

**Nomination of John Frederick Heil III to the United States District Court for the  
Northern, Eastern, and Western Districts of Oklahoma  
Questions for the Record  
Submitted January 15, 2020**

**QUESTIONS FROM SENATOR FEINSTEIN**

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

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

It is never appropriate for a lower court to depart from Supreme Court precedent.

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

It is the role of a district court to fully and faithfully apply all binding Supreme Court precedent as well as binding circuit court precedent. To the extent that there might be an identifiable gap in the law, or a conflict among circuit courts, there might be a rare occasion where a district should point out the gap or the need of the higher court to resolve the conflict – all-the-while following Supreme Court precedent.

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

A district court in Oklahoma should apply the law to the facts and circumstances in each case and render judgment consistent with Supreme Court and Tenth Circuit precedent. The Supreme Court has held that district court decisions are not binding precedent in either different judicial districts, or even in the same judicial district. However, district courts should strive not only to render judgments that are fair, impartial and just, but do so in a manner that promotes predictability and reliance on the rule of law.

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

The Supreme Court alone has the prerogative to overrule one of its precedents. As a district court nominee, I do not believe it appropriate for me to opine on when the Supreme Court should exercise its prerogative.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that “superprecedent” is “precedent that defines the law and its requirements so

effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

*Roe v. Wade* is Supreme Court precedent of which all lower courts are bound. If confirmed, I will fully and faithfully apply *Roe* and all binding Supreme Court precedent.

- 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 district court nominee, I believe it would be inappropriate for me to comment on my views regarding Justice Stevens's dissent. If confirmed, I will be bound to follow *Heller* as well as all other Supreme Court precedent.

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

In *Heller*, the Supreme Court noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626 (2008). The Court further explained its decision as consistent with the "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 building." *Id.* at 627.

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

As a district court nominee, I believe it would be inappropriate for me to comment on my personal views regarding *Heller*. If confirmed, I will be bound to follow *Heller* as well as all other Supreme Court precedent.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

**a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

In *Citizens United v. FEC*, the Supreme Court held that "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). As a district court nominee, I believe it would be inappropriate for me to comment on my personal views regarding *Citizens United*. If confirmed, I will be bound to follow *Citizens United* as well as all other Supreme Court precedent.

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

In *Citizens United v. FEC*, the Supreme Court held that "First Amendment protection extends to corporations." 558 U.S. 310, 342 (2010). As a district court nominee, I believe it would be inappropriate for me to comment on my personal views regarding *Citizens United*. If confirmed, I will be bound to follow *Citizens United* as well as all other Supreme Court precedent.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that “person” under the Religious Freedom Restoration Act includes “corporations.” 573 U.S. 682, 707-08 (2014). If confirmed, I will be bound to follow *Hobby Lobby* as well as all other Supreme Court precedent. Beyond this, as a district court nominee, I believe it would be inappropriate for me to comment on my personal views regarding the issue.

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

As a district court nominee, and consistent with Canons of the Code of Conduct for United States Judges, I believe it would be inappropriate for me to comment on my personal views on issues of pending or impending litigation.

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

As a district court nominee, and consistent with Canons of the Code of Conduct for United States Judges, I believe it would be inappropriate for me to comment on my personal views on issues of pending or impending litigation.

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

As a district court nominee, and consistent with Canons of the Code of Conduct for United States Judges, I believe it would be inappropriate for me to comment on my personal views on issues of pending or impending litigation.

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

No.

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

- a. **Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related**

**to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

I have no recollection of being asked by anyone on my “views on administrative law.”

- 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?**

I have no recollection of being asked by anyone on my “views on administrative law.”

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

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

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

I have not studied this issue. Further, as a district court nominee, and consistent with Canons of the Code of Conduct for United States Judges, I believe it would be inappropriate for me to comment on my personal views on this issue.

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

The Supreme Court has explained that it is appropriate to consider legislative history when the text of a statute is ambiguous. *Cf. Exxon Mobil Corp. v. Allapattah Serv., Inc.* 545 U.S. 546, 567-71 (2005).

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

No.

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

I considered relevant legal authority, drafted my answers to each of the questions and submitted my response to the Office of Legal Policy at the Department of Justice, soliciting feedback. Thereafter, I finalized my answers and authorized the submission thereof.

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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?

I have read the story in response to your request.

- 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.

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on this issue.

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

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on this issue.

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

No.

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

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on this issue.

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

I agree with the metaphor used to explain a judge’s role. Unlike a baseball player on either team, whose role is to advance the interests of his side or team, the umpire’s role should be neutral; the umpire’s role is to apply the rules of the game fairly to all to ensure the integrity of the game. Similarly, the judge’s role is to apply the rule of law, equally, fairly and impartially to the parties before the court.

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

To the extent that Supreme Court or Tenth Circuit precedent or statutes instruct a district judge to take into account consequences, then a judge should fairly and faithfully apply that law. However, in the absence of such instruction, a judge should not allow his or her own personal views to distract from the fair and impartial application of the law to the facts before the court for consideration. A judge should apply the rule of law as written, even if that means application of law that is contrary to personal views or desired consequences.

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?

The Supreme Court has stated that “at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This calls for a district court to apply an objection standard, not a subjective standard. If confirmed, I will faithfully apply Supreme Court and Tenth Circuit precedent regarding when summary judgment is proper under Federal Rule of Civil Procedure 56.

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?

A judge should fairly and impartially apply the rule of law to each and every party before the court. At all times, I believe a judge should apply the Golden Rule: treating others as one would want to be treated; treating all before the court with dignity and respect and without bias.

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

Personal lives and different experiences can shape personal viewpoints. My personal life has taught me that all people are created equally despite the fact that each of us may have different backgrounds or experiences. If confirmed, I would fairly and impartially apply

the rule of law to each and every party before the court. At all times, I would seek to apply the Golden Rule: to treat others as I would want to be treated; to treat all before the court with dignity and respect and without bias. It would be my sincere endeavor to practice humility at all times.

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 Seventh Amendment ensures that, absent a waiver, civil disputes will be decided by litigants’ peers.

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

All constitutional provisions should be of concern to judges. However, as a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on issues of pending or impending litigation. If confirmed, I will fully and faithfully apply any Supreme Court and Tenth Circuit precedent on these issues.

- 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?

All constitutional provisions should be of concern to judges. However, as a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on issues of pending or impending litigation. If confirmed, I will fully and faithfully apply any Supreme Court and Tenth Circuit precedent on these issues.

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

If confirmed, I will fully and faithfully apply all Supreme Court and Tenth Circuit precedent regarding the deference to be afforded congressional fact-findings on legislation expanding or limiting individual rights.

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.



- b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

- i. Determining whether the seminar or conference specifically targets judges or judicial employees.

If confirmed, I will fully and faithfully consider my participation in any educational seminar in relation to all of my obligations under the Canons of the Code of Conduct for the Judiciary in assessing whether my participation is appropriate.

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

If confirmed, I will fully and faithfully consider my participation in any educational seminar in relation to all of my obligations under the Canons of the Code of Conduct for the Judiciary in assessing whether my participation is appropriate.

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

If confirmed, I will fully and faithfully consider my participation in any educational seminar in relation to all of my obligations under the Canons of the Code of Conduct for the Judiciary in assessing whether my participation is appropriate.

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

If confirmed, I will fully and faithfully consider my participation in any educational seminar in relation to all of my obligations under the Canons of the Code of Conduct for the Judiciary in assessing whether my participation is appropriate.

- 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.

If confirmed, I will fully and faithfully consider my participation in any educational seminar in relation to all of my obligations under the Canons of the Code of Conduct for the Judiciary in assessing whether my participation is appropriate.

- 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?

If confirmed, I will fully and faithfully consider my participation in any educational program in relation to all of my obligations under the Canons of the

Code of Conduct for the Judiciary in assessing whether my participation is appropriate.

**Questions for John F. Heil III**  
**From Senator Mazie Hirono**

1. In *State v. Chambers*, you prosecuted a 17-year-old white woman as an accomplice after she drove two African American teens to a health clinic where they murdered a woman after an attempted robbery. In her defense, Chambers claimed she did not know that her two passengers planned to commit a crime. During your closing argument, you asked the jury, “Why would two black guys from north Tulsa pick a white girl from south Tulsa to commit robberies with if she wasn’t in on it?”

**a. Do you feel it was appropriate to draw on the jury’s prejudices by injecting race into a prosecution in this way?**

It is not appropriate to draw on prejudice or to inject race into the prosecution or defense of any case, and I have never done so. That was certainly not the purpose of the referenced argument. As the question acknowledges, Chambers claimed that she did not know that her two accomplices planned to commit a crime.

I perceived the undertone or implication of Chambers’ defense to be that, given her different background from the others (a white, affluent teenage female from South Tulsa compared to two black teenage males from North Tulsa), she would not have known that Steven White and Marcus Currie intended to commit a crime that day. However, I believe the evidence demonstrated that without White and Currie knowing Chambers quite well (and without Chambers’ knowledge of and acquiescence in their planned crime), they would not have been engaged in the commission of multiple robbery attempts that afternoon with an unsuspecting Chambers as their driver; rather, these three knew and trusted one another. Indeed, the evidence demonstrated that they trusted one another so well that they felt comfortable scouting out multiple robbery victims that afternoon before settling on Michelle Hendrix as their victim. In other words, I perceived Chambers as attempting to rely on the historically segregated nature of the Tulsa community, and the fact that she lived in a different part of Tulsa and was of a different race than her co-conspirators, as a basis for concluding that she would not have known what White and Currie were intending to do and that they would not have confided in her with plans of the crime. Rather than injecting race, I was attempting to refute this implication by turning it on its head. If, as Chambers correctly implied, Tulsa is a historically segregated community, the fact that she was friends with and previously chose to spend time with White and Currie undermined the suggestion that Chambers did not know what was going on (or that White and Currie would not have confided in her the robbery plan) simply because they came from different economic backgrounds, lived in different parts of Tulsa and were of a different race.

The crime was made no worse because of any defendant’s race, and no guilt was attributed to any defendant because of race. To the contrary, I believe that the argument actually acknowledged implicit bias, and I sought to remove that bias as an unwarranted and unjustified defense under the circumstances of the case. Perhaps the argument was inartfully stated, but it was set forth only to identify and remove the prejudice that I believed the defense was attempting to capitalize on. In hindsight, I acknowledge that I could have worded the argument differently.

It is my sincere belief that people should not be judged by the color of their skin, but by the content of their character.

- b. Studies show racial bias plays a significant role in all stages of our criminal justice system, from profiling by police to charging decisions by prosecutors to application of the death penalty. If confirmed, what steps would you take to make sure racial prejudice and other biases do not play a role in your own decisions and those made by juries in your courtroom?**

Judges should do whatever it takes to ensure that their courtrooms are free from racial prejudice and bias. If confirmed, I would do everything within my ability to ensure that my decisions and my courtroom are free from racial prejudice and bias. I would review studies on the issue, talk with other judges to gain historical perspective and consider educational materials and seminars that might be available through the Administrative Office of the United States Courts.

- c. Have you taken any implicit bias training?**

No.

- d. If confirmed, do you commit to taking training on implicit bias?**

If confirmed, I would do everything within my ability to ensure that my decisions and courtroom are free from racial prejudice and bias. I would be open to participating in any training, including training in implicit bias, that might assist in the overall fundamental fairness of the court.

2. In your Senate Judiciary Questionnaire, you described your practice at your current firm, in part, as involving “whistleblower claims under various whistleblower programs.”

- a. Please describe the important role that whistleblowers play in our society.**

My practice has not involved whistleblower claims or whistleblower programs. I do not have experience with these types of claims.

- b. At least one of the whistleblower cases you handled involved an anonymous whistleblower. Do you think it is appropriate to reveal the identity of a whistleblower in retaliation for reporting abuse and misconduct?**

My practice has not involved whistleblower claims or whistleblower programs. I do not have experience with these types of claims.

**Nomination of John F. Heil III**  
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**QUESTIONS FROM SENATOR BOOKER**

1. You worked as an Assistant District Attorney in the Tulsa County District Attorney's Office from 1997 to 2000.<sup>1</sup> While in that position, you said that you were "offered an opportunity to become one of two prosecutors on a drug task force being created to take primary responsibility for the prosecution of major drug crimes in Tulsa County."<sup>2</sup>

- a. What was considered a "major drug crime"?

Major drug crimes included trafficking in dangerous controlled drugs, manufacturing methamphetamine and attempting to manufacture methamphetamine.

- b. Do you believe that mandatory minimums are a useful tool in combatting drug trafficking?

As a prosecutor, I was responsible for enforcing various laws, including the enforcement of the Trafficking in Illegal Drugs Act. By this statute, the Oklahoma Legislature set forth various guidelines for punishments, which included various statutory minimum sentences. The Oklahoma Court of Criminal Appeals has previously stated that the guidelines for punishment set forth in this statute represents a determination by the Legislature that those who traffic in illegal drugs deserve a stiff punishment.

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to offer my personal views on this issue. However, if confirmed, I will carefully consider all facts and circumstances of every case, along with any mandatory minimums set by Congress as well as the sentencing guidelines provided by the U.S. Sentencing Commission, before making any sentencing determination.

- c. Do you believe that mandatory minimums deter crime?

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to offer my personal views on this issue. However, if confirmed, I will carefully consider all facts and circumstances of every crime, along with any mandatory minimums set by Congress as well as the sentencing guidelines provided by the U.S. Sentencing Commission, before making any sentencing determination.

- d. As an Assistant District Attorney, did you use mandatory minimums to prosecute low-level drug offenders? If so, please explain your rationale.

Under the Uniform Controlled Dangerous Substances Act, the Oklahoma

Legislature set forth various ranges of punishments for the possession of, and the possession with the intent to distribute, dangerous controlled drugs, which did include certain statutory minimums. To the extent that I prosecuted such offenses, I not only complied with the law, but I used prosecutor discretion as appropriate to determine the most appropriate outcome of every case giving due consideration to the unique facts and circumstances of every case, which guided recommendations that included a range of consequences from prison time, fines, probation and/or participation in the Drug Court Diversion program.

- e. In 2018, Congress passed the First Step Act and the president signed it into law. The bill expanded the safety valve to allow judges to sentence qualified low-level nonviolent drug offenders below the mandatory minimum if they cooperate with the government. If confirmed, how would you utilize the safety valve for qualifying individuals?

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to offer specific examples of how I would use the First Step Act in any given circumstance. However, if confirmed, I will carefully consider all facts and circumstances of every case, along with the appropriate options set forth by the First Step Act, as well as the sentencing guidelines provided by the U.S. Sentencing Commission, before making any sentencing determination.

- 2. While working as an Assistant District Attorney, you prosecuted a man who was accused of murdering his step-daughter in *State v. Patterson III*.<sup>3</sup> In that case, the jury originally found Patterson guilty and recommended the death penalty.<sup>4</sup> Patterson then appealed and the court reversed the verdict and remanded the case for a new trial stating, “The prosecutor . . . invited the jury to (1) consider the fact that Appellant confessed, but (2) pay no attention to any details of that purported confession or any credibility problems with the person relating it, and (3) convict Appellant on a theory that had no evidentiary basis.”<sup>5</sup> In the next trial, Patterson was found guilty and sentenced to life in prison.

- a. Were you the lead prosecutor in the case?

I was co-counsel in the case. I was asked by another assistant district attorney to assist with the case.

- b. What role did you play in the prosecution of Patterson?

I shared responsibility with another assistant district attorney in prosecuting the case. We worked together in the presentation of the evidence, each presenting testimony and various other evidence through witnesses called in the case. We also shared in the cross-examination of various defense witnesses. I presented the State’s first closing argument. My co-counsel presented the State’s final rebuttal closing argument.

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<sup>1</sup> SJQ at 9.

<sup>2</sup> *Id.* at 10.

<sup>3</sup> *Id.* at 18.

<sup>4</sup> *Id.*

<sup>5</sup> *Patterson v. State*, 45 P.3d 925, 931 (Okla. Ct. of Crim. App. April 12, 2002).

- c. What, if anything, did you learn from the appellate court's decision and how did it impact the manner in which you wielded your discretion as a prosecutor?

The Court of Criminal Appeals issued its decision in April 2002, two years after I left the District Attorney's Office to begin private practice with my current law firm. Since that decision, I have not presented any cases as a prosecutor. Nonetheless, the decision was helpful in underscoring not only a judge's role to ensure a fair trial, but in highlighting the roles of defense attorneys and prosecutors to ensure a fair trial as well.

3. Also while working as an Assistant District Attorney, you worked on the cases of *State v. White* and *State v. Chambers*, which involved an attempted robbery and the murder of a mother in front of her daughters.<sup>6</sup> In the case, Chambers—a white female—drove White and his accomplice—two black males—to a health center where White and his friend tried to rob a woman.<sup>7</sup> When the woman resisted, she was shot and killed.<sup>8</sup> White was convicted by a jury and sentenced to life without parole.<sup>9</sup> Chambers was tried in a separate case and was ultimately found not guilty by an all-white jury.<sup>10</sup> At Chamber's trial, you said the following in your closing argument: "Why would two black guys from north Tulsa pick a white girl from south Tulsa to commit robberies with if she wasn't in on it?"<sup>11</sup>

- a. What did you mean by that comment?

I perceived the undertone or implication of Chambers' defense to be that, given her different background from the others (a white, affluent teenage female from South Tulsa compared to two black teenage males from North Tulsa), she would not have known that Steven White and Marcus Currie intended to commit a crime that day. However, I believe the evidence demonstrated that without White and Currie knowing Chambers quite well (and without Chambers' knowledge of and acquiescence in their planned crime), they would not have been engaged in the commission of multiple robbery attempts that afternoon with an unsuspecting Chambers as their driver; rather, these three knew and trusted one another. Indeed, the evidence demonstrated that they trusted one another so well that they felt comfortable scouting out multiple robbery victims that afternoon before settling on Michelle Hendrix as their victim. In other words, I perceived Chambers as attempting to rely on the historically segregated nature of the Tulsa community, and the fact that she lived in a different part of Tulsa and was of a different race than her co-conspirators, as a basis for concluding that she would not have known what White and Currie were intending to do and that they would not have confided in her with plans of the crime. Rather than injecting race, I was attempting to refute this implication by turning it on its head. If, as Chambers correctly implied, Tulsa is a historically segregated community, the fact that she was friends with and previously chose to spend time with White and Currie undermined the suggestion that Chambers did not know what was going on (or that White and Currie would not have confided in her the robbery plan) simply because they came from different economic backgrounds, lived in different parts of Tulsa and were of a different race.

- b. Do you regret using such a racial dog whistle in a case?

It is not appropriate to draw on prejudice or to inject race into the prosecution or



defense of any case, and I have never done so. That was certainly not the purpose of the referenced argument. The crime was made no worse because of any defendant's race, and no guilt was attributed to any defendant because of race. To the contrary, I believe that the argument actually acknowledged implicit bias, and I sought to remove that bias as an unwarranted and unjustified defense under the circumstances of the case. Perhaps the argument was inartfully stated, but it was set forth only to identify and remove the prejudice that I believed the defense was attempting to capitalize on. In hindsight, I acknowledge that I could have worded the argument differently.

It is my sincere belief that people should not be judged by the color of their skin, but by the content of their character.

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

I understand originalism to mean that the Constitution should be interpreted based on the original understanding of its terms at the time it was ratified. To that end, in interpreting the Constitution, originalism instructs that one must first look to the original understanding or meaning of provisions at the time of ratification. If confirmed, I would follow Supreme Court and Tenth Circuit precedent in interpreting the Constitution.

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

I understand textualism to mean that courts are bound by statutory language and that, in interpreting statutes, courts should follow the text of statutes as written. If confirmed, I would follow the text of statutes as written and enacted by the legislature. I would follow Supreme Court and Tenth Circuit precedent in interpreting statutes.

6. 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?

The Supreme Court has held that legislative history may be considered when the text of a statute is ambiguous. If confirmed, I would follow Supreme Court and Tenth Circuit precedent regarding consulting legislative history.

- 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?

The Supreme Court has held that legislative history may be considered when the text of a statute is ambiguous. If confirmed, I would follow Supreme Court and Tenth

Circuit precedent regarding consulting and evaluating legislative history.

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

Yes. I consider judicial restraint to mean that a district judge should decide only the dispute before the court, appropriately, narrowly deciding the dispute under the rule of law as written in a fair and impartial manner, without attempting to guide an outcome based upon the judge's own personal views that may conflict with the law.

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<sup>6</sup> State v. White, Case No. CF-1996-1140 (Tulsa Cty District Ct, 1998).

<sup>7</sup> Bill Braun, Jury clears Chambers of wrongdoing, TULSA WORLD (April 15, 2000), [https://www.tulsaworld.com/archive/jury-clears-chambers-of-wrongdoing/article\\_45364dc5-6f6d-54b4-a63e-d7d9aaff7edd.html](https://www.tulsaworld.com/archive/jury-clears-chambers-of-wrongdoing/article_45364dc5-6f6d-54b4-a63e-d7d9aaff7edd.html).

<sup>8</sup> *Id.*

<sup>9</sup> State v. White, Case No. CF-1996-1140 (Tulsa Cty District Ct, 1998).

<sup>10</sup> Braun, *supra* note 7.

<sup>11</sup> *Id.*

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>12</sup> Was that decision guided by the principle of judicial restraint?

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on this issue. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent.

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>13</sup> Was that decision guided by the principle of judicial restraint?

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on this issue. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>14</sup> Was that decision guided by the principle of judicial restraint?

As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on this issue. If confirmed, I will fully and faithfully apply Supreme Court and Tenth Circuit precedent.

8. 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.<sup>15</sup> 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.<sup>16</sup>

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

I have not studied this issue. However, as a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on issues that may relate to pending or impending litigation.

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

I have not studied this issue. However, as a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on issues that may relate to pending or impending litigation.

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

I have not studied this issue. However, as a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on issues that may relate to pending or impending litigation.

9. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>17</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>18</sup> 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.<sup>19</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>20</sup>

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<sup>12</sup> 554 U.S. 570 (2008).

<sup>13</sup> 558 U.S. 310 (2010).

<sup>14</sup> 570 U.S. 529 (2013).

<sup>15</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>16</sup> *Id.*

<sup>17</sup> 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>.

<sup>18</sup> *Id.*

<sup>19</sup> 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>.

<sup>20</sup> *Id.*

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

I have not studied this issue. However, I understand that studies have reported implicit racial bias within the criminal justice system.

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

I have not studied this issue. However, I understand that studies have reported implicit racial bias within the criminal justice system, including disproportionate representation in jail and prison systems.

- 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 studied this issue. However, I understand that studies have reported implicit racial bias within the criminal justice system.

- 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.<sup>21</sup> Why do you think that is the case?

I have not studied this issue and am not familiar with the cited 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.<sup>22</sup> Why do you think that is the case?

I have not studied this issue and am not familiar with the cited report.

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

A judge should fairly and impartially apply the rule of law to each and every party before the court. At all times, I believe a judge should apply the Golden Rule: treating others as one would want to be treated; treating all before the court with dignity and respect and without bias.

10. 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.<sup>23</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>24</sup>

- 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 this issue and am not familiar with the referenced study.

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

I have not studied this issue and am not familiar with the referenced study.

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

Yes.

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<sup>21</sup> 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](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>22</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>23</sup> 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>.

<sup>24</sup> *Id.*

12. 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.

13. Do you believe that *Brown v. Board of Education*<sup>25</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

14. Do you believe that *Plessy v. Ferguson*<sup>26</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

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

No.

16. 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."<sup>27</sup> Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Recusal and disqualification issues are governed by 28 U.S.C. § 455 and any governing precedent. As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to comment on an issue that relates to a specific litigation matter.

17. 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."<sup>28</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

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

<sup>25</sup> 347 U.S. 483 (1954).

<sup>26</sup> 163 U.S. 537 (1896).

<sup>27</sup> 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>.

<sup>28</sup> 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 January 15, 2020**  
**For the Nomination of:**

**John F. Heil III, United States District Judge for the Northern, Eastern, and Western Districts of Oklahoma**

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

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

The imposition of punishment upon conviction is a very important and solemn obligation that a district judge must exercise with great care, caution and with the desire to implement punishment that is measured and based upon the facts, circumstances and applicable law. I would look to 18 U.S.C. § 3553 and the factors that Congress has outlined to impose a sentence that is sufficient and appropriate, but no greater than is necessary. I would follow applicable federal statutes as well as Supreme Court and Tenth Circuit precedent on sentencing, consult the advisory Sentencing Guidelines, consider statements of the parties, study presentence investigation reports and carefully consider any departure from guidelines that might be appropriate under the circumstances of the case. I would likely review sentences within the court's district, as well as nationally, based on similar circumstances, but not lose sight of the specific facts and circumstances surrounding each individual defendant.

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

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

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

I recognize that the Sentencing Guidelines are advisory in nature and are not binding on a district judge; yet, they are instructive in determining fairness, providing certainty in sentencing and avoiding unwarranted sentencing disparities. Still, flexibility is important to permit individualized sentences when warranted. Accordingly, in determining appropriate sentencing in a particular case, a district judge should consider the properly calculated guideline range, the grounds for departure authorized by authority and the factors set forth in 18 U.S.C. § 3553(a).

- 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.<sup>1</sup>

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

Mandatory minimum sentences are within the purview of Congress. If confirmed, I will fully and faithfully apply the laws enacted by Congress as well as any binding precedent. As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to offer my personal views on this issue.

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

Mandatory minimum sentences are within the purview of Congress. If confirmed, I will fully and faithfully apply the laws enacted by Congress as well as any binding precedent. As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to offer my personal views on this issue.

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

Mandatory minimum sentences are within the purview of Congress. If confirmed, I will fully and faithfully apply the laws enacted by Congress as well as any binding precedent. As a district court nominee, consistent with the Canons of the Code of Conduct, I do not believe it is appropriate for me to offer my personal views on this issue.

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.<sup>2</sup> **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

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

If confirmed, I will impose sentences on a case-by-case basis, with careful consideration of my ethical obligations under the Canons of the Code of Conduct, my oath, and in compliance with the Constitution and any binding Supreme Court and Tenth Circuit precedent.

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

<sup>2</sup> See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

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

If confirmed, I will impose sentences on a case-by-case basis, with careful consideration of my ethical obligations under the Canons of the Code of Conduct, my oath, and in compliance with the Constitution and any binding Supreme Court and Tenth Circuit precedent.

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

If confirmed, I will impose sentences on a case-by-case basis, with careful consideration of my ethical obligations under the Canons of the Code of Conduct, my oath, and in compliance with the Constitution and any binding Supreme Court and Tenth Circuit precedent.

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

Yes.

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

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

Yes.

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

I have not studied this issue. However, I understand that studies have reported racial disparities within the criminal justice system.

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

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

Yes.

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

Yes.