

**Nomination of Brett Talley to the  
U.S. District Court for the Middle District of  
Alabama Questions for the Record  
Submitted October 24, 2017**

**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 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 or fail to apply faithfully the relevant Supreme Court or 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?**

District court judges are bound to follow Supreme Court and circuit precedent and should do so faithfully. I can imagine situations in which it might be appropriate for a district court judge to raise questions about a binding precedent, such as when a more recent Supreme Court precedent has undermined the analysis supporting the relevant circuit court precedent or raises a particular practical difficulty for a district judge. But the judge must apply all relevant, binding precedent without fail.

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 textbook 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 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”? “superprecedent”?**

For a district court judge, all Supreme Court precedent is “superprecedent,” entitled to “super-stare decisis” respect. A district judge has no discretion to deviate from Supreme Court precedent.

**b. Is it settled law?**

*Roe v. Wade* is settled as precedent of the Supreme Court and binding on all lower court judges.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-

sex couples the right to marry.

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

Please see the response to No. 2(b) above.

**b. On Friday, June 30, the Texas Supreme Court issued a decision in *Pidgeon v. Turner* which narrowly interpreted *Obergefell* and questioned whether states were required to treat same-sex couples equally to opposite-sex couples outside the context of marriage licenses. The Texas Supreme Court stated that “The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and... it did not hold that the Texas DOMAs are unconstitutional.” Is this your understanding of *Obergefell*?**

I am only generally familiar with *Obergefell* and its holding, but if confirmed, I would be bound by the rulings of the United States Supreme Court on issues of federal law, not the Texas Supreme Court, and I would apply *Obergefell* faithfully.

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 judicial nominee, it would be inappropriate for me to offer my personal views on any particular Supreme Court opinion. If I am confirmed, I will apply *Heller* and all other Supreme Court and circuit precedent faithfully.

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

As I said at my hearing, the Court in *Heller* stated, “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008).

**c. Did *Heller*, in finding an individual right to bear arms, depart from**

**decades of Supreme Court precedent?**

In *Heller*, the Supreme Court asserted that “nothing in our precedents” foreclosed the holding in the case, concluding, rather, that the question had never been squarely addressed as it “did not present itself.” *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). As noted above, it would be inappropriate for me as a district court judicial nominee to offer a personal opinion about the correctness of that reasoning.

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?**

If I am confirmed, my personal opinions will not influence my role as a district court judge, and I would apply *Citizens United* and all other Supreme Court and circuit precedent faithfully.

**b. What is the right way to balance individual’s First Amendment rights when corporations can, in effect, silence an individual through monetary spending?**

Please see the response to No. 5(a) above. It would be inappropriate for me, as a judicial candidate, to weigh in on issues that are properly within the role of the legislative branch.

6. You graduated from law school only ten years ago, and you have spent only a small portion of time since then practicing law. In addition, according to your Questionnaire, you have never tried a case. Your overall qualifications and preparation for becoming a lifetime- appointed federal judge are of concern to me, especially since the American Bar Association has not yet issued a formal rating on your nomination.

**a. How many times have you appeared in a federal district court on behalf of a client?**

While the Deputy Solicitor General of Alabama, I often had occasion to represent Alabama’s interests in challenging actions taken by the federal government. In one case in particular, Alabama led an 18-state coalition in a case I filed in the Southern District of Alabama, challenging federal regulations, *Alabama, et al. v. National Marine Fisheries Service, et al.*, No. CV 16-00593 (S.D. Ala. Nov. 29, 2016).

**b. How many times have you argued a motion in federal district court on**

**behalf of a client?**

Motions in federal court are often argued on the briefs, rather than in person. This is particularly true in matters involving constitutional challenges or challenges to federal regulations. Typically, these actions would begin with a challenge to the states' standing, followed by a motion for preliminary injunction staying the regulation. If the states were successful in establishing standing and gaining a preliminary injunction, the case would move on to a summary judgment stage on the merits. Two representative cases where I was significantly involved with the motions briefing are the states' challenge to the Waters of the United States rule and the states' challenge to the Clean Power Plan.

In addition, the Office of Solicitor General is responsible for defending laws enacted by the Alabama Legislature. During my time, a number of such laws were challenged. In those cases, the plaintiffs moved for a preliminary injunction, which the state opposed.

**c. How many times have you participated in hearings in federal district court on behalf of a client?**

To my recollection, during my time as Alabama's Deputy Solicitor General, I participated as part of the legal team in one hearing in federal district court in the Middle District of Alabama and a number of telephonic hearings in the Northern District of Alabama.

**d. How many appeals have you argued in federal appellate court?**

I have argued three cases before the Eleventh Circuit Court of Appeals and one case before the Alabama Court of Criminal Appeals. In addition, I have second-chaired a number of arguments before both the Eleventh Circuit and the Alabama Supreme Court.

**e. Had you made your interest in being considered for a federal judgeship known to anyone—including at the Department of Justice, or the White House—before Senator Shelby's office reached out to you in June 2017 (per your response to Question 26 of your Questionnaire)?**

I have had casual conversations with friends and co-workers about serving in the judiciary over the years, and at one point I was asked, along with several others, to provide a resume to the White House for possible future consideration. To my knowledge, none of these conversations played any role in my consideration.

**Why do you believe you were nominated to be a federal judge?**

To my knowledge, I was nominated on the basis of a recommendation made by

Senators Shelby and Strange.

**f. What steps are you undertaking to prepare to assume the responsibilities of a federal district court judge, if you are confirmed?**

I am blessed to have two of the finest judges in the country as mentors—Judges Coogler and Dubina, for whom I have clerked for two years and one year, respectively. I have been in touch with both of them, seeking their advice and guidance on the best way to proceed, in the event that I am confirmed. I have arranged with Judge Coogler to shadow him in his work, to reacquaint myself with the routine of a district court judge and to learn best practices and procedures. The Administrative Office of the Courts also provides a wealth of material for judicial candidates to study, and I intend to study assiduously the Federal Rules of Civil Procedure, Rules of Evidence, the Sentencing Guidelines, and treatises thereon.

7. Additionally, according to your Questionnaire, you have limited experience with criminal law.

**a. Specifically, what steps are you undertaking to prepare yourself to hear criminal cases?**

Federal judges come to the bench from a variety of legal backgrounds, each with something to learn and something to contribute. My work in the Alabama Attorney General's office often involved criminal matters, including the balancing of aggravating and mitigating factors, allegations of violations of *Brady* and *Batson*, and allegations of coerced confessions, improperly introduced 404 evidence, and other prosecutorial misconduct. I also worked on numerous AEDPA and habeas corpus actions that involved underlying issues of criminal procedure. To supplement this experience, I intend to study the relevant areas of the law and work with experts—judges, prosecutors, and defense attorneys—to better understand the challenges and important procedural requirements of criminal law.

**b. How will you familiarize yourself with the requirements of the Speedy Trial Act, a defendant's right to counsel, a defendant's right against self-incrimination, prosecutors' obligations under *Brady v. Maryland* and *Giglio v. United States*, and other critical aspects of criminal proceedings?**

Please see the response to No. 6(f) and 7(a) above.

8. A federal district court judge's responsibilities are not limited to trials but also include making decisions regarding sufficiency of evidence and procedural propriety, such as reviewing search and arrest warrant applications, monitoring various electronic evidence gathering methods, or determining pre-trial detention

and release conditions.

**a. How familiar are you with the procedural and substantive rules that govern these various pre-trial hearings and investigative tools?**

Please see the response to No. 6(f) and 7(a) above.

**b. If you have no experience with these critical issues, how do you plan to educate yourself to understand these issues before you preside over any such matter?**

Please see the response to No. 6(f) and 7(a) above.

9. District court judges often say that the most difficult aspect of their job is sentencing defendants. Judges also comment that one of the most complicated legal areas are decisions involving the United States Sentencing Guidelines. How do you plan to familiarize yourself with the Guidelines, and, more importantly, how do you plan to prepare yourself to sentence criminal defendants?

During my two years clerking for Judge Coogler, I participated in a number of sentencing hearings and was able to witness and learn how a federal district court judge approaches the difficult job of sentencing defendants, including how he uses the sentencing guidelines and the probation officers' expertise. If fortunate enough to be confirmed, I intend to re-review the sentencing guidelines, review relevant precedent and treatises on the subject, and observe as many sentencing hearings as possible before I begin to conduct such hearings in my courtroom.

10. While you worked in the Alabama Attorney General's Office, you filed a brief on behalf of Alabama and several other states in a Ninth Circuit case, *Peruta v. San Diego*, regarding the constitutionality of California law governing the concealed carry of firearms. In this case, several individuals who wished to carry concealed firearms in San Diego County challenged the county's definition of "good cause" as unduly restrictive in violation of their Second Amendment right to bear arms and the Supreme Court's decision in *Heller*. Your brief argued that San Diego's definition of "good cause" prevented most California citizens from carrying concealed weapons and that that definition, coupled with California's ban on the open carry of firearms, violated the Second Amendment by effectively preventing all public carry of firearms. The en banc Ninth Circuit disagreed, holding that San Diego's definition of "good cause" was constitutional because there is no Second Amendment right to concealed carry of a firearm.

**a. Why did the Alabama Attorney General's Office decide to take a position in this case?**

At the time, I was the Deputy Solicitor General, and it was the decision of the Attorney General whether to take positions in cases.

**b. Why did you believe it was a worthwhile expenditure of the Alabama**

**taxpayers' limited resources to challenge the gun control legislation adopted by another state, in a circuit that does not include Alabama and does not have jurisdiction over Alabama?**

It was the responsibility of the Attorney General to decide which challenges were appropriate.

**c. Please identify any other briefs you filed in cases challenging the constitutionality of another state's laws, and note whether the state whose law was being challenged was in the Eleventh Circuit or not.**

I do not recall any other briefs I filed challenging a state's laws. I do recall a brief supporting California's use of a procedural bar in criminal cases, which the Ninth Circuit had found California could no longer apply. That brief was joined by all the states in the Ninth Circuit and cited by the Supreme Court in a per curiam opinion reversing the lower court's ruling. *Johnson v. Lee*, 136 S. Ct. 1802, 1804 (2016). During my time as Deputy Solicitor General, the State of Alabama would also have joined any number of other briefs in cases challenging the constitutionality of other states' laws when the Attorney General of Alabama determined that it was in the State's interest to do so. *See, e.g.*, Brief of West Virginia and 43 Other States in Supp. of Pet., *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016) (arguing that Nevada's law allowing private citizens to sue other States in its courts without the State's consent violated the Constitution's structure).

11. In several posts on your "Government in Exile" blog, you suggested that the right to bear arms is an important protection against the government. For example, on February 5, 2013, you wrote, "an armed revolution truly is the last defense against tyranny." (*Gun Control and Japanese Internment*, 2/5/13)

In a different post, you printed a reader comment that said, "[w]e will have to resort to arms when our other rights—of speech, press, assembly, representative government—fail to yield the desired results. A gun owner may consider his weapon to be his first line of defense against a common criminal, but it must be his last defense against the uncommon criminal that an illegitimate government would become." You responded, "I agree with this completely." (*Practicality and the Right to Bear Arms*, 2/9/13)

**a. Do you still agree with these statements?**

If I am confirmed, my personal views on this or any other issue will have no bearing on how I would rule in case. Rather, I would be duty bound to apply relevant Supreme Court and circuit precedent to the facts before me.

At the time, I understood the commenter to be reiterating that "resort to arms" would be the absolute last resort against a truly tyrannical government, after the appropriate exercise of our constitutional rights to speak, including in the press; to assemble to petition our government for a redress of grievances; and to vote for

new representatives. I reinforced the point that the use of arms against a government, though certainly contemplated by the Framers who took up arms in favor of American independence, should be a last resort with the next sentence: “We are certainly far from that place today, and I don’t think any situation in American history—with the possible exception of slavery—has called for armed rebellion against the state.”

**b. Please explain when you believe it is appropriate for American citizens to participate in an armed uprising against the government.**

Please see the response to No. 11(a).

12. In another post, you wrote that you believed that lawmakers who favor gun-control measures are “not playing straight with the American people and [are] not negotiating in good faith.” You also said that you did not “trust” them on the issue. (*Are Any Restrictions on Gun Ownership Legitimate?*, 1/15/13)

**a. Could you please elaborate on these statements?**

If I am confirmed, my personal views on this or any other issue will have no bearing on how I would rule in case. Rather, I would be duty bound to apply relevant Supreme Court and circuit precedent to the facts before me.

At the time, I was attempting to point out that a lack of trust between people on both sides of the gun-control issue has prevented the two sides from reaching compromise positions. I pointed out that your view was not based on any nefarious purpose, but on an attempt to prevent the kinds of tragedies that you have experienced in your own life. I hoped that fostering understanding of the two sides of the issue would help alleviate the lack of trust that I identified.

**b. If you are confirmed, how will litigants appearing before you in support of gun-control laws—including the government—be assured that you can be impartial on this issue?**

As a judge, I would be duty-bound to set aside any personal views on any issue that would come before me, faithfully applying the precedents of the Supreme Court and the circuit. I pledge to do so.

13. In a different blog post, you encouraged your readers to join the National Rifle Association. You wrote, “Today I pledge my support to the NRA; financially, politically, and intellectually. I ask you to do the same. Join the NRA. They stand for all of us now, and I pray that in the coming battle for our rights, they will be victorious.” (*A Call to Arms: It’s Time to Join the National Rifle Association*, 1/26/13) Yet at your hearing, you refused to commit to recusing yourself from cases involving the NRA or where the NRA had taken a position.

**a. You said at your hearing that you would “hate to prejudge any case that**

**came before me, even a recusal question. Sitting here today, I feel no reason that I could not rule fairly in a case involving weapons.” But 28 U.S.C. § 455(a) requires a judge to recuse himself or herself “in any proceeding in which his impartiality might reasonably be questioned.” Do you agree that judges are obligated to recuse in cases where their impartiality might reasonably be questioned by an objective observer?**

I agree that 28 U.S.C. § 455(a) requires a federal judge to “disqualify himself in any proceeding in which his impartiality might be questioned.” The next subsection lists additional grounds for disqualification. *See* 28 U.S.C. § 455(b). If fortunate enough to be confirmed, I would apply the recusal statute, along with the precedents interpreting it and any applicable canons of judicial ethics, in deciding whether to disqualify myself from a particular case.

**b. Do you agree that the recusal standard for federal judges is not simply whether a judge personally “feels” that he or she could be objective?**

Please see the response to No. 13(a).

**c. Given what you have written about the NRA, under what circumstances do you believe your impartiality would not reasonably be questioned by an objective observer in a case that involved a legal issue on which the NRA had taken a position, or which involved the NRA as a party?**

Please see the response to No. 13(a).

14. Again, in January 2013, you wrote, “Today I pledge my support to the NRA; financially, politically, and intellectually. I ask you to do the same. Join the NRA. They stand for all of us now, and I pray that in the coming battle for our rights, they will be victorious.” (*A Call to Arms: It’s Time to Join the National Rifle Association*, 1/26/13). Yet despite pledging your support to the NRA and exhorting your blog readers to join the NRA in January 2013, according to Question 11a of your Senate Questionnaire, you did not actually become a member of the National Rifle Association until 2016.

**a. Why did you urge your readers to join the NRA and then decline to do so yourself in 2013?**

Shortly after publishing that post and others, I was offered a position with Senator Rob Portman. Because I understood that in that role I would be representing his views and not my own, I put aside the blog and the positions I had taken in it for the time-being.

**b. What finally prompted you to become a member of the NRA in 2016?**

I do not recall precisely why I joined at that time, other than that I had completed

my service with Senator Portman and had intended to become a member for some time.

15. At your hearing, you stated that with respect to your blog, “one of the things I was trying to do was generate discussion... because I wanted people to be able to use my blog to discuss these issues, to come together, find common ground.” You subsequently told Senator Blumenthal that you were trying to offer “constructive dialogue.” Below is your blog post “A Call To Arms: It’s Time to Join the National Rifle Association.” **Please explain how any of these statements were intended to help people “come together” or “find common ground,” or how this blog post offered “constructive dialogue.”**

*I rarely join lobbying groups, and I almost never tell other people that they should do so. But desperate times, my friends.*

***It has become evident to me—as I am sure it has become obvious to you—that the President and his democratic allies in Congress are about to launch the greatest attack on our constitutional freedoms in our lifetime. The coming fight over gun restriction is the latest battle in the long war that activists have raged over the last several decades against our Second Amendment rights. The object of that war is to make guns illegal, in all forms.***

*In the world they imagine, only the state and its officers would be permitted to own and carry a weapon.*

***It is an outrage that these activists have exploited the tragedy in Connecticut for their own ends, and it is sad that the President has decided to forgo an opportunity to reform our gun control regulations, so many of which only burden law abiding citizens while doing nothing to keep guns out of the hands of violent criminals.***

*The President will no doubt launch quite the political campaign to gain support for his policies, but make no mistake—this is only the first action of many against our right to bear arms. **In the President’s mind, and in the mind of liberals in Congress, there is no such thing as a good gun, and there is no such thing as a good gun owner.***

*These politicians either do not know or do not care that an armed, responsible citizenry is the last and greatest bulwark against tyranny that a nation can have. They certainly do not care about our right to bear arms, enshrined in the Constitution and reaffirmed by recent Supreme Court rulings. They do not appreciate that in the United States of America, the state does not have a monopoly on force. Rather, in our country, the common man is elevated as an equal with the state, a citizen that is as entitled to carry a weapon as any police officer or soldier.*

*For thousands of years of human history, it was not so. From the Samurai of Japan to the knights of the feudal order, it was the nobility—the powerful and the high born—who were permitted to bear the sword, not the commoner. But here, there is no nobility, there are no commoners. At least, until this point in our history.*

***If President Obama and his allies have their way, they take yet another step in***

*rendering us dependent on the government, in this case for our safety and that of our families—and ultimately for our freedoms.*

*This attack cannot stand.*

*Fortunately, there is a group dedicated to the protection of our Second Amendment Rights—the National Rifle Association. Today I pledge my support to the NRA; financially, politically, and intellectually. I ask you to do the same. Join the NRA. They stand for all of us now, and I pray that in the coming battle for our rights, they will be victorious.*

This post and others were meant to generate discussion and spike interest, drawing people to the blog who might not agree with it. Once people did post and disagree, I elevated the post to the front page and engaged in a respectful, constructive discussion.

16. Internet searches show that you maintain a Twitter account and that you posted publicly from that account in the past. However, the account is currently private.

**a. When did you make your Twitter account private?**

I made my Twitter account private some time before my nomination. I do not recall the date.

**b. Question 12a of the Senate Judiciary Questionnaire asks judicial nominees to “List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.” The tweets that you made while your account was public, and anyone could have read them, qualify as such material. Why were these tweets not published to the Committee as ‘material published only on the Internet’?**

That portion of the question refers to the type of substantive written materials that are listed preceding it. Tweets, which are fewer than 140 characters in length, are not of that nature.

**c. You stated at your hearing, “Since I have been nominated, I have made no political tweets.” You were nominated less than two months ago—on September 7, 2017. Please share with the Committee the “political tweets” you wrote since you began serving as a Deputy Assistant Attorney General in the Trump Administration, and the date you made your Twitter account private.**

Please see the response to Nos. 16(a) and 16(b) above.

17. The following tweets appear to have been authored from your Twitter account.

**“Hillary Rotten Clinton might be the best Trumpism yet.”**

**“@DWSTweets’ [Debbie Wasserman-Schultz’s] email scandal didn’t put our nation at risk, but she resigns. Meanwhile, @HillaryClinton is on her way to the nomination.”**

**“The press cares when you lie to the American people. Unless you are @HillaryClinton #LochteGate”**

**“The worst part of #NeverTrump is that they are helping Hillary win the election. Their self-righteousness while doing it is a close second.”**

**You retweeted a person who wrote “Must say: fact that Bernie fans at DNC now chanting the same “LOCK HER UP!!” refrain from RNC represents single greatest Trump-troll ever.”**

**You retweeted Laura Ingraham when she wrote “When your kids & grandkids ask you what you did to defeat the Clinton mob, what will you tell them?”**

**You retweeted a person who wrote “There are two choices: Hillary and 5,000 liberal political appointees or @realDonaldTrump and 5,000 conservative political appointees.”**

Additionally, you have written several opinion pieces for CNN.com. During last year’s presidential election, you wrote an article for CNN which stated, “[i]f you support activist justices on the Supreme Court, if you support late-term abortion on demand, if you support open borders and amnesty, if you want a continuation of a foreign policy that has helped plunge the Middle East into war-torn chaos, if you want four more years of the past eight years, Hillary Clinton is your candidate.” You also claimed that “Hillary Clinton has committed acts that would have resulted in the prosecution of ordinary citizens.” (Who Won the Debate?, CNN.com, 10/20/16).

- a. Given the extent—and the vehemence—of your prior political commentary, what assurances or evidence can you give the Committee and future litigants who come before you that you will be fair and impartial to everyone who appears before you, if confirmed—including towards those whose political views differ from yours?**

Many federal judges, nominated by Presidents of both parties, engaged in political commentary before they joined the federal bench. But upon taking the judicial oath of office, they become bound to “faithfully and impartially discharge and perform all the duties incumbent” upon them as federal judges, 28 U.S.C. § 453, and to comply with the canons of judicial ethics for federal judges, which provide that judges “should not engage in . . . political activity,” Canon 5(C), Code of Conduct for United States Judges. If fortunate enough to be confirmed, I would fully and faithfully comply with these obligations.

I would also note that, throughout my career, I have worked fairly with

people who hold views across the political spectrum, including over the last year with members of the Judiciary Committee. I believe that experience should assure this Committee and future litigants that I would approach each case before me fairly and impartially.

**Do you believe these tweets and your online commentary inspire confidence in your temperament and impartiality as a federal judicial nominee?**

Please see the response to No. 17(a) above.

**b. Do you believe there are any prior political statements that ought to be disqualifying for a federal judicial nominee?**

Please see the response to No. 17(a) above.

18. Shortly after the 2016 election, you wrote an article accusing Democrats of “playing the race card” to explain the election results and argued that “[b]laming racism for a lost election is nothing new for some on the left.” (*Democrats, the Party Who Cried Racist*, CNN.com, 12/1/16) **Please explain what you meant by these statements.**

The purpose of this editorial was to defend then-Senator Sessions from claims I thought were unfounded and to note that using unfounded allegations of racism for political ends would make it more difficult to address racism in our country.

19. According to your questionnaire, you started working as a political appointee at the U.S. Department of Justice in January 2017. In February 2017, you wrote an op-ed titled “What the pundits got wrong about Luther Strange,” in which you wrote “General Strange is now Senator Strange, and we in Alabama are lucky to have him. The decision to elevate him to that position was the best decision our governor has made.”

**a. Did you consult with Department of Justice ethics officials regarding whether this op-ed complied with the Hatch Act before publishing it?**

I did.

20. Last November, you wrote an article for CNN arguing that President Trump should pick Judge William Pryor to fill the Supreme Court seat vacated by Justice Scalia. You wrote, “Pryor is a conservative; he is a pre-eminent defender of federalism, the separation of powers, and deciding cases based on the original meaning of the Constitution.” You also said that, “[f]or too long, conservatives have gone for the ‘stealth’ pick, nominations of jurists with little or no judicial track record, who may or may not adhere to a conservative judicial philosophy.” (*Who Donald Trump Should Appoint to the Supreme Court*, CNN.com, 11/15/16) You are currently the Deputy Assistant Attorney General in charge of judicial nominations at the Justice Department’s Office of Legal Policy.

- b. It seems fair to assume that you would not hold other judicial nominees to a standard you did not meet yourself. What do you look for in judicial nominees to ensure that they adhere to a conservative judicial philosophy?**

The article was an advocacy piece urging the appointment of Judge Pryor to the Supreme Court. As Deputy Assistant Attorney General, my duty is to facilitate the President's selection of candidates.

- c. You told Senator Blumenthal that you participate in interviews for potential judicial nominees—that you had participated in perhaps 50 different candidate interviews. You said that you asked nominees questions about “temperament, and following the law and following precedent.” What kinds of questions to you ask about precedent?**

Although it would be inappropriate for me to reveal confidential information learned through my official duties, there are no litmus tests. Candidates are generally asked questions to ascertain that they understand the duty of a lower-court judge to follow precedent, which is the foundation of the rule of law in this country.

- d. Do you ask nominees specifically about their views on the Supreme Court precedents *Roe v. Wade*, *Planned Parenthood v. Casey*, *Whole Women's Health v. Hellerstadt*, or any other case involving reproductive rights?**

Please see the response to No. 20(c).

- e. Do you ask nominees specifically about their views on *District of Columbia v. Heller*, or any other case involving the Second Amendment?**

Please see the response to No. 20(c).

21. Please describe with particularity the process by which these questions were answered.

I received these questions from your office through the Office of Legal Policy on October 24. I drafted answers to them and returned them to DOJ, received suggestions, and then finalized them for submission.

**Senator Dick Durbin**  
**Written Questions for Brett Talley**  
**October 24, 2017**

For questions with subparts, please answer each subpart separately.

**Questions for Brett Talley**

1. According to your questionnaire you have never tried a case.

- a. **How can you claim to be qualified for a lifetime appointment to supervise federal trials on a daily basis when you have never yourself tried a single case?**

I am honored that Senators Shelby and Strange believe me to be qualified for this position and recommended me to the President, who evidently agreed with their assessment. Federal judges come to the bench from a variety of legal backgrounds, each with something to learn and something to contribute. I have worked in all three branches of the federal government, in state government, and in private practice. I served as the Deputy Solicitor General of Alabama, one of the highest-ranking lawyers in the state, handling the most sensitive and most important legal matters Alabama faced. Through my experience as a litigator on behalf of the State of Alabama and in private practice, I have been involved in litigation in federal courts at every stage, from the filing of a complaint in district court to successfully defending against petitions for certiorari in the United States Supreme Court. I have argued cases before the Eleventh Circuit Court of Appeals and the Alabama Court of Criminal Appeals regarding some of the most difficult issues district courts consider, including the admissibility of 404 evidence and confessions, the constitutionality of death penalty procedures, and the application of AEDPA in habeas petitions. I have also filed briefs in other circuit courts and in the Supreme Court and have had my work cited by the Supreme Court. Through my experience working in the United States Senate, I have a deeper understanding than most of the difficulties in crafting legislation and the importance of faithfully applying statutes as written by Congress. Finally, I served for two years as a district court clerk. These positions are highly sought after because of the unique opportunity to learn from a federal judge and to see from that side of the bench how the legal process should work. In that capacity, I have witnessed firsthand the preparation necessary for both criminal and civil trials, including a high-profile trial of the former mayor of Birmingham. I hope that all these experiences will be of benefit to me if I am fortunate enough to be confirmed.

If I am confirmed, I will work diligently to supplement that experience in areas where I have less familiarity.

- b. **Do you think it is advisable to put people with literally no trial experience on the federal district court bench?**

I am honored to have the support of Senators Shelby and Strange and to have been nominated by the President, as I was honored to represent the State of Alabama in

numerous state and federal courts. It would be inappropriate for me as a nominee to comment on the advisability of any nomination.

2. On January 26, 2013, you wrote a piece entitled “A Call to Arms: It’s Time to Join the National Rifle Association” in which you said “Today I pledge my support to the NRA, financially, politically and intellectually. I ask you to do the same. Join the NRA. They stand for all of us now, and I pray that in the coming battle for our rights, they will be victorious.” **Will you commit that if you are confirmed, you will recuse yourself from any matter involving the National Rifle Association as a party or amicus, given your unequivocal statement of partiality toward this organization?**

Please see the response to Ranking Member Feinstein, question No. 13(a).

3. You wrote on January 29, 2013: “I don’t think that the United States is at all close to falling under a tyrannical regime. But I’m not naïve enough to think that it couldn’t happen here. And at least if it did, we would have some means to resist it. We would have some way to fight back. Gun control isn’t just about hunting or even about protecting our families. It’s about preserving our freedoms.” **Does this statement represent your current views?**

Please see the response to Ranking Member Feinstein, question No. 11(a).

4. On December 15, 2016, you wrote an opinion column in support of President Trump’s choice of Scott Pruitt to be the Administrator of the EPA. You wrote that “during the Obama Administration the EPA became a lawless organ of federal power” and that Pruitt “has spent the last six years pushing back on the EPA’s most egregious overreaches.” **Will you commit that if you are confirmed you will recuse yourself from any matters involving the EPA or Administrator Pruitt?**

Please see the response to Ranking Member Feinstein, question No. 13(a).

5. On October 20, 2016 you wrote a piece on CNN.com in which you said “Hillary Clinton has committed acts that would have resulted in the prosecution of ordinary citizens.” **To which acts were you referring?**

During the campaign, there were widely publicized reports that Secretary Clinton may have violated certain statutes related to the treatment of sensitive documents during her time as Secretary of State. These reports were tied to an investigation by the FBI and Department of Justice.

6. The American Bar Association’s Standing Committee on the Federal Judiciary states that nominees ordinarily should have at least 12 years of practical legal experience before they can be considered for the federal bench. You do not yet have 12 years of practical legal experience. You only graduated from law school in 2007.

- a. **Do you agree with the American Bar Association's Standing Committee on the Federal Judiciary that candidates for federal judgeships should have at least 12 years of practical legal experience?**

Please see the response to question No. 1 above.

- b. **Do you believe that you are better qualified to serve on the federal bench than other candidates who have more practical legal experience than you? If so, why?**

Please see the response to question No. 1 above.

**Nomination of Brett Talley to the  
United States District Court  
For the Middle District of  
Alabama Submitted October 24,  
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?

Justice Roberts’ metaphor is certainly apt in that a judge does not write the rules and doesn’t get to decide not to apply them simply because he or she disagrees with them. Rather, a judge must follow the law and precedents in all cases.

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

A judge should follow the law, including all relevant precedent, in all cases. When the law calls upon a judge to consider the practical consequences of a particular ruling, the judge should do so. For instance, when presented with a motion for a temporary restraining order or a preliminary injunction, a judge should consider whether a failure to issue such an order or injunction would result in “irreparable harm” to the movant.

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

No. Generally, judges apply an objective, reasonable factfinder standard to determine whether or not there are genuine disputes regarding material facts. In doing so, the judge is not to apply his or her own opinion about the relative strength of the evidence.

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?

A judge should have empathy for the parties and attorneys who appear before him, particularly given it may be the first or only experience that a party will have with the federal judicial system. But a judge should never allow personal opinions or experiences to justify a departure from the law, including any relevant precedent.

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

Please see the response to No. 2(a) above.

- c. Do you believe you can empathize with “a young teenage mom,” or understand what it is like to be “poor or African-American or gay or disabled or old”? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

I don't know that anyone can fully understand what it is like to be a person that they are not, or claim to appreciate fully the struggles and trials of someone who has faced disadvantages that they have not. This is one reason that strict adherence and faithful application of the law is so important. The outcome in a case should not turn on whether or not the judge can empathize with a party. It should turn on the law and the facts.

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?

It is not.

4. In a 2013 blog post, you wrote, “Today I pledge my support to the NRA; financially, politically, and intellectually.” What did you mean by that? Is that public statement consistent with canon 1 of the Model Code of Judicial Conduct, which provides: “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety”? How can you be a neutral arbiter in Second Amendment cases or any other cases where the NRA has a vested interest given that statement? In response to Senator Feinstein's question, why would you not commit to recusing yourself in these cases?

I was stating my intention, as a private citizen, to join the NRA. The Canons of Judicial Conduct, of course, did not apply to me at that time. If I am fortunate enough to be confirmed, I will scrupulously adhere to my oath of impartiality and will faithfully apply the recusal standards in all cases, including those involving the Second Amendment.

5. During your career, you have defended questionable practices concerning the death penalty, such as executing a mentally incompetent death-row inmate and allowing a judge to override a jury's recommendation for a life sentence and impose the death penalty. Do you stand by these positions today? How would your past work on death penalty cases influence your sentencing practices as a district court judge?

I defended the practices to which you refer in my capacity as an attorney representing a client, the state of Alabama. Those representations will have no influence on my sentencing practices, other than providing familiarity and experience with the legal issues surrounding the death penalty and challenges to sentences generally.

6. In 2016, you defended Scott Pruitt, saying that Democrats' criticism of Pruitt as a climate-change denier was mere “character assassination” and that Republicans “cannot allow his nomination to be scuttled because of his adherence to the rule of law and his assertion that free people in a free country should be able to challenge climate change dogma without fear of prosecution.”
  - a. What did you mean by that?

As I explained in the article, at the time I was representing the State of Alabama in a number of challenges to regulations that Alabama believed were unsupported by statutes passed by Congress. I was also representing the State of Alabama in a joint intervention with the State of Texas in a case involving a legal action and threatened prosecution against corporations and private think tanks for downplaying the risks of climate change. I noted that opposition to Pruitt seemed largely based on his involvement in those and other legal disputes.

- b. Do you believe that climate change is real and is caused in some part by anthropogenic activity? If you do not, please identify what evidence or research you rely upon to come to that conclusion? If you do not have an opinion, on what basis did you make your claim about Democratic criticism of Scott Pruitt?

The litigation referenced above was unrelated to the facts concerning climate change and its causes. Rather, the State of Alabama and others successfully argued the EPA had overstepped statutory boundaries established by Congress. I do not believe it would be appropriate for me, as a judicial nominee, to offer my personal beliefs on an issue I understand to be a subject of political debate. If I am confirmed, my personal views on climate change or any other issue will have no bearing on how I approach cases.

- c. When you made that statement were you aware of the United States Supreme Court's 2007 decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, which held that the Clean Air Act gives the EPA the authority to regulate the emissions of greenhouse gases, and that courts have subsequently dismissed the challenges to the EPA's endangerment finding and the related greenhouse gas regulations? If you have not reviewed *Massachusetts v. Environmental Protection Agency* and its progeny, will you commit to me that you will do so now?

I was generally aware of the Supreme Court's decision in *Massachusetts v. EPA* and I am happy to review it further. The case is not only important for its analysis of environmental issues, but is often cited in district courts as granting to states, as quasi-sovereigns, "special solicitude" in standing analysis. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007).

7. You have previously argued that the government has the authority to order a drone strike on American citizens on U.S. soil. Do you still believe that today? What constitutional rights do you believe that position implicates? How can you assure this committee that you will protect and defend civil liberties based on this position?

The thrust of that writing was that Congress should pass legislation regulating the use of drone strikes on American soil in order to protect the civil liberties of Americans. Were I to be faced with a case involving the use of drones on American soil, I would apply the law and precedents of the Supreme Court and Eleventh Circuit, without regard to my personal views on the issue.

8. Given that you graduated from law school only ten years ago and have never tried a case, why do you believe you are qualified to serve as a federal district court trial judge?

Please see the response to Sen. Durbin, question No. 1(a).

**Nomination of Brett Joseph Talley, to be United States District Judge for the Middle  
District of Alabama  
Questions for the Record  
Submitted October 24, 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?

As a district court judge, I would follow faithfully the precedents of the United States Supreme Court and Eleventh Circuit identifying factors that lower courts should consider to determine whether a right is fundamental and protected under the Fourteenth Amendment.

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

Please see the response to No. 1(a) above.

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

Please see the response to No. 1(a) above.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has previously been recognized by a court of appeals outside your circuit?

Please see the response to No. 1(a) above.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Please see the response to No. 1(a) above.

- f. What other factors would you consider?

Please see the response to No. 1(a) above.

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

“Without equating gender classifications, for all purposes, to classifications based on race or national origin,” the Supreme Court has held that gender classifications are subject to scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

- 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?

As a district court judge, I would be bound by the rulings of the Supreme Court and Eleventh Circuit in this area, regardless of arguments made to the contrary.

- 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?

As a district court judge, I would follow *United States v. Virginia* and any other precedent of the Supreme Court or the Eleventh Circuit.

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

This question encompasses cases and controversies that might come before me if I were confirmed to be a district court judge. Were the question to arise, I would consider the arguments of the parties, study the briefs, and rule in accordance with Supreme Court and Eleventh Circuit precedent.

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

Please see the response to No. 2(c) above.

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

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects a woman’s right to use contraceptives.

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

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects a woman’s right to obtain an abortion.

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

The Supreme Court has repeatedly held that there is a constitutional right to privacy that protects intimate relations between consenting adults, regardless of their sexes or genders.

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

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

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “Higher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), 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?

If faced with this question, I would consult the rules of evidence and any relevant Supreme Court or Eleventh Circuit precedent on the appropriateness of considering different kinds of evidence. As a district court judge, I would follow Supreme Court and Eleventh Circuit precedent without regard to the evidence on which the holding was based, except to the extent those courts limit their holdings based on particular evidence.

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

District court judges are regularly faced with considering expert testimony and evidence presented in both civil and criminal cases. The Federal Rules of Evidence, along with the precedents interpreting those rules, provide guidance to district judges about the weight and admissibility of such evidence. I regularly had occasion to grapple with those rules and precedents during my time as Alabama’s Deputy Solicitor General, and I understand the importance of the district court’s role in serving as a gatekeeper for such evidence, particularly in jury cases. If confirmed, I will faithfully follow the Rules of Evidence and any relevant Supreme Court and Eleventh Circuit precedents interpreting them.

5. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

- a. 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. 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?

It is my understanding that scholars are divided on whether *Brown* is consistent with the original public meaning of the Fourteenth Amendment. *Brown* is, of course, settled law and I would apply it faithfully, regardless of its consistency or inconsistency with any theory of constitutional interpretation.

- 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 October 23, 2017).

Originalism has its defenders and detractors, but as a district court judge, I would be bound to follow Supreme Court precedent, regardless of whether a particular decision comported with that theory of interpretation.

6. You have only two-and-a-half years of litigation experience, one of which was your first year after graduating law school. Although you have argued appeals, you have never tried a case.
- a. Have you argued any motion under the Federal Rules of Civil Procedure?

Please see the response to Ranking Member Feinstein, No. 6(b).

- b. Have you argued any motion under the Federal Rules of Criminal Procedure?

I do not believe so, though my appellate work often involved criminal law issues including those of procedure.

- c. Have you presented argument in federal district court on an evidentiary issue governed by the Federal Rules of Evidence?

I have not, though I have presented arguments on evidentiary issues in state court, which follows similar evidentiary rules to the federal courts. For instance, in at least two cases I argued on behalf of the state against challenges of appellants to the admission of extrinsic evidence under the state-law analogue to Rule 404, arguing that other bad acts the appellant had committed were unduly prejudicial and inadmissible. I also argued on behalf of the state against a challenge in a murder case to the admissibility of a confession and tacit admissions made incident to arrest.

- d. Have you taken a deposition in a federal court proceeding?

Yes. While at Gibson, Dunn & Crutcher, I participated in litigation in D.C. Superior Court against a landlord accused of defrauding and threatening to illegally evict a number of

Spanish-speaking, immigrant families. I conducted a four-hour deposition of an individual our team believed to be the landlord's accomplice. In addition, I second-chaired a number of depositions of other witnesses, including the landlord himself. Eventually, our team was able to reach a settlement that allowed a tenant association to purchase one of the buildings and protected tenants from eviction. I also second-chaired the defense of a deposition in a Department of Justice prosecution involving a large financial institution.

- e. Have you argued a discovery motion in federal district court?

I have not, but discovery issues often arose while I clerked on the district court and in matters I participated in as Deputy Solicitor General of Alabama.

- f. Have you participated in a federal court mediation?

Yes. While clerking on the district court, I participated in a multi-day mediation between a large, international automobile company and a maker of electric batteries for hybrid vehicles.

- g. Have you participated in a pre-trial conference in federal court?

Yes. While clerking on the district court, I participated in a number of pre-trial conferences.

- h. Have you participated in voir dire?

Yes. While clerking on the district court, I participated in voir dire at least four times.

- i. Have you examined a fact witness in federal district court?

I have not.

- j. Have you examined an expert witness in federal district court?

I have not. I have, however, dealt with issues involving expert testimony as Deputy Solicitor General of Alabama.

- k. If confirmed, what experience will you rely upon as you approach the task of being a federal trial court judge?

Please see the response to Senator Durbin, No. 1(a).

7. For the past several months, you have managed the nominations unit in your role as Deputy Assistant Attorney General for the Office of Legal Policy in the U.S. Department of Justice. During your hearing, Senator Hirono asked, "Have you worked to ensure that President Trump's nominees are reliable conservatives instead of stealth picks." Your answer did not

address the question. She asked you a second time and you replied, “We provide background info to the President . . . .”

- a. During your time managing the nominations unit, have you considered a candidate’s current or prior political party affiliations? If yes, could that factor alone be determinative regarding a potential nominee’s advancement in the process?

The role of the Office of Legal Policy is to facilitate the consideration of judicial candidates by the President and to assist his nominees through the confirmation process. It is the President’s decision alone what factors to consider, and it would be inappropriate for me to comment on what factors the President does or does not consider.

- b. During your time in the Office of Legal Policy, have you observed other individuals within OLP or in different parts of the Department of Justice or the White House demonstrate a preference toward “reliable conservatives” in selecting judicial nominees?

Please see the response to No. 7(a) above.

8. Senator Blumenthal asked you several questions about your role managing the nominations unit, including whether you or your colleagues ask potential nominees about “their beliefs or convictions.” You did not directly answer Senator Blumenthal’s question but rather asserted that there is no “litmus test.” When interviewing potential judicial nominees, do you or your colleagues ask about “their beliefs or convictions”?

I answered Senator Blumenthal’s question as fully I could, consistent with the confidentiality obligations attendant to my position. Please see the response to No. 7(a) above.

9. Did you have any role in selecting yourself for this seat? Did your colleagues in the Department of Justice participate in your consideration or selection in any way?

I had no role in selecting myself for this seat. Senator Shelby’s office contacted me about the seat. After that call, I was processed in the same way as any other candidate and screened off from my own potential nomination. I was interviewed by the White House Counsel’s Office and a representative of OLP who was my supervisor at the time.

10. During the hearing, Senator Feinstein asked you if, in light of your past statements on guns and gun control, you would recuse yourself from cases involving guns. You were unwilling to make such a commitment.

- a. On further review, would you recuse yourself from cases involving firearms and the Second Amendment?

Please see the response to Ranking Member Feinstein, No. 13(a).

- b. If your answer to 10(a) is no, how can litigants trust you to be impartial in such cases?

If recusal is appropriate in a case, I would recuse. In cases where recusal is not

appropriate, I will be duty-bound to set aside personal views and beliefs, no matter what the issue, and apply the law in a fair and impartial way.

11. Following the tragic 2012 shooting of first graders in Newtown, Connecticut, you wrote in your blog that it was “sensationalist” for the national media to focus on the deaths of 20 children but treat 40 automobile accidents per week as “nothing out of the ordinary.”

a. Why is it “sensationalist” to seek solutions to prevent such tragedies from happening again?

The point was simply that particularly horrific tragedies draw more attention than others, and that it was “not surprising that such a violent attack against innocence itself would spur us to action.” The intent was not to advocate against seeking solutions. In fact, I wrote, “And certainly, we should take responsible measures to ensure that such tragedies are avoided as much as is possible.”

b. In the same blog, you called it a “dereliction of duty” to send children to schools without armed guards and said “members of the faculty should be armed.” Do you believe school employees should be armed? If your answer is yes, which employees should be armed?

The post states in full, “Certain members of the faculty should be armed. They should be trained in the use of a weapon, and they should receive extra pay for taking on this responsibility... This is not a call for allowing everyone in the world to bring guns to schools. I am not claiming that simply going out and buying a gun will make you safer. But having trained, responsible, security officials would make our schools safer.”

- c. In a subsequent blog post on Newtown, you said the American people “overreact[ed]” to the shooting, and the “Second Amendment suffered.” How, exactly, did the American people overreact to this terrible event, and how did the Second Amendment suffer?

The post makes the point that in the face of tragedy, people look for someone to blame, fingers are pointed in many directions, and because of that, the solutions offered often do not address the initial problem. It built on others expressing concern that proposed legislative responses to the tragedy in Newtown would not have prevented a similar tragedy from occurring in the future.

As with my other non-legal writings, however, these posts were informal policy discussions. If I am confirmed, my duty will be to enforce the laws enacted by Congress and signed by the President, consistent with Supreme Court and Eleventh Circuit precedent, without regard to my personal policy views.

12. You wrote an article in January 2017 in which you suggested that during Jeff Sessions’ hearing to be Attorney General, Democrats were not “attacking Sessions because they actually believe he is a racist. . . . Democrats don’t like Sessions because he’s conservative . . . . Enter the race card.”

- a. Do you believe it was fair to ask about Attorney General Sessions’ record to assess his ability to advance equal rights and equal justice?

I believe it would have been fair to ask questions about his record to assess his ability to advance equal rights and equal justice. As expressed in my article, my concern was that Attorney General Sessions was being judged by some on the basis of something other than his ability to do those things.

- b. If confirmed, what would you do to make sure minority litigants’ claims were fairly considered?

It is fundamental to the rule of law and to justice that every person who steps foot inside a courtroom knows that their rights will be fairly considered. The Middle District of Alabama has a long and storied history of judges who addressed racism and discrimination head on and were instrumental in consigning the abhorrent practice of *de jure* segregation to the dustbin of history. If I were confirmed, I will do everything in my power to ensure that my courtroom is a place where decisions are made based on the law and the facts and no other consideration and where every person has a fair opportunity to be heard.

**Questions for the Record for Brett Talley  
Submitted by Senator Richard Blumenthal  
October 24, 2017**

1. In the aftermath of the Sandy Hook Elementary School shooting, you wrote two blog posts. In the first post, you argued that the goal of advocates for sensible limits on firearms is “a United States where guns are illegal altogether.” In the second post, you claimed that “[i]n [President Obama’s] mind, and in the mind of liberals in Congress, there is no such thing as a good gun, and there is no such thing as a good gun owner.”

- a. **Do you believe that advocates for reducing gun violence – including the advocates on this Committee – are lying when they say they want sensible reforms?**

In the posts, I was pointing out that there are people who are in favor of banning firearms altogether. I also noted that they come “by this view honestly,” believing that such a ban is the only way to prevent gun violence. The concern I was expressing is that the gulf between people on the issue of gun violence creates an unfortunate lack of trust on both sides.

2. You have previously criticized pro-choice policies and laws that protect reproductive rights.

- a. **Do you believe there is a right to privacy protected by the Constitution?**

The Supreme Court has repeatedly held that there is a constitutional right to privacy.

- b. **Will you adhere to Supreme Court precedent set by a line of case law—including *Roe* and *Casey*—that has determined that the Constitution guarantees a right to privacy?**

If fortunate enough to be confirmed, I will faithfully apply all precedents of the Supreme Court, including those like *Roe* and *Casey* recognizing a right to privacy.

3. Your previous writing is dominated by conservative political commentary. For example, in an opinion piece published after the third presidential debate in Las Vegas last year, you wrote, “[i]f you support activist justices on the Supreme Court, if you support late-term abortion on demand, if you support open borders and amnesty, if you want a continuation of a foreign policy that has helped plunge the Middle East into war-torn chaos, if you want four more years of the past eight years, Hillary Clinton is your candidate.” Earlier last year, in another op-ed targeted against Secretary Clinton, you also said that “[w]e cannot allow GOP elites to hand the future to an increasingly leftist Democratic Party.”

- a. **What assurances can you provide the Committee that you will be a fair and impartial judge?**

The personal views of a judge, whether publicly expressed or not, should play no role in deciding cases and controversies. I believe strongly in the oath that judges take to set aside personal beliefs and rule fairly and impartially, based on the law and the facts. The judiciary must not become politics by other means. If I am fortunate

enough to be confirmed, I will serve the law and the Constitution, not my own ends or beliefs.

**b. Which writings of yours demonstrate the even-handedness and temperament required in a federal judge?**

My writings have always been in the position of an advocate—for a client, a candidate, or my personal views. That position is fundamentally different from the position of a judge. Nevertheless, I would direct you to the briefs I have written as an attorney to demonstrate my careful treatment of and respect for the rule of law, including the adherence to precedent. I would also refer you to the letters submitted on my behalf attesting to my temperament, and to the members of the Committee staff, with whom I have worked fairly over the last year.