consider, among other things, the history and characteristics of the defendant; this could include personal circumstances that might incline others (who lack the judge's duty of impartiality) to have empathy towards the defendant. Likewise, under 18 U.S.C. § 3771, the judge must hear out a victim at sentencing, which could result in the judge properly considering the victim's unique circumstances, albeit without empathizing with the victim as might others who lack the judge's duty of impartiality.

Nomination of Eli J. Richardson to the
United States District Court for the
Middle District of Tennessee
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?

I believe that Justice Roberts' metaphor effectively conveys multiple characteristics concerning the role of a federal judge. Among them are decision making, impartiality and due judicial restraint. However, I also realize that this metaphor does not fully or exactly describe the role of federal judges in all of its particulars.

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

If I am fortunate enough to be confirmed as a district judge, I would apply Supreme Court and relevant circuit court precedent in rendering decisions. To the extent such precedent instructs me to consider the consequences of a particular ruling, I would do so. For example, I understand that under applicable law, in deciding whether to issue an injunction, a district judge must consider the consequences of not issuing the injunction. I would abide by all such precedent. Likewise, to the extent Supreme Court and Sixth Circuit precedent authorizes but does not require me to consider the consequences of a particular ruling, I might exercise my discretion to consider the consequences.

    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?

Yes, in some cases. In some instances, after a motion for summary judgment is filed, the non-movant in its response or by its lack of response effectively admits the facts that clearly support judgment as a matter of law in favor of the movant. In these instances, the determination that there exists no genuine issue of material facts properly may be considered an objective determination. In other instances, however, reasonable jurists could indeed disagree as to whether there is a genuine issue of material fact. Indeed, this is generally what happens when an appellate court reverses the district court based on its determination of this question. In such situations, the determination as to whether there is a genuine issue of material fact properly can be viewed as a subjective one.

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?

To my understanding, empathy refers to putting oneself "in the shoes" of another in order to understand how the other person is feeling. Thus defined, empathy does not have a proper role in the judicial decision-making process, because the judge must be impartial and thus not put himself or herself "in the shoes" of any party. On the other hand, the judge should endeavor always to fully understand and consider all parties' positions, including relevant factual assertions concerning a party's personal circumstances.

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

It is vital that a judge not favor any party over another based on personal life experiences. However, a judge's personal life experiences might assist the judge in understanding the evidence or arguments in some cases.

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?

I can state unequivocally that, if I am fortunate enough to be confirmed, I would treat all litigants, including the "little guy," fairly and impartially, for several reasons. First, I would be duty-bound to so do, and I would honor that duty. Second, and relatedly, I would not be biased against or disregard the rights of anyone, including the "little guy." Third, I have long recognized and fought for the rights of specific "little guys" (including pro bono clients) who were among my clientele, and I would not begin ignoring those rights upon joining the federal bench.

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?

The Federal Rules of Civil Procedure govern what discovery, and discovery tactics, are and are not permissible. Rule 26(b)(1) states that discovery must be both relevant and proportional to the needs of the case, considering among other things the parties' resources. Rule 26(b)(1) also indicates that proposed discovery should not be permitted to the extent that its burden or expense outweighs its likely benefit. Likewise, Rule 26(b)(2)(C) mandates protection against proposed discovery that is unreasonably cumulative or duplicative, can be obtained from a source that is more convenient, less burdensome or less expensive, or seeks information the party seeking the discovery already has had ample opportunity to obtain. These provisions all indicate that voluminous discovery may be inappropriate under certain circumstances, especially when not prompted by a genuine need for non-redundant discovery. Likewise, Federal Rule of Civil Procedure 11(b) indicates that pretrial motions are inappropriate when made for an improper purpose such as to harass or needlessly increase the cost of litigation.

To prevent discovery and discovery tactics in violation of the Federal Rules of Civil Procedure, a judge should carefully consider any motions for a protective order under Rule 26(c) and any motions for sanctions under Rule 26(g). In hopes of avoiding even reaching that point, a judge also should seek at case management conferences to reinforce the necessity of complying with the applicable principles concerning discovery.

Nomination of Eli Jeremy Richardson, to be United States District Judge for the Middle District of Tennessee
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?

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

Yes.

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

Yes. I would consult relevant Supreme Court and circuit court precedent to make this determination. Absent such precedent, I would also consider persuasive precedent from other circuit courts of appeals regarding whether the right at issue is deeply rooted in this nation's history and tradition.

    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?

Yes, I would consider, and treat as binding any, Supreme Court or circuit precedent recognizing the right. Absent such precedent, I would also consider precedent from courts of appeals outside my circuit.

    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?

I have previously observed that there is a continuum that runs from "same," to "similar," to "different," and that sometimes in litigation a subjective determination must be made as to where on that continuum two items being compared happen to fall. *See* Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 Miss. L.J. 41, 70 (1995). Accordingly, due to the subjectivity of a determination that another right is in fact "similar" to the right at issue, I would be cautious in considering the recognition of another right on the grounds that the other right is allegedly "similar" to the right at issue.

    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*).

I would 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" if relevant precedent has indicated in some way that the right might be of this character.

f. What other factors would you consider?

In deciding such questions, I would rely on Supreme Court and circuit court precedent, and never on any personal views or opinions. In all cases, I would carefully consider any evidence and arguments presented and give them all weight to which I believed that are entitled under the law.

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

As held and reaffirmed by the Supreme Court, the Equal Protection Clause of the Fourteenth Amendment applies to gender as well as race.

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

I would respond that the Supreme Court has squarely held that the Equal Protection Clause applies to gender. I would also note that the text of the Fourteenth Amendment, and not its purported intent, is the starting point of the analysis.

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?

I cannot speculate as to why this is the case, because I am not in a position to know why the Supreme Court took (or did not take) the cases it took and why it decided the cases it took the way it decided them.

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

Respectfully, I believe that this question presents issues of constitutional law upon which it would be inappropriate for me to comment as a nominee for district judge.

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

Respectfully, I believe that this question presents issues of constitutional law upon which it would be inappropriate for me to comment as a nominee for district judge.

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?

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that there is a constitutional right to privacy that protects a woman's right to use contraceptives. I recognize this as binding precedent that must be applied by district courts.

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

In *Roe v. Wade* and its progeny, including *Planned Parenthood v. Casey*, the Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to obtain an abortion. I recognize these cases as binding precedent that must be applied by district courts.

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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of whether they were of the same sex. I recognize *Lawrence* as binding precedent that must be applied by district courts.

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.

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?

It is appropriate for a district judge to consider such evidence to the extent that applicable Supreme Court or court of appeals precedent permits the district court to consider such evidence in addressing a particular question.

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

I believe that sociology, scientific evidence, and data underlie to an extent some of the binding precedent, from the Supreme Court and the applicable court of appeals, that a district judge would be bound to apply. In that sense, sociology, scientific evidence, and data have a valid role in a

district court's judicial analysis. Sociology, scientific evidence, and data also have a role in the district court analysis to the extent that applicable precedent, from the Supreme Court and the applicable court of appeals, direct or authorize the district court to consider such information.

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?

I recognize *Brown* as binding precedent. I do not have an opinion as to whether *Brown* is consistent with originalism. In my view, however, the holding reached in *Brown* is entirely consistent with the Fourteenth Amendment's prohibition against "den[ial] of . . . equal protection of the laws."

    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 agree that terms like "the freedom of speech," "equal protection," and "due process of law" are not precise or self-defining," and I believe that this reality creates challenges under any theory of constitutional interpretation, including originalism.

6. A federal district court in Maryland sanctioned you for persisting with a lawsuit against a victim of sexual harassment for the sole purpose of clearing your client's name. The court wrote that "there was no actual controversy" and that a declaratory judgment "would serve no useful purpose."
    a. Did you disagree with the judge's decision to sanction you?

I respectfully did, and do, disagree with the district judge's decision to sanction me.

    b. If you disagreed, what is the basis for your disagreement, and why did you not appeal the decision?

I acknowledge that there were strong arguments that justiciability considerations precluded this particular declaratory judgment action from going forward, at least at some point after the filing of the action. The court found unequivocally that those arguments prevailed and dismissed the case. However, courts regularly dismiss lawsuits (including claims brought under the Declaratory Judgments Act) unequivocally without also finding that Rule 11 sanctions should be imposed on plaintiff's counsel for pursuing the case in furtherance of his or her client's objectives. I

respectfully believe that mine was a case in which the court, while having grounds to dismiss the case, should not have gone further and imposed Rule 11 sanctions. In this regard, it is worth noting that counsel does not violate Rule 11 merely by choosing to fight an uphill battle he or she knows may ultimately be lost. *E.g.*, *Fleming Sales Co. v. Bailey*, 611 F. Supp. 507, 519 (N.D. Ill. 1985). Even assuming, as the court found, that vindication of the CEO's name would not serve to resolve any "actual controversy" and thus could not be pursued via a declaratory judgment action, that does not mean that the purpose of vindicating the CEO's name was "improper" within the meaning of Rule 11(b)(1).

While understanding the significance of the decision, I chose to forgo appealing it for several reasons. First, at the time I was a GS-11 federal employee (an FBI Special Agent) with limited financial resources to pursue an appeal. Second, I also was a new father with a heavy workload and thus serious other priorities. Third, I also recognized that, due to the abuse-of-discretion standard applied by the Court of Appeals to the district court's decision to impose sanctions order under Rule 11, an appeal was unlikely to succeed even though in my view it should certainly have succeeded under *de novo* review. Accordingly, I chose not to appeal the sanctions order and instead to abide by it, while respectfully disagreeing with it.

c. Do you regret anything about your actions in connection with this case?

I certainly regret that my actions could be viewed as sanctionable by the district court; it distresses me that the district court had this perception, and it has been very important to me that something like this never happen again. I also regret that in deciding to pursue declaratory judgment action, I may have placed too much emphasis on my client's heart-felt, evidentially-supported, and legitimate desire to vindicate his reputation, and not enough emphasis on how the decision to pursue the action could be viewed by the court. I also lament being unable to counter any misimpressions at the time as to the motivation behind the pursuit of the action.