

**Nomination of David Barlow to the United States District Court for the
District of Utah
Questions for the Record
Submitted July 24, 2019**

QUESTIONS FROM SENATOR FEINSTEIN

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

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

Lower courts are bound by Supreme Court precedent unless the Court modifies the precedent or, in the case of statutory interpretation, Congress revises the statute.

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

District court judges are bound to follow Supreme Court precedent. In limited circumstances, a district court judge may find the Court's precedent to be sufficiently confusing, unworkable or otherwise problematic in the case at hand that a discussion of the difficulties could be warranted.

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

District court decisions are binding only in the case in which they are issued, unless there are issues of res judicata or collateral estoppel.

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

The Supreme Court is responsible for deciding whether and when to overturn its own precedents. It is then up to the lower courts to follow any such change in those precedents.

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

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

Roe v. Wade is binding Supreme Court precedent on lower courts. If I am confirmed, I would faithfully follow it.

b. Is it settled law?

Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

As a lower court judge, I would be bound to follow *Heller*, like all other Supreme Court precedents that have not been overturned or modified. Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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

Heller stated that the Second Amendment right was not without limits.

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

As a lower court judge, I would be bound to follow *Heller*, like all other Supreme Court precedents that have not been overturned or modified. Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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?

Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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

Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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

Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

6. During your tenure as the United States Attorney for Utah, your office was involved in a public corruption investigation involving a businessman named Jeremy Johnson along with former Utah Attorneys General Mark Shurtleff and John Swallow. Among other aspects of this matter, the Federal Election Commission filed a complaint against Mr. Johnson in which the FEC alleged that part of the scheme was to make straw donations to politicians – of both parties – during the 2010 election cycle in the hope of having some influence in choosing the next U.S. Attorney for Utah. (Complaint, *FEC v. Johnson*, 2:15-cv-00439-DB (D. Utah 2015) (June 19, 2015)) According to news reports, your office withdrew from the Swallow investigation “without explanation,” turning it over to the Public Integrity Section of the Justice Department. (*Top Federal Prosecutor for Utah to Leave Office*, SALT LAKE TRIBUNE, Apr. 10, 2014)

Please detail your office’s handling of this investigation and the reasoning behind your office’s actions.

During the course of the investigation, circumstances were identified which suggested the possibility of recusal. In May 2013, after consultation with the Department of Justice, it was determined that our office would be recused and that the Public Integrity Section would continue and complete the investigation. My understanding is that the Department of Justice’s Public Integrity Section completed its investigation later that year.

7. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration’s interview process for judicial nominees. He said: “On the judicial piece ... one of the things we interview on is their views on administrative law. And what you’re seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years...”

- a. **Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

I do not recall specific questions about my views of administrative law, which have not been an area of focus in my career. As with all other areas of the law, I would faithfully follow the law, including Supreme Court and Tenth Circuit precedent.

- b. **Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

Not to my knowledge, though I often do not know the group affiliations of

people with whom I speak.

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

I believe that lower court judges are bound by and should follow the governing statutes and Supreme Court precedent and applicable circuit court precedent on administrative law.

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

Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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

The Supreme Court sometimes uses legislative history in construing an ambiguous statute. I would look to Supreme Court precedent in deciding when and how to use it.

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

No.

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

I read the questions and prepared responses. I then sent my responses to the Justice Department. I then finalized the answers and had them submitted on my behalf.

Written Questions for David B. Barlow
Submitted by Senator Patrick Leahy
July 24, 2019

1. You have served in a political position on the Senate Judiciary Committee and have contributed to numerous Republican political campaigns.

(a) Can you discuss the importance of judges being free from political influence or the appearance thereof?

It is very important that judges be free from political influence, though I do not believe that previous public service or prior involvement in electoral politics is problematic.

Also, my prior public service and electoral involvement have involved both Republicans and Democrats. Over the years, I have contributed to a few campaigns for candidates running as Republicans or Democrats. I also have had the privilege of working as a staffer for Senator Mike Lee, being nominated to serve as a United States Attorney by President Obama, being appointed to serve on the Attorney General's Advisory Committee by Attorney General Eric Holder, and testifying before this Committee on behalf of Attorney General Loretta Lynch. Further, I have had the opportunity to serve on the Board of Directors of the bipartisan National Association of Former United States Attorneys (NAFUSA), where I was selected by and served alongside former United States Attorneys from both Republican and Democratic administrations. I also was honored to receive a letter of support for this nomination to serve as a United States District Judge from numerous fellow United States Attorneys with whom I served during the Obama Administration.

Freedom from political influence is secured by the lifetime tenure which the Constitution provides and by the conduct of judges that faithfully apply our nation's laws without regard to their own policy preferences. And, of course, Canon 5 of the Code of Conduct for United States Judges prohibits political activities. If I am confirmed, I will apply the law without regard to politics and will follow the Canons of the Code of Conduct for United States Judges.

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

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

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

The Supreme Court has made it clear that statutory context is relevant to determining the meaning of words and phrases. As a district court judge, I would follow Supreme Court and Tenth Circuit precedent on statutory construction.

3. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.”

(b) Does that kind of rhetoric from a President – that a judge who rules against him is a “so-called judge” – erode respect for the rule of law?

Article III of the Constitution establishes an independent judiciary, something which is vital to the proper functioning of government. Under Canons 2 and 5 of the Code of Conduct for United States Judges, I do not believe it is appropriate for me as a judicial nominee to comment on a statement made by an elected official.

(c) While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?

If I am confirmed, I do not believe it would be appropriate for me to criticize the legitimacy of a judge or court. Under Canons 2 and 5 of the Code of Conduct for United States Judges, I do not believe it is appropriate for me as a judicial nominee to comment on a statement made by an elected official.

4. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.)

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

If such a matter were to come before me, I would follow all Supreme Court and Tenth Circuit precedent regarding judicial review of national security decisions.

5. Many are concerned that the White House’s denouncement of “judicial supremacy” was an attempt to signal that the President can ignore judicial orders.

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

If such a matter were to come before me, I would review and apply all Supreme Court and Tenth Circuit precedent as well as the totality of the facts before me. When parties do not comply with binding court orders, there are procedures available for enforcing them.

6. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President “may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers.”

- (a) **Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?**

The Supreme Court has found that Congress has war powers. If a matter involving these issues were to come before me, I would apply Supreme Court and Tenth Circuit precedent to the issues before me.

Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

- (b) **In a time of war, do you believe that the President has a “Commander-in-Chief” override to authorize violations of laws passed by Congress or to immunize violators from prosecution?**

If confirmed as a district court judge, I would follow all applicable laws on these matters, including Supreme Court and Tenth Circuit precedents.

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

If confirmed as a district court judge, I would follow all applicable laws on these matters, including Supreme Court and Tenth Circuit precedents.

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

Because these issues are the subject of pending or impending litigation, it would not be appropriate for me to express a view under Canon 3(a)(6) of the Code of Conduct for United States Judges.

8. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

- (a) **Do you agree with that view? Does the Constitution permit discrimination against women?**

The Supreme Court has held that the Equal Protection Clause applies to classifications discriminating against women. If I am confirmed, I would apply the Supreme Court and Tenth Circuit precedents in the cases before me.

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

The Voting Rights Act is the law. If I am confirmed, it would be my privilege and duty to faithfully apply our laws to the cases before me.

10. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?

In Article I, Section 9, the Constitution states: “no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”

11. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

(a) When is it appropriate for a court to substitute its own factual findings for those made by Congress or the lower courts?

In practice, a district court judge relies primarily on the parties to develop the evidentiary record before it, subject to the Federal Rules of Evidence. In any matters in which I would be considering factual findings made by Congress or by other lower courts, I would apply Supreme Court and Tenth Circuit precedents regarding factual findings made by Congress.

12. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?

Each of these three amendments to the Constitution contains an enforcement clause granting Congress the power to enforce each amendment by appropriate legislation.

13. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.”

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

If I am confirmed, I will follow all Supreme Court precedent, including *Lawrence v. Texas*.

14. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

If I am confirmed, I will be bound by all Supreme Court and Tenth Circuit precedents. It would not be my responsibility to determine whether any such decisions should be overturned.

15. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

It is important that judges avoid both actual and apparent conflicts. If I am confirmed, I would follow all applicable ethical rules in determining, on a case-by-case basis, the cases in which I should be recused. One example of cases in which I would recuse myself would be matters in which I have had prior involvement. Of course, there are many different situations which could make recusal necessary or appropriate, but they are generally fact dependent. I would treat each such matter carefully and thoughtfully.

16. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding of the role of the courts and their responsibility to protect the constitutional rights of all individuals. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”

(b) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

The courts play a central role in upholding constitutional rights, including the protections provided by the Fourteenth Amendment. As a district court judge, I would fully and faithfully protect constitutional rights and follow all Supreme Court precedent, including *United States v. Carolene Products*.

17. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the administration's conflicts of interest and the events detailed in the Mueller report, we are fulfilling our constitutional role.

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

Yes, though under the Canons 2, 3, and 5 of the Code of Conduct for United States Judges, it would not be appropriate for me as a judicial nominee to comment on any specific congressional oversight activities.

18. **Do you believe there are any discernible limits on a president's pardon power? Can a president pardon himself?**

I have not dealt with this issue during my career. If such a matter were to arise in a case before me, I would follow Supreme Court and Tenth Circuit precedent.

19. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

The scope of congressional power under Article I and the Fourteenth Amendment have been and continue to be litigated in the courts and have been addressed by the Supreme Court. If I am confirmed, I will follow all Supreme Court and Tenth Circuit precedents on the scope of congressional power under Article I.

20. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

As a district court judge, I would apply all Supreme Court and Tenth Circuit precedent regarding the review of executive factual findings.

21. **How would you describe the meaning and extent of the “undue burden” standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The Supreme Court has determined that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quotes omitted). If I am confirmed, I would follow all Supreme Court precedent on this issue, including *Planned Parenthood v. Casey* and *Whole Woman’s Health v. Hellerstedt*.

22. Federal courts have used the doctrine of qualified immunity in increasingly broad ways. For example, qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many other startling cases.

- (a) **Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Do you believe there can be rights without remedies?**

As a district court judge, it would be my responsibility to follow all Supreme Court and Tenth Circuit precedent on qualified immunity. I believe any further response would be inappropriate under Rules 2, 3, and 5 of the Code of Conduct for United States Judges.

23. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Chief Justice Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology,” such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

- (a) **In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

The Fourth Amendment contains very important protections guaranteed by the Constitution. Because litigation on this issue is pending or impending, I do not believe it would be appropriate for me to comment further under Canon 3 of the Code of Judicial Conduct for United States Judges.

24. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because Congress, with the power of the purse, rejected the President's request to provide funding for the wall.

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

If I am confirmed as a district court judge, I will faithfully apply all Supreme Court and Tenth Circuit decisions on this issue. Because this matter involves an issue likely to be the subject of pending or impending litigation, I do not think it would be appropriate for me to comment further under Canon 3 of the Code of Conduct for United States Judges.

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to the United States District Court for the District of Utah
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QUESTIONS FROM SENATOR WHITEHOUSE

1. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

- a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

As requested, I did.

- b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

Under Canons 2 and 5 of the Code of Judicial Conduct, I believe it would be inappropriate for me to comment on this.

- c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Under Canons 2 and 5 of the Code of Judicial Conduct, I believe it would be inappropriate for me to comment on this.

- d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I do not. I received a letter of support from many U.S. Attorneys with whom I worked in the Obama Administration, but I do not have reason to believe that any of them have roles with the organizations identified.

- e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

Under Canons 2 and 5 of the Code of Judicial Conduct, I believe it would be inappropriate for me to comment on this.

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

No metaphor is perfect, but this one has appeal and relevance. I believe that judges should fairly and faithfully apply the laws of the United States to the facts of the cases before them. Judges should not inject their own desired policy preferences or outcomes into their work.

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

Judges should consider the practical consequences of rulings to the extent that governing law makes them relevant and to avoid absurdities.

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

I believe the standard is an objective one and should be treated as such. Of course, the decision about whether there is a genuine issue of material fact is being made by an individual judge, who then has to take care that he or she is not inserting his or her own preferences into the determination.

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

It is important to recognize the humanity and dignity of all that appear in court. Judges also are called upon to fairly and faithfully apply the law to all who come before them. I commit to doing both if I am confirmed to serve as a judge.

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

As a judge, I would bring with me my experiences representing the United States of America as well as those being investigated by the government. I also would bring with me my experiences representing both plaintiffs and defendants. I would bring my pro bono representation experiences as well, including representing people with a wide range of life experiences. I would also bring with me a commitment to treat all fairly and equally under the law. I would not allow any personal policy preferences to alter that commitment.

- 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 believe it is crucial that judges treat all with fairness, respect, and dignity. And I have had the privilege of working and associating with people from a variety of backgrounds and life experiences. Of course, no one has had everyone else's life experiences, but that does not prevent a person from treating all fairly under the law.

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

No.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."
a. What role does the jury play in our constitutional system?

The right to trial by jury was sufficiently important to be enshrined in the Constitution. Under applicable circumstances, it permits litigants to have the facts of their case decided by up to twelve peers, rather than by a single judge.

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

I would apply all binding precedent, including Supreme Court and Tenth Circuit decisions.

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

I would apply all binding precedent, including Supreme Court and Tenth Circuit decisions.

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

I would apply all binding precedent, including Supreme Court and 10th Circuit decisions.

8. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

- a. Have you read Advisory Opinion #116?

Yes, I have read it.

- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
i. Determining whether the seminar or conference specifically targets judges or judicial employees.

I will apply all applicable ethical rules prior to participating in any seminars or conferences.

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

I will apply all applicable ethical rules prior to participating in any seminars or conferences.

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

I will apply all applicable ethical rules prior to participating in any seminars or conferences.

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

I will apply all applicable ethical rules prior to participating in any seminars or conferences.

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

I will apply all applicable ethical rules prior to participating in any seminars or conferences.

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

I will apply all applicable ethical rules prior to participating in any seminars or conferences.

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QUESTIONS FROM SENATOR BOOKER

1. From your record, your time as U.S. Attorney for the District of Utah from 2011-2014 seems to be your first significant experience with criminal proceedings. Additionally, in your Questionnaire, you stated that approximately 30 percent of your private practice since 2014 has involved criminal proceedings.¹

- a. How has your experience as a U.S. Attorney shaped your view of the role of plea bargaining in the criminal justice system?

It was a tremendous privilege and experience to serve as a U.S. Attorney in the Obama Administration. In that role, I had supervisory or personal involvement in a very large number of investigations and cases. As in most districts, the supermajority of criminal cases in the District of Utah are resolved by plea. Observing and participating in that process in a large number of cases provided valuable experience and insight into the role of plea bargains.

- b. How did your time as a U.S. Attorney prepare you to, if confirmed, preside over criminal proceedings as a judge?

As U.S. Attorney, I had supervisory or personal involvement in a very large number of criminal investigations and cases. This involvement included, among other things, reviewing cases for prosecution or declination, indicting cases before grand juries, participating in detention hearings, changes of plea, evidentiary hearings, status conferences, pretrial conferences, trials, sentencings, and appeals. I believe that these experiences formed part of the basis of the “unanimously Well Qualified” rating I received from the American Bar Association.

- c. How has your time in private practice since 2014 prepared you to, if confirmed, preside over criminal proceedings as a judge?

Since returning to private practice, I have had the opportunity to represent individuals and companies in both civil and criminal investigations and litigation involving numerous states and countries over a range of different subject matters. These experiences have given me additional perspective complementing that gained serving as a U.S. Attorney.

2. In the beginning of 2013, when you were U.S. Attorney for the District of Utah, your office was overseeing the investigation of former Utah Attorneys General John Swallow and Mark Shurtleff.² In May 2013, you had your office removed from the investigation for “unspecified conflicts of interest.”³

- a. Why did you have your office removed from the case?

During the course of the investigation, circumstances were identified which suggested the possibility of recusal. In May 2013, after consultation with the Department of Justice, it was determined that our office would be recused and that the Public Integrity Section would continue and complete the investigation. My understanding is that the Department of Justice's Public Integrity Section completed its investigation later that year.

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

I have not served as a judge previously and do not think of myself in a labeled way. As a judge, I would seek to apply all federal laws fairly and even-handedly to all cases and litigants before me.

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

I have not served as a judge previously and do not think of myself in a labeled way. As a judge, I would seek to apply all federal laws fairly and even-handedly to all cases and litigants before me.

5. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

Yes, under appropriate circumstances.

¹ SJQ at p. 20.

² Robert Gehrke & Tom Harvey, *Frustrated Utah prosecutors to feds: Take over Swallow, Shurtleff cases*, THE SALT LAKE TRIBUNE, June 25, 2015, <https://www.sltrib.com/news/2015/06/25/frustrated-utah-prosecutors-to-feds-take-over-swallow-shurtleff-cases/>.

³ *Id.*

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Yes, under appropriate circumstances.

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

As a district court nominee, I think it would be inappropriate for me to say what appellate court judges should do. If I am confirmed, it would be my role to faithfully apply all binding Supreme Court and Tenth Circuit precedents to cases before me.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁴ Was that decision guided by the principle of judicial restraint?

As a district court nominee, I think it would be inappropriate for me to comment on this. If I am confirmed, it would be my role to faithfully apply all binding Supreme Court precedents to cases before me.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁵ Was that decision guided by the principle of judicial restraint?

As a district court nominee, I think it would be inappropriate for me to comment on this. If I am confirmed, it would be my role to faithfully apply all binding Supreme Court precedents to cases before me.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁶ Was that decision guided by the principle of judicial restraint?

As a district court nominee, I think it would be inappropriate for me to comment on this. If I am confirmed, it would be my role to faithfully apply all binding Supreme Court precedents to cases before me.

- 7. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁷ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁸

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

elections?

Because litigation involving these issues is likely pending or impending, it would not be appropriate for me to comment under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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

Because litigation involving these issues is likely pending or impending, it would not be appropriate for me to comment under Canon 3(a)(6) of the Code of Conduct for United States Judges.

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

Because litigation involving these issues is likely pending or impending, it would not be appropriate for me to comment under Canon 3(a)(6) of the Code of Conduct for United States Judges.

8. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5

⁴ 554 U.S. 570 (2008).

⁵ 558 U.S. 310 (2010).

⁶ 570 U.S. 529 (2013).

⁷ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁸ *Id.*

times more likely to be arrested for possessing drugs than their white peers.⁹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹⁰ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹¹ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹²

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

I have not studied implicit bias specifically, but I have no doubt that bias unfortunately still exists in our society.

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

I am aware of data suggesting that they are.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not, though I have read some materials regarding bias in the criminal justice system. I do not recall or have a list of the titles.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹³ Why do you think that is the case?

I am not familiar with that report.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹⁴ Why do you think that is the case?

I am not familiar with that study.

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

As a nominee for the district court, it would not be appropriate for me to comment on how appellate judges should do their work. However, it is critically important that all who work in criminal justice system, including judges, treat all with fairness and equality.

9. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁵ In the 10 states that saw

the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁶

⁹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

¹⁰ *Id.*

¹¹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹² *Id.*

¹³ U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁴ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹⁵ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁶ *Id.*

- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied that question.

- b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied that question.

10. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

As a judicial nominee, I do not think it would be appropriate for me to comment on the criteria or goals that should be used by the President in making judicial nominations.

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

Yes.

12. Do you believe that *Brown v. Board of Education*¹⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes, it was. I do not believe that, under the Code of Conduct for United States Judges, it generally is appropriate for me as a judicial nominee to opine on the correctness of binding precedent. However, *Brown v. Board of Education* is an exception.

13. Do you believe that *Plessy v. Ferguson*¹⁸ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No, it was not.

14. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

I was not instructed that I could not opine on Supreme Court decisions.

15. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”¹⁹ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

Under Canons 2 and 5 of the Code of Judicial Conduct, I do not believe it is appropriate for me as a judicial nominee to comment on a statement made by a political figure. If I am confirmed, I will follow the rules and binding precedent in making recusal or disqualification assessments.

16. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”²⁰ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Under Canons 2 and 5 of the Code of Judicial Conduct, I do not believe it is appropriate for me as a judicial nominee to comment on a statement made by a political figure. If I am confirmed, I will follow all binding precedent on due process and related issues.

¹⁷ 347 U.S. 483 (1954).

¹⁸ 163 U.S. 537 (1896).

¹⁹ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

Questions for the Record from Senator Kamala D. Harris
Submitted July 24, 2019
For the Nomination of

David B. Barlow, to the U.S. District Court for the District of Utah

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

Sentencing is a tremendously important responsibility. I would approach each sentencing with the seriousness of purpose the responsibility entails. From a process standpoint, my work would entail reviewing and following all Supreme Court and 10th Circuit precedent; consulting the advisory Sentencing Guidelines and performing the required guideline calculation; studying the Presentence Investigation Report; carefully considering all evidence from the case that is relevant to the sentence, including any statement from the defendant, information provided by the defendant's family and friends, and any statement from the victim(s); and application of the Section 3553(a) factors.

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

The law instructs judges to impose sentences "sufficient, but not greater than necessary" to comply with the purposes identified in Section 3553(a)(2). I would use the general process outlined above, together with any other permissible and useful steps, to render fair and proportionate sentences.

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

The Sentencing Guidelines are not binding on district court judges. I also would consult Part K of the Sentencing Guidelines in considering potential departures.

- d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹

- i. **Do you agree with Judge Reeves?**

Setting criminal penalties to include mandatory minimum sentences involves the political process. As a judicial nominee, I think it would be inappropriate for me to comment under Canons 2 and 5 of the Code of

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

Conduct for United States Judges.

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

Setting criminal penalties to include mandatory minimum sentences involves the political process. As a judicial nominee, I think it would be inappropriate for me to comment under Canons 2 and 5 of the Code of Conduct for United States Judges.

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

As a judicial nominee, I think it would be inappropriate for me to comment under Canons 2 and 5 of the Code of Conduct for United States Judges.

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.¹ **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

I would need to consider the propriety of doing so, being mindful of the separation of powers and the Code of Conduct for United States Judges.

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

I would need to consider the propriety of doing so, being mindful of the separation of powers and the Code of Conduct for United States Judges.

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

I would need to consider the propriety of doing so, being mindful of the separation of powers and the Code of Conduct for United

¹ See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

States Judges.

- e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes, I would.

- 2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes, each and every judge does.

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

It is critically important that judges treat all equally and fairly. I am absolutely committed to this principle. I was honored to receive the Distinguished Service Award from the local NAACP at the conclusion of my service as U.S. Attorney. Under Canons 2 and 5 of the Code of Conduct for United States Judges, I do not believe it would be appropriate for me to comment further.

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

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

I have had the opportunity to hire and work with diverse colleagues over the years. It is critically important that all qualified applicants be encouraged to apply and receive full consideration in the process.

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

Yes, I would.