

Nomination of Howard Nielson to the United States District Court for the District of Utah
Questions for the Record
January 17, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. Would you describe your approach to constitutional interpretation to be “originalist”? If so, what does that mean to you? If not, how would you describe your approach?

I would not be inclined to apply a label to the approach to constitutional interpretation that I would take if I am fortunate enough to be confirmed. I would address constitutional issues by faithfully applying Supreme Court and Tenth Circuit precedent. If those precedents do not resolve the issue, I would carefully study the text of the relevant constitutional provision and employ the traditional tools of legal interpretation recognized by the Supreme Court and Tenth Circuit.

2. 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?**

The Supreme Court has made clear that lower courts must follow Supreme Court precedents unless they have been overruled by the Supreme Court itself.

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

The Supreme Court has made clear that circuit court judges must follow Supreme Court precedent. I am unaware of any legal principle or precedent that suggests that it is necessarily improper for circuit court judges to voice concerns with existing Supreme Court precedent so long as they follow that precedent.

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

Each circuit court has rules and precedents establishing when it may overturn its own precedents. In many cases, prior circuit precedent can be overturned only by the en banc court. Federal Rule of Appellate Procedure 35 indicates that en banc review, and thus potential reconsideration of circuit precedent, may be warranted where there is a conflict with Supreme Court precedent, prior precedent within that circuit, or a decision from another circuit court or where the case presents a question of exceptional importance.

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

Various Supreme Court cases discuss factors that the Supreme Court will consider in deciding whether to overturn its own precedent. Among the factors the Supreme Court has identified are reliance interests, whether the precedent has proved

unworkable in practice, and whether other developments in the law have undermined a precedent's legal underpinnings.

3. 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?”

I agree that *Roe v. Wade* has survived repeated attempts to overrule it and thus appears to satisfy the definition set forth above.

b. Is it settled law?

Although certain aspects of *Roe v. Wade* have been clarified by subsequent Supreme Court precedents—most notably *Planned Parenthood v. Casey*—the core holding of *Roe v. Wade* is plainly settled law.

4. 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.
5. At your nomination hearing, a number of Senators asked you about your work in the Justice Department's Office of Legal Counsel (OLC), and specifically about any work you may have done on torture and detention-related issues. In an exchange with Senator Whitehouse, you agreed that you were part of a “clean-up crew” tasked with reviewing the Bybee/Yoo torture

memos, and in an exchange with Senator Coons, you stated that the Bybee/Yoo memos had “been withdrawn and rightfully so.”

- a. As part of your work reviewing the Bybee/Yoo memos, did you advocate at the time that those memos be formally withdrawn?**

As I explained at the hearing, I assisted Assistant Attorney General Goldsmith with reviewing and identifying the problems with the Bybee/Yoo memos. The attorney-client privilege and other considerations, however, prevent me from discussing specific views that I may have expressed at this time.

- b. If yes, why did you believe that those memos needed to be withdrawn? If not, why not?**

Please see my response to Question 5.a

6. After the Bybee/Yoo opinions were withdrawn, OLC issued several additional memos related to enhanced interrogation techniques, under both Acting Assistant Attorneys General Daniel Levin and Steven Bradbury. In an exchange with Senator Coons, you stated that both Daniel Levin and Steven Bradbury had asked for your “input” and that you had provided them with your “best legal independent judgment.” **Please clarify what you mean by “input”—specifically whether you played any role in drafting, editing, reviewing or otherwise contributing to the following OLC legal opinions on this topic:**

- a. OLC Acting Assistant Attorney General Daniel Levin’s August 6, 2004 letter to the CIA approving the use of waterboarding.**

I do not recall the issuance of this letter.

- b. OLC Acting Assistant Attorney General Daniel Levin’s December 30, 2004 memo, “Definition of Torture Under 18 U.S.C. §§ 2340–2340A.”**

As I explained at the hearing, many attorneys—not just within the Office of Legal Counsel, but also in other parts of the Department of Justice and other parts of the Executive Branch—reviewed drafts of the opinions ultimately issued by Dan Levin and Steve Bradbury in December 2004 and May 2005 and made or suggested comments and revisions. But key deliberations and the decisions to issue the opinions were made at a very senior level by the acting head of the office and senior officials in the Deputy Attorney General’s Office, the Attorney General’s Office, and other parts of the Executive Branch. My recollection is that I discussed some of the issues raised by the opinions with other attorneys in the Office of Legal Counsel and participated—at the direction of the acting head of the office and along with multiple other attorneys—in the review process discussed above.

- c. OLC Acting Assistant Attorney General Stephen Bradbury’s May 10, 2005 Memo for John Rizzo, “Application of 18 U.S.C. §§ 2340-2340A to Certain**

Techniques that May be Used in the Interrogation of a High Value al Qaeda Detainee.”

Please see my response to question 6.b.

- d. OLC Acting Assistant Attorney General Stephen Bradbury’s May 30, 2005 Memo for John Rizzo, “Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May be Used in the Interrogation of High-Value al Qaeda Detainees.”**

Please see my response to question 6.b.

- e. OLC Acting Assistant Attorney General Stephen Bradbury’s July 2007 Memo for John Rizzo, “Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees.”**

I was no longer at the Department of Justice at the time this opinion was issued and I played no role in its issuance.

- f. Any other OLC memo or document addressing the legality of specific enhanced interrogation techniques.**

During my tenure at OLC, attorneys prepared and circulated a number of drafts relating to enhanced interrogation techniques. I reviewed some of these drafts. I am unaware of any opinions issued by the Office relating to enhanced interrogation techniques while I was at the Office other than the opinions issued by Dan Levin and Steve Bradbury in December 2004 and May of 2005.

7. Did you agree at the time with Acting Assistant Attorney General Daniel Levin’s conclusion approving the use of waterboarding in the August 2004 letter he wrote to the CIA? If you disagreed at the time, did you put your views in writing or otherwise take steps to register your disagreement?

Please see my response to question 6.a.

8. Did you agree at the time with Acting Assistant Attorney General Stephen Bradbury’s legal conclusion in his May 10, 2005 memo that waterboarding, sleep deprivation, and walling did not violate the federal ban on torture? If you disagreed at the time, did you put your views in writing or otherwise take steps to register your disagreement?

The attorney-client privilege and other considerations prevent me from discussing specific views that I may have expressed at this time.

9. At your nomination hearing, Senator Coons asked you very explicitly whether you believe waterboarding is torture. In response, you stated that you could not “imagine” that “waterboarding could possibly be carried out consistent with” Common Article III or the Army Field Manual.

a. Let me ask you again, and please provide a yes or no answer — do you believe that waterboarding constitutes torture?

Yes, I believe that waterboarding generally constitutes torture. There may be narrow circumstances—*i.e.*, the military’s use of waterboarding in connection with training—that arguably do not fall within the scope of 18 U.S.C. § 2340A. The statutes and Supreme Court precedent that I discussed at the hearing make clear that any use of waterboarding in interrogation is illegal, and they would prevent any attempt to justify waterboarding in this context based on any sort of narrow reading of 18 U.S.C. § 2340A.

10. In a 2007 letter to the *Washington Post*, you and another former colleague from OLC wrote of Steven Bradbury that he “is a careful lawyer of unimpeachable integrity and sound judgment.”

a. Do you believe that the torture memos authored by Steven Bradbury reflect “sound judgment”?

The 2007 letter was written on behalf of all nine deputies who had worked under Mr. Bradbury. It was originally signed by all nine deputies but, pursuant to the *Washington Post*’s policy, only two signatures were ultimately included. The letter was intended as a general defense of Mr. Bradbury’s professionalism against what we regarded as unfair attacks—I do not believe that I or any of the other deputies intended to speak to the merits of specific opinions.

b. The 2009 Report by the Office of Professional Responsibility “found several indicia that the Bradbury Memos were written with the goal of allowing the ongoing CIA program to continue” (pg. 242) and “reflect uncritical acceptance of the CIA’s representations regarding the method of implementation of certain EITs” (pg. 243). Did these findings make you reconsider your 2007 evaluation of Mr. Bradbury’s “sound judgment”?

Please see my response to question 10.a.

11. In your August 2005 memorandum to file regarding “Whether Persons Captured and Detained in Afghanistan are ‘Protected Persons’ under the Fourth Geneva Convention,” you

concluded “that no part of Afghanistan is occupied territory or the home territory of the United States and, therefore, that persons captured and detained by the United States in Afghanistan are not eligible for ‘protected person’ status.”

- a. Your memo states that you initially provided advice to the Criminal Division on this topic in May and June of 2004. Why did it take between May 2004 and August 2005 for you to commit your advice to a memorandum for the files?**

My recollection is that Jack Goldsmith and I put significant research and thought into this question in May and June of 2004. We were forced to put our work aside, however, in light of other priorities. I completed the memo to file in August 2005 because I was leaving the Office and was seeking to wrap up loose ends before I left. Given the amount of research and thought that Jack Goldsmith and I had put into the issue, I thought it made sense to document our research and analysis for the files.

- b. Did any aspect of the advice you provided to the Criminal Division in May and June 2004 change by the time you committed your advice to writing 15 months later?**

Not that I can recall.

- c. At the time you provided legal advice to officials in the Department’s Criminal Division — later memorialized in your memo to file — what did you understand to be the implications of concluding that those captured and detained in Afghanistan were ineligible for “protected person” status under the Fourth Geneva Convention?**

I believed that a particular individual would be charged with violating other federal criminal statutes rather than with violating provisions of the Fourth Geneva Convention.

d. Before providing legal advice in May/June 2004, did you consult with the State Department's Office of Legal Adviser? If not, why not? If so, did that office share your conclusions regarding the inapplicability of the Fourth Geneva Convention?

I do not recall consulting with the State Department's Office of Legal Adviser, though it is possible that Jack Goldsmith may have done so. In 2002, the Legal Adviser to the State Department had opined that "it is widely recognized that only individuals who fall into enemy hands in occupied territory or the enemy's territory are protected persons" under the Fourth Geneva Convention, Memorandum for William J. Haynes, General Counsel, Department of Defense, from William H. Taft, IV, Legal Adviser, Department of State: *Re: 1949 Geneva Conventions: The President's Decisions under International Law* 88 (Mar. 22, 2002)—the same position reflected in our advice to the Criminal Division.

e. Do you continue to believe that individuals captured and detained by U.S. forces abroad are not protected by the Fourth Geneva Convention?

I have not studied the question since leaving the Office of Legal Counsel. The Fourth Geneva Convention is a complicated and difficult treaty and there is certainly room for good faith disagreement about its proper interpretation. However, the advice that Jack Goldsmith and I gave to the Criminal Division reflects a very traditional view of the Fourth Convention—the view taken by the Report issued by the Senate Foreign Relations Committee in connection with the Convention's ratification and by prominent law-of-war scholars such as Richard Baxter, a view described by the State Department's Legal Adviser in 2002 as "widely recognized," and a view that one scholarly critic has even referred to as "the conventional wisdom."

12. Did you have any role in drafting, editing, reviewing, or otherwise contributing to OLC opinions about the following subjects? If so, please describe the opinion and your role.

a. Detention policies and practices (besides your August 2005 memorandum to file regarding "Whether Persons Captured and Detained in Afghanistan are 'Protected Persons' under the Fourth Geneva Convention").

I worked on a number of national security issues while at the Office of Legal Counsel—primarily when Jack Goldsmith was head of the Office. Much of our work involved identifying and attempting to correct previous mistakes and excesses. I do not have access to nonpublic materials and am not confident that I recall everything that I worked on. I do not recall any involvement in the issuance of any public or nonpublic opinions addressing detention policies and practices. It is possible, however, that some of the Office's opinions may have had some implications for detention policies and practices, such as the opinions discussed in response to question 6 and Jack Goldsmith's opinion on Protected Person Status in Occupied Iraq under the Fourth Geneva Convention, which I reviewed and commented on. I may have assisted the head of the office in providing oral or

informal advice that touched on issues relating to detention or provided such advice at the direction of the head of the office.

b. Rendition?

I worked on a number of national security issues while at the Office of Legal Counsel—primarily when Jack Goldsmith was head of the Office. Much of our work involved identifying and attempting to correct previous mistakes and excesses. I do not have access to nonpublic materials and am not confident that I recall everything that I worked on. I do not recall any involvement in the issuance of any public or nonpublic opinions or other advice addressing whether U.S. personnel could transfer individuals to foreign custody.

c. Warrantless wiretapping?

I worked on a number of national security issues while at the Office of Legal Counsel—primarily when Jack Goldsmith was head of the Office. Much of our work involved identifying and attempting to correct previous mistakes and excesses. I do not have access to nonpublic materials and am not confident that I recall everything that I worked on. I did not have the required security clearances and was not involved in preparing or reviewing opinions relating to the President’s Surveillance Program or the Terrorist Surveillance Program. Nor do I recall any involvement in the issuance of any other public or nonpublic opinions relating to warrantless surveillance or wiretapping. I may have assisted the head of the office in providing oral or informal advice relating to these matters.

13. At your nomination hearing, several Senators asked you about arguments you made in *Hollingsworth v. Perry*, which involved a challenge to California’s Proposition 8, a ballot measure defining marriage as between one man and one woman. You were asked about your claim during a cross-examination that sexual orientation is a choice, and you were asked about a motion you filed seeking to vacate Judge Vaughn Walker’s opinion on the basis that he failed to disclose his same-sex relationship and whether he intended to marry his longtime partner. In defense of your positions, you made two arguments. First, you emphasized that you were a junior member of the legal team representing the official proponents of Proposition 8. Second, you stated that the positions you take in litigation are those of your clients.

a. While in private legal practice, have you ever recommended that a client should not take a particular litigation position or that a client should not make a specific legal argument that the client nevertheless favored? Did you do so in *Hollingsworth*?

Yes, to both questions.

b. Do you believe heterosexual judges can rule impartially on cases which involve LGBT civil rights? Why?

As I stated at the hearing, I believe the law is clear that no one is required to recuse

himself or herself based on status. Where additional facts are involved, recusal issues must be resolved on a case-by-case basis, applying the judicial canons and the federal recusal statute. Under the judicial canons, it would be inappropriate for me to address hypothetical cases that could arise in litigation.

- c. While in private legal practice, have you ever conceived of, recommended, or advocated for a particular litigation position or a specific legal argument that the client had not itself suggested or formulated? Did you do so in *Hollingsworth*?**

In *Hollingsworth* and in other cases I have developed specific legal arguments to support my clients' general views and positions. The arguments I present as an advocate are always offered on behalf of my clients, however, not myself.

- d. You have been licensed to practice in Utah since 2000. Under Rule 3.1 of Utah's Rules of Professional Conduct, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument**

for an extension, modification, or reversal of existing law.” Further, under Rule 5.2(a), “[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.” Recognizing that you were not the lead attorney in *Hollingsworth*, do you nevertheless believe that the motion to vacate Judge Walker’s ruling was consistent with the Utah Rules of Professional Conduct, including your obligations as a subordinate attorney?

Yes.

14. In 2016, you submitted an amicus brief in *Whole Woman’s Health v. Hellerstedt*, urging the Supreme Court to uphold a Texas law that severely restricted women’s access to reproductive healthcare. In your brief, you argued that the Court should defer “to the Texas Legislature’s judgment about how best to safeguard the health and safety of women who seek abortions,” and you claimed that those challenging the law could not “overcome the presumption that the Texas Legislature adopted these regulations out of genuine concern for the health and safety of women who receive abortions.”

a. How do the requirements of the Texas law — that a doctor performing abortions has admitting privileges at a local hospital, and that a facility where abortions are performed meet the standards for ambulatory surgical centers — “safeguard the health and safety of women who seek abortions”? What evidence do you have to support these claims?

My clients’ position on this issue, as well as the evidence offered in support of that position, are set forth in Part II of the amicus brief.

15. In 2014, you represented the National Rifle Association in *National Rifle Association v. McCraw*, in which you asked the Supreme Court to overturn lower court rulings that had upheld certain gun restrictions — including a ban on concealed carry in public — on those under the age of twenty-one. As the Fifth Circuit had noted in upholding the restrictions, the challenged law advanced “Texas’s stated goal of maintaining public safety.” Yet unlike in *Whole Woman’s Health*, where you emphasized the need to defer to the Texas Legislature, in *McCraw* you appeared to give no weight to Texas’s judgment that age-based restrictions on concealed carry advance public safety.

a. Why was deference to the Texas Legislature appropriate in *Whole Woman’s Health v. Hellerstedt* but not in *National Rifle Association v. McCraw*?

My clients’ argument for deference in *Whole Woman’s Health* is set forth in Part I of the amicus brief filed in that case. My client’s argument in the *McCraw* is set forth, *inter alia*, at Part I of the petition for writ of certiorari filed in that case.

16. In another Second Amendment case, *Friedman v. City of Highland Park*, you urged the Supreme Court to grant certiorari to help “correct the lower courts’ massive resistance to [*District of Columbia v.*] *Heller* and their refusal to treat Second Amendment rights as deserving respect equal to other constitutional rights.”

- a. Please list all cases in which lower courts have exhibited “massive resistance to *Heller*” and refused “to treat Second Amendment rights as deserving respect equal to other constitutional rights.” Please provide citations in addition to case names.**

The cases offered in support of my clients’ argument are collected, with their citations, in Part II of the petition for writ of certiorari filed in that case.

- b. “Massive resistance” is a phrase that commonly refers to the deliberate campaign of legal and legislative resistance to the U.S. Supreme Court’s decision**

in *Brown v. Board of Education* (see, e.g., NAACP Legal Defense and Educational Fund, “Brown at 60: The Southern Manifesto and ‘Massive Resistance’”, available at <http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown>). Is it your belief that court decisions interpreting the *Heller* decision are akin to the tactics used by pro-segregationist forces detailed in the article linked above and elsewhere?

No.

- c. **Do you believe that the Court’s opinion in *Heller* still allows for commonsense gun regulations?**

The Supreme Court in *Heller* made clear that “the right secured by the Second Amendment is not unlimited” and that its opinion did not “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” which the Court described as “presumptively lawful regulatory measures.” *District of Columbia v. Heller*, 554 U.S. at 595, 626, 627 & n.26 (2008).

17. The Justice Department’s Office of the Inspector General (OIG) interviewed you as part of its investigation into politicized hiring at the Department between 2002 and 2006. You were interviewed in connection with the 2002 Screening Committee, which reviewed and approved candidates for both the Department’s Honors Program and its Summer Law Intern Program, or SLIP. During an interview with OIG, you said that you may have participated in the screening process, but that you could not recall “with certainty.” OIG ultimately concluded that the Committee “considered political or ideological affiliations when deselecting candidates” from the Honors Program and SLIP.

- a. **Do you believe it is appropriate for the Justice Department to take political or ideological affiliations into account when hiring for its honors program, summer legal internship, or for any career positions?**

No.

18. It has been reported that Brett Talley, a Deputy Assistant Attorney General in the Office of Legal Policy who is responsible for overseeing federal judicial nominations—and who himself has been nominated to a vacancy on the U.S. District Court for the Middle District of Alabama—did not disclose to the Committee many online posts he had made on public websites.

- a. **Did officials at the Department of Justice or the White House discuss with you generally what needed to be disclosed pursuant to Question 12 of the Senate Judiciary Questionnaire? If so, what general instructions were you given, and by whom?**

Without disclosing specific advice by any attorney, I understood that I was

required to make a thorough effort to identify and disclose all responsive material.

- b. Did Mr. Talley or any other individuals at the Department of Justice or the White House advise you that you did not need to disclose certain material, including material “published only on the Internet,” as required by Question 12A of the Senate Judiciary Questionnaire? If so, please detail what material you were told you did not need to disclose.**

No.

- c. Have you ever posted commentary—under your own name or a pseudonym—regarding legal, political, or social issues on public websites that you have not already disclosed to the Committee? If so, please provide copies of each post and describe why you did not previously provide it to the Committee.**

No.

- d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps**

to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

No.

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

A majority of the Supreme Court has indicated that legislative history may be consulted when statutory language is ambiguous.

20. According to your Senate Questionnaire, you were an intermittent member of the Federalist Society between 1997 and 2007, and you served as the Programs Vice Chair of the Litigation Practice Group from 1999 to 2001. The Federalist Society's "About Us" webpage, states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools.

My role as a member and programs vice chair of the litigation group of the Federalist Society was limited to attending events, helping to organize a small number of events, and moderating one panel discussion. I did not write or contribute to any of the statements on the "about us" webpage and am not in a position to speak for the Federalist Society or offer commentary on the meaning of its statements.

b. As a member of the Federalist Society, explain how exactly the organization seeks to "reorder priorities within the legal system."

Please see my response to question 20.a.

c. As a member of the Federalist Society, explain what "traditional values" you understand the organization places a premium on.

Please see my response to question 20.a.

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

On January 17, the Department of Justice's Office of Legal Policy forwarded the questions to me. I prepared draft responses to the questions, returned those responses to the Office of legal

Policy, received suggestions, and finalized my responses.

Senator Dick Durbin
Written Questions for Kurt Engelhardt, Howard Nielson and Barry Ashe
January 17, 2018

For questions with subparts, please answer each subpart separately.

Questions for Howard Nielson

1. You represented the plaintiff in *Friedman v. City of Highland Park*, which challenged the constitutionality of a municipal ordinance in Highland Park, Illinois, banning assault weapons. The Seventh Circuit upheld the ordinance, and the cert petition you filed in this case argued that the Supreme Court “needed to correct the lower courts’ massive resistance to *Heller* and their refusal to treat Second Amendment rights as deserving respect equal to other constitutional rights.” Your cert petition was rejected.

a. **Is it still your view that the lower courts are engaged in “massive resistance” to the *Heller* decision?**

This was the position of my clients in *Friedman v. City of Highland Park*. The views I express as an advocate in litigation are those of my clients.

b. **In what way is this “massive resistance” demonstrated?**

My clients’ view was that the lower courts have resisted the clear implications of *Heller* in resolving Second Amendment challenges, as detailed in Part II of the petition for writ of certiorari filed in that case.

c. **Do you think that the right of same sex couples to marry articulated in the Supreme Court’s decision in *Obergefell* is deserving of equal respect as the right to keep and bear arms articulated by the Supreme Court in *Heller*?**

Yes. Both rights have been recognized by the Supreme Court and, if I am fortunate enough to be confirmed, I will faithfully follow all Supreme Court precedents, including *Obergefell*.

2. When a federal district court judge struck down California’s Proposition 8 ban on same sex marriage in the *Hollingsworth v. Perry* case in 2010, you filed a motion to vacate the judgment on the grounds that the judge, President Reagan appointee Vaughn Walker, was in a long-term same-sex relationship and that he failed to disclose his sexual orientation and whether he had any desire to marry his partner. Your brief said it must be presumed that Judge Walker had a nonwaivable conflict of interest and said “only if Chief Judge Walker had unequivocally disavowed any interest in marrying his partner could the parties and the public be confident that he did not have a direct personal interest in the outcome of the case.”

Your motion for vacating the judgment was denied by then-Chief Judge James Ware, a George H.W. Bush appointee, who wrote that “the sole fact that a federal judge shares the same circumstances or personal characteristics with other members of the general public, and that the judge could be affected by the outcome of a proceeding in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification.”

a. **Please explain your thinking behind your argument for vacating Judge Walker’s decision.**

My clients expressly disclaimed the argument that Judge Walker should have recused himself because he was gay. My clients’ position was that Judge Walker failed to disclose facts that may have indicated that he had a direct, concrete, personal stake in the outcome of the case he was deciding.

b. **Is it still your view that Judge Walker’s decision should have been vacated?**

That was the position of my clients in the Proposition 8 litigation. The views I express as an advocate in litigation are those of my clients.

3. In 2015, you filed a Supreme Court amicus brief opposing same-sex marriage in the *Obergefell* case, in which Justice Kennedy delivered the Court’s opinion that same-sex couples have a fundamental right to marry protected by the Constitution.

a. **Do you believe that *Obergefell* was wrongly decided?**

I accept *Obergefell* as the law of the land and will follow that decision faithfully if I am fortunate enough to be confirmed. Like other nominees, I believe it would be inappropriate for me to express disagreement or agreement with specific Supreme Court decisions, since it might incorrectly suggest to litigants that, if I am fortunate enough to be confirmed, I might be more willing to follow some Supreme Court decisions than others.

b. **Do you pledge, if you are confirmed, that you will not take steps to undermine the Court’s decision in *Obergefell*?**

Yes. I will faithfully follow that decision and will not seek to undermine it.

4. When you were at the Office of Legal Counsel, you authored a memo in August 2005 entitled “Whether Persons Captured and Detained in Afghanistan are “Protected Persons” under the Fourth Geneva Convention.” Your memo claimed that the Fourth Geneva Convention, which requires the humane treatment of civilian detainees and prohibits torture, only applies to the United States when it comes to civilians held on U.S. territory or in covered occupation scenarios - and thus did not apply to persons captured or detained in Afghanistan because it was not U.S.-occupied territory. Under your memo’s reasoning, U.S. personnel could torture civilians outside of the United States without breaching the Geneva

Convention, and other countries could likewise torture captured U.S. civilians as long as they did not bring the detainees back to their own territory.

Human Rights First sent a letter to this Committee noting that your memo is “in direct contradiction to clearly established law” and pointing out that the Supreme Court noted in *Hamdan* that the Geneva Conventions were drafted to be broad so as not to limit their protections. Several distinguished former military lawyers also sent the Committee a letter claiming that your memo was “based on flawed legal reasoning” and “appears to have been a result-driven product.”

a. Do you stand by the analysis you produced in your 2005 memo?

I have not studied the question since leaving the Office of Legal Counsel. The Fourth Geneva Convention is a complicated and difficult treaty and there is certainly room for good faith disagreement about its proper interpretation. However, the advice that Jack Goldsmith and I gave to the Criminal Division reflects a very traditional view of the Fourth Convention—the view taken by the Report issued by the Senate Foreign Relations Committee in connection with the Convention’s ratification and by prominent law-of-war scholars such as Richard Baxter, a view described by the State Department’s Legal Adviser in 2002 as “widely recognized,” and a view that one scholarly critic has even referred to as “the conventional wisdom.”

In addition, it is not correct that the Memo to File’s conclusion would authorize the use of torture so long as it was done outside the United States. To the contrary, the Memo pointedly identified statutes, treaties, and rules of customary international law that bar torture and other mistreatment outside of the United States. *See* Memo to File at 27–28. The same treaties and rules of customary law would protect U.S. citizens.

b. Would you reach the same conclusions today?

Please see my response to question 4.a.

5. In 2007, you co-authored a response to a *Washington Post* editorial that criticized Steven Bradbury, the former head of OLC whom you worked for and who authored several torture memos that sought to justify techniques the CIA had used when interrogating suspects abroad. You wrote that Bradbury “is a careful lawyer of unimpeachable integrity and sound judgment. He always strives to get the law right and always demands the same from us.”

In November 2017, Senator John McCain opposed the nomination of Mr. Bradbury as general counsel for the Department of Transportation on the basis that he would “not support any nominee who justified the use of torture by Americans.” Senator McCain said that Mr. Bradbury’s memos on torture were “permission slips for torture” and that his work “did a disservice to our nation and its defenders.”

a. Do you believe the use of torture by Americans can be justified?

No.

- b. **Do you believe Steven Bradbury was justified in the positions that he advocated for in his torture memos?**

As I explained at the hearing, I believe those memos were properly withdrawn.

- c. **Will you provide the Committee with a full list of any memos authored by Steven Bradbury at OLC that you contributed to?**

I do not have access to a full list of the memos authored by Mr. Bradbury. I reviewed many but not all of the opinions that Mr. Bradbury issued while I was at OLC. I did not review Mr. Bradbury's opinions after I left OLC.

6.

- a. **Is waterboarding torture?**

Yes, I believe that waterboarding generally constitutes torture. There may be narrow circumstances—*i.e.*, the military's use of waterboarding in connection with training—that arguably do not fall within the scope of 18 U.S.C. § 2340A. Other statutes and Supreme Court precedent make clear that any use of waterboarding in interrogation is illegal, and they would prevent any attempt to justify waterboarding in this context based on any sort of narrow reading of 18 U.S.C. § 2340A.

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

Yes, I believe that waterboarding generally constitutes cruel, inhuman, and degrading treatment. There may be narrow circumstances—*i.e.*, the military's use of waterboarding in connection with training—that arguably do not fall within the meaning of this phrase. Federal statutes and Supreme Court precedent make clear that any use of waterboarding in interrogation is illegal, and they would prevent any attempt to justify waterboarding in this context based on any sort of narrow reading of this phrase.

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

Yes.

7.

- a. **Do you think you treated applicants to the DOJ Honors Program and Summer Law Intern Program fairly when you served as part of a hiring screening committee in 2002?**

I cannot recall participating in the screening process, and the Department of Justice's Inspector General was uncertain whether I was involved in that process. Regardless, I have never made decisions relating to hiring civil service employees based on politics or any other improper consideration.

- b. **Do you think the Inspector General was unfair in recommending that people involved with this politicized hiring scandal should not get a job with the federal government again?**

The Inspector General made this recommendation against certain, specific individuals. I have not studied the basis for that recommendation. The Inspector General did not make that recommendation against me.

8. **Do you think the American people are well served when judicial nominees decline to answer simple factual questions by claiming that such questions call for the nominee to opine on “political questions”?**

I do not believe that it is appropriate for judicial nominees to comment on matters that are the subject of political controversy.

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

Please see my response to question 8.

**Nomination of Howard C. Nielson to the
United States District Court
For the District of Utah
Questions for the Record
Submitted January 17, 2018**

QUESTIONS FROM SENATOR WHITEHOUSE

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

No metaphor is perfect, but I generally agree with this one. I believe it effectively conveys the insights that in our constitutional system the role of judges is to faithfully apply the law and that issues of policy are to be decided by the people and their elected representatives.

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

There are some contexts, such as the decision to grant or deny certain forms of equitable relief, where the law requires a judge to consider practical consequences. Generally, however, a judge’s job is to apply the law faithfully without regard to policy considerations.

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

The Supreme Court’s cases provide considerable guidance regarding the proper application of Rule 56. These cases make clear that a judge must carefully and fairly evaluate the parties’ submissions to determine whether there is a genuine dispute as to any material fact without regard to the judge’s personal policy preferences.

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

I believe that a fundamental premise of our legal system is the right of each litigant to be heard. I believe that empathy can play an important role in helping a judge carefully and fairly listen to the arguments of each litigant. Ultimately, however, a judge must decide cases based on the law, not on other considerations.

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

I believe that a judge's personal life experience can help a judge carefully and fairly listen to the arguments of each litigant. Ultimately, however, a judge must decide cases based on the law, not other considerations.

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

No.

4. What assurance can you provide this Committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

I am deeply committed to giving each litigant, whether rich or poor, a fair chance to be heard and to deciding cases impartially based on the law.

- a. In civil litigation, well-resourced parties commonly employ "paper blizzard" tactics to overwhelm their adversaries or force settlements through burdensome discovery demands, pretrial motions, and the like. Do you believe these tactics are acceptable? Or are they problematic? If they are problematic, what can and should a judge do to prevent them?

I believe such tactics can be abusive and improper. The recent amendments to Federal Rule of Civil Procedure 26(b), which require that discovery requests be proportional to the needs of the case—considering, among other things, the parties' resources and whether the burden or expense of the proposed discovery outweighs its likely benefits—provide additional tools for preventing such abuses.

5. In 2005, you authored an OLC opinion concluding that the Geneva Conventions do not constrain how the United States treats civilians in its custody or control outside of the United States. Your opinion, if implemented, would essentially authorize the use of torture so long as it was done outside the United States. Beth Van Schaack, a former Deputy to the Ambassador-at-Large for War Crimes Issues at the State Department, has argued that your analysis uses a "linguistic sleight of hand" to reach a conclusion that

would “virtually gut” the treaty, and is so flawed that it should be added to the “legal scrapheap.” She further notes that the memo contains results-driven reasoning that fails to engage with opposing precedent and contrary interpretations that would have undermined your conclusions.

- a. Do you stand by the conclusions in your 2005 memo?

I have not studied the question since leaving the Office of Legal Counsel. The Fourth Geneva Convention is a complicated and difficult treaty and there is certainly room for good faith disagreement about its proper interpretation. However, the advice that Jack Goldsmith and I gave to the Criminal Division reflects a very traditional view of the Fourth Convention—the view taken by the Report issued by the Senate Foreign Relations Committee in connection with the Convention’s ratification and by prominent law-of-war scholars such as Richard Baxter, a view described by the State Department’s Legal Adviser in 2002 as “widely recognized,” and a view that one scholarly critic has even referred to as “the conventional wisdom.”

In addition, it is not correct that the Memo to File’s conclusion would essentially authorize the use of torture so long as it was done outside the United States. To the contrary, the Memo pointedly identified statutes, treaties, and rules of customary international law that bar torture and other mistreatment outside of the United States. *See* Memo to File at 27–28.

- b. Do you believe the Geneva Conventions do not constrain how the United States treats civilians in its custody or control outside of the United States?

The advice reflected in the memo to file addressed specific provisions of one of the Geneva Conventions. That memo made clear that Part II of that Convention would protect civilians outside of the United States. And the Supreme Court’s decision in *Hamdan* makes clear that Common Article 3 of the Geneva Conventions would apply in the context considered by the memo as well.

- c. If you stand by the memo’s conclusions, do you likewise believe that U.S. civilians could be lawfully mistreated by our enemies if they were held outside enemy territory? If not, why not?

The memo to file made clear that Part II of the Fourth Geneva Convention, other treaties, including the Hague Regulations, and the rules of customary international law would protect civilians in this context.

- d. How do you respond to Van Schaack’s criticisms?

Please see my response to question 5.a. In addition, the memo carefully analyzed the text, structure, and negotiating record of the Fourth Geneva Convention. It also carefully considered contrary interpretations of the Convention. *See, e.g.,* Memo to File at 8–13 & nn.8, 12, 14; *id.* at 15 n.16; *id.* at 22 n.21.

6. During the Bush administration, the DOJ Inspector General conducted numerous investigations into cases of illegally politicized hiring and firing at DOJ. You were involved in one of those cases, where OIG concluded that a 4-member screening committee on which you served had “considered political or ideological affiliations”

when evaluating candidates for career attorney positions. Your name appears several times in OIG's report. Responding to OIG's conclusions, you stated that you were "not in a position to go behind" OIG's data analysis showing that politics and ideology played a role in your committee's hiring decisions, but that if you "took it at face value, the results were not what the Department had intended."

- a. If your committee did not intend to screen candidates for partisan or ideological affiliation, how do you explain why it made hiring decisions that, per OIG's extensive data analysis, reflected ideological favoritism?

I do not recall participating in the screening process, and the Inspector General was uncertain whether I was involved in that process. Regardless, I have never made decisions relating to hiring civil service employees based on politics, ideology, or any other improper consideration. I have not studied the OIG's data analysis and am not in a position to explain the conclusions OIG drew from that analysis.

- b. Do you believe that subconscious ideological bias could have affected the committee's decisionmaking?

I have not studied the OIG's data analysis and am not in a position to explain the conclusions OIG drew from that analysis.

- c. As a judge, how would you guard against similar subconscious biases from affecting your judicial decisionmaking?

If I am fortunate enough to be confirmed, I am deeply committed to carefully and fairly listening to the arguments of all litigants and deciding cases impartially based on the law without regard to any personal policy preferences or other considerations.

**Nomination of Howard C. Nielson, Jr., to be United States District Judge for the
District of Utah
Questions for the Record
Submitted January 17, 2018**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

If I am fortunate enough to be confirmed, I would consider the factors that have been recognized by the Supreme Court and the Tenth Circuit.

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

Yes.

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

Yes. The Supreme Court's decision in *Washington v. Glucksberg* makes clear that this is an appropriate factor to consider. *Glucksberg* indicates that it is appropriate to consult statutes, treatises, and cases from the English common law and from our nation's history in considering this factor.

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

If I am fortunate enough to be confirmed, I would not only consider but would be bound to follow Supreme Court or circuit precedent recognizing a fundamental right. I would also consider precedent from a court of appeals outside my circuit.

- d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

Yes.

- e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. *Casey* and *Lawrence* make clear that this is an appropriate factor to consider.

- f. What other factors would you consider?

I would consider other factors set forth in Supreme Court and Tenth Circuit precedents.

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

The Supreme Court has made clear that the Fourteenth Amendment applies to both race and gender.

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

I would follow the Supreme Court's precedents holding that the Fourteenth Amendment protects against gender discrimination.

- b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

As a judicial nominee, it would not be appropriate for me to speculate on the timing of specific decisions of the Supreme Court.

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

Yes, that is my understanding of the Supreme Court's decision in *Obergefell*.

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

This is a matter that is currently subject to litigation and has not yet been resolved by the Supreme Court. As a judicial nominee, it would be improper for me to comment on such an issue.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

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

Yes, the Supreme Court has held that there is.

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

Yes, the Supreme Court has repeatedly held that there is.

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

Yes, that is my understanding of the Supreme Court's decision in *Lawrence*.

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

I do not disagree with any of the above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
- a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

In those contexts where the Supreme Court has indicated such evidence is relevant. For example, the Eighth Amendment and the Fourth Amendment are two areas where Supreme Court precedent sometimes requires consideration of such evidence.

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

Supreme Court precedent makes clear that such evidence is frequently relevant to establishing relevant adjudicative and legislative facts in many areas of the law.

5. You have been a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
- a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Persuasive scholarly arguments have been made that *Brown* is deeply faithful to the

core original meaning of the Fourteenth Amendment. As a judicial nominee, it would not be appropriate for me to attempt to classify the court's methodology in *Brown*.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited January 16, 2018).

The Supreme Court's decisions have given meaning to these terms and I would faithfully follow those decisions if I am fortunate enough to be confirmed.

6. You authored an amicus brief in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which argued that children born to married heterosexual couples are more likely to be raised in stable family units.
 - a. What evidence do you did you rely on when making that argument?

My clients' argument was that children born to married heterosexual couples are more likely to be raised in stable family units than the children of unmarried heterosexual couples. My clients relied primarily on evidence regarding the historical understanding of the purposes of marriage, as reflected in treatises, cases, and statutes. This evidence is contained in Part I.B. of the amicus brief.

- b. Do you believe that children raised by heterosexual, married couples experience a more stable upbringing compared to children raised by married same-sex couples?

No. Nor did my clients make this argument in the amicus brief.

- c. In your view, are same-sex marriages less stable compared to heterosexual marriages?

No. Nor did my clients make this argument in the amicus brief.

7. You filed an amicus brief in *Whole Woman's Health v. Hellerstedt*, 135 S. Ct. 2292 (2016). In part, the brief argued that, “[f]aced with conflicting evidence over the utility of the regulations at issue, the Texas Legislature chose to take the more cautious, safety-oriented approach,” and “[c]ourts are not qualified to second-guess this type of quintessentially legislative judgment.”
- a. Do you agree that the dispositive issue is whether the actions of the Texas legislature amounted to an undue burden on a women’s right to choose?

Yes, that is the standard the Court applied in *Whole Woman's Health* and previous decisions, such as *Casey*.

- b. Do you agree that, under this legal standard, a court must consider whether a legislature’s stated rationale to enact legislation that restricts abortion access is a pretextual justification for the legislation?

Although some of the briefs in the case addressed the issue of pretext, I do not believe the Supreme Court analyzed or relied on arguments relating to pretext in *Whole Woman's Health*. To the extent other Supreme Court precedents or Tenth Circuit precedents indicate that a court should consider pretext in this context, I would follow those decisions if I am fortunate enough to be confirmed.

8. While working in the Office of Legal Counsel, did you provide oral advice related to U.S. detention and/or interrogation to any U.S. government official on any occasion other than the advice to DOJ’s Criminal Division that you memorialized on August 5, 2005? If so, please describe the oral advice in detail and identify to whom it was given.

I worked on a number of national security issues while at the Office of Legal Counsel—primarily when Jack Goldsmith was head of the Office. Much of our work involved identifying and attempting to correct previous mistakes and excesses. I do not have access to nonpublic materials and am not confident that I recall everything that I worked on. In addition, the attorney client privilege, classification, and other considerations limit my ability to discuss matters that the Office has not made public. That said, I do not believe that I offered any oral advice relating to interrogation—to the contrary, I believe that any advice on this issue would have been given directly by the head of the Office—though I may have offered oral advice on certain issues relating to detention in consultation with and at the direction of the head of the Office.

9. During your hearing, you stated that your August 2005 OLC memo memorialized advice focused on a “charging decision.” Specifically, you stated that “there was no question at that time that the individual in question was going to be charged” and that “the question was only whether he was going to be charged under the specific provisions of the Geneva Convention at issue there, or under other federal criminal law.”
- a. Did the government charge “the individual in question” and, if so, what was the crime charged?

I believe the individual in question was charged with multiple counts of violating 18 U.S.C. § 113.

- b. Did the alleged conduct of “the individual in question” include alleged torture, abuse, or other violations of the Geneva Conventions in Afghanistan or Iraq?

I do not believe the indictment charged violations of the Geneva Conventions.

- c. Was criminal liability under the War Crimes Act the issue you were addressing in the advice memorialized in your August 2005 OLC memo?

I believe that may have been the issue that Jack Goldsmith and I were addressing in our advice.

- d. Did you advise the Criminal Division on other criminal statutes that could be a basis for a criminal charge for the alleged conduct?

I believe we discussed the availability of multiple bases for prosecution, though the ultimate decision of what charges to bring was made by the Criminal Division.

Questions for the Record for Howard C. Nielson, Jr.

Senator Mazie K. Hirono

1. As I mentioned at the hearing, as part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees for a lifetime appointment to the federal bench, I am asking nominees to answer the following two questions:

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

No.

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

No.

2. At the hearing, you were asked about a 2007 Washington Post Letter to the Editor that you co-wrote. In the Letter to the Editor, you responded to criticism of Steven Bradbury's torture memos during his tenure at the Justice Department's Office of Legal Counsel by defending Mr. Bradbury as "a careful lawyer of unimpeachable integrity and sound judgment." When asked about your involvement in the development of these memos, which Senator John McCain as called "permission slips for torture," you responded that you were asked to review these memos and identify problems with them.

a. In reviewing these memos, did you express any disagreement with them or identify any problems with them at that time?

The attorney-client privilege and other considerations prevent me from discussing specific views that I may have expressed at this time.

b. When you worked at the Department of Justice, did you speak out against Mr. Bradbury's torture memos or notify the Attorney General, the Justice Department's Inspector General, or any of your superiors of any concerns with these memos? If so, to whom did you present these concerns?

The attorney-client privilege and other considerations prevent me from discussing specific views that I may have expressed at this time. Prior to issuance, the memos were reviewed and discussed by senior officials in the Office of the Deputy Attorney General and the Office of the Attorney General, as well as senior officials in other parts of the Executive Branch.

c. Given that Mr. Bradbury's torture memos have been withdrawn, do you still believe that Mr. Bradbury is a "lawyer of unimpeachable integrity and sound judgment"?

The 2007 letter was written on behalf of all nine deputies who had worked under Mr. Bradbury. It was originally signed by all nine deputies but, pursuant to the Washington Post's policy, only two signatures were ultimately included. The letter

was intended as a general defense of Mr. Bradbury's professionalism against what we regarded as unfair attacks—I do not believe that I or any of the other deputies intended to speak to the merits of specific opinions.

3. During your tenure at the Justice Department's Office of Legal Counsel, you wrote a memo arguing that the Geneva Convention's protections that govern the treatment of civilians in war did not apply to those captured and detained in Afghanistan.
 - a. **International law scholars have called your memo "dangerous" and criticized it for its "results-driven reasoning that fails to engage (or even cite) all (or any of) the opposing precedent and contrary interpretations out there." How do you explain your failure to engage in contrary interpretations?**

I do not believe that this is a fair characterization of the memo to file. The Fourth Geneva Convention is a complicated and difficult treaty and there is certainly room for good faith disagreement about its proper interpretation. However, the advice that Jack Goldsmith and I gave to the Criminal Division reflects a very traditional view of the Fourth Convention—the view taken by the Report issued by the Senate Foreign Relations Committee in connection with the Convention's ratification and by prominent law-of-war scholars such as Richard Baxter, a view described by the State Department's Legal Adviser in 2002 as "widely recognized," and a view that one scholarly critic has even referred to as "the conventional wisdom." Nor is it correct that memo did not engage contrary interpretations. *See, e.g.*, Memo to File at 8–13 & nn.8, 12, 14; *id.* at 15 n.16; *id.* at 22 n. 21.

- b. **How can we be assured that you will not engage in such dangerous "results-driven" reasoning in your judicial opinions, if you are confirmed?**

As discussed in my response to question 3.a, I do not believe that this is a fair characterization of the memo to file. If I am fortunate enough to be confirmed, I am committed to deciding cases fairly and impartially based on the law without regard to personal policy views or other extraneous considerations.

- c. **In writing your memo, did you follow the Justice Department's internal review process and did you get feedback from other federal agencies? Was your memo shared with the State Department to get their input based on their international law expertise?**

The memo to file reflected oral advice that Jack Goldsmith and I provided to the Criminal Division. The memo itself is not a formal opinion but simply documented our research and analysis for OLC's files. Accordingly it was not subject to the review process generally used for formal opinions.

I do not recall consulting with the State Department's Office of Legal Adviser, though it is possible that Jack Goldsmith may have done so. In 2002, the Legal Adviser to the State Department had opined that "it is widely recognized that only individuals who fall into enemy hands in occupied territory or the enemy's territory are protected persons" under the Fourth Geneva Convention, Memorandum for William J. Haynes, General Counsel, Department of Defense, from William H. Taft, IV, Legal Adviser, Department of State, *Re: 1949 Geneva Conventions: The President's Decisions under International Law* 88 (Mar. 22, 2002)—the same position reflected in our advice to the Criminal Division.

4. You were asked at the hearing about your efforts to disqualify Chief Judge Vaughn Walker from *Perry v. Schwarzenegger*, which involved the issue of same-sex marriage, because Judge Walker is gay and in a committed relationship. Your filings in that case even demanded that he disclose his private marriage intentions. In response to questions at the hearing, you pointed out that these were litigation positions of your client.

a. Did the arguments you made in that case not comport with your own views?

It would be inappropriate under the rules of professional responsibility and deeply unfair to my clients for me to discuss which views of which clients I agree and disagree with personally.

- b. At the hearing, you stated that the law is clear that judges should not have to recuse themselves because of their status. You also explained that your efforts to disqualify Chief Judge Vaughn Walker were within the fair bounds of advocacy. Can you please explain how your efforts to disqualify Chief Judge Walker and vacate his judgment were within the fair bounds of advocacy if the law is clear that judges need not recuse themselves based on their status?**

My clients expressly disclaimed the argument that Judge Walker should have recused himself because he was gay. My clients' position was that Judge Walker failed to disclose facts that may have indicated that he had a direct, concrete, personal stake in the outcome of the case he was deciding.

5. In *Whole Woman's Health v. Hellerstedt*, you co-authored a Supreme Court amicus brief that defended restrictive abortion regulations in Texas.

a. Beyond the "Texas Legislature's judgment," what scientific evidence did you have that Texas's abortion regulations actually promoted women's safety?

The evidence offered in support of my clients' position on this issue is set forth in Part II of the amicus brief.

b. Do you think that regulations that force more than half of abortion clinics in a state to close, as was the case in Texas, restrict a woman's reproductive rights?

The Supreme Court held that the regulations at issue in *Whole Woman's Health* did constitute an undue burden and were thus unconstitutional. I accept that decision as the law of the land and, if I am fortunate enough to be confirmed, I will follow that decision and all other Supreme Court precedent.

c. By forcing women to drive to other states to get abortion services, didn't the Texas regulations, which the Supreme Court struck down, undermine any purported goal to make abortions safer for women in Texas?

The Supreme Court reached that conclusion in *Whole Woman's Health*. I accept this decision as the law of the land and, if I am fortunate enough to be confirmed, I will follow that decision and all other Supreme Court precedent.

6. You have taken many actions in your career that have opposed efforts to impose

restrictions on gun ownership, such as bans on large-capacity magazines and assault rifles.

a. Is it your view that the Second Amendment does not permit restrictions on possessing large-capacity magazines and semi-automatic assault rifles?

The views I express as an advocate in litigation are those of my clients. My clients in *Friedman v. City of Highland Park* took the position that the restrictions at issue in that case violated the Second Amendment.

b. You represented the National Rifle Association in unsuccessfully challenging firearms regulations that regulated gun ownership of people under age 21. Do you believe that the Second Amendment prevents any restrictions on gun ownership by young adults or children?

The views I express as an advocate in litigation are those of my clients. My clients in *NRA v. McCraw* and *NRA v. BATFE* took the position that specific restrictions on the purchase and carriage of firearms by 18–20 year-old adults were unconstitutional. My clients did not argue that the Second Amendment prevents all restrictions on gun ownership by such adults, nor did they challenge any laws restricting gun ownership by children under the age of 18.

7. You were named in a report by the Justice Department's Office of the Inspector General that found that the Department of Justice had engaged in politicized hiring from 2002 to 2006. The report referred to you as being part of a Selection Committee that had been deselecting candidates with liberal or Democratic Party affiliations.

a. Do you think it is appropriate for a federal government official to hire people based on their political affiliations for career positions in an agency involved in law enforcement?

No.

b. Can you affirm that you were not involved in any way in selecting or deselecting candidates for positions in the Department of Justice based on political affiliation?

Yes. I do not recall participating in the screening process, and the Inspector General was uncertain whether I was involved in that process. Regardless, I have never made decisions relating to hiring civil service employees based on political affiliation or any other improper consideration.

**Questions for the Record from Senator Kamala D. Harris
Submitted January 17, 2018**

For the Nominations of:

Barry W. Ashe, to be United States District Judge for the Eastern District of Louisiana

Howard C. Nielson, Jr., to be United States District Judge for the District of Utah

James R. Sweeney II, to be United States District Judge for the Southern District of Indiana

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?

I would review the statute or statutes establishing the sentencing range for the offense or offenses of which the defendant was convicted, review the presentence report, determine the appropriate sentencing range under the Sentencing Guidelines, and determine whether a departure or variance from the Guidelines would be appropriate based on the factors identified by the Sentencing Guideline policy statements and commentary or the factors identified by 18 U.S.C. § 3553(a) and Supreme Court and Tenth Circuit precedents.

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

Please see my response to question 1.a.

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

The Sentencing Guideline policy statements and commentaries identify factors that may justify a departure. In addition, in *United States Booker* and its progeny the Supreme Court has held that the Sentencing Guidelines are not mandatory and has identified various factors, including those set forth in 18 U.S.C. § 3553(a), that may justify a variance from the Sentencing Guidelines.

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

i. Do you agree with Judge Reeves?

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

If I am fortunate enough to be confirmed, I would be required to follow constitutional statutes requiring mandatory minimum sentences. Accordingly, as a judicial nominee, I believe it would be inappropriate for me to comment on the wisdom or desirability of such statutes.

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

Please see my response to question 1.d.i.

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

Please see my response to question 1.d.i.

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

1. Describing the injustice in your opinions?

If confronted with such a circumstance, I would consider proactive efforts that are available under the law and consistent with my ethical obligations.

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

Please see my response to question 1.d.iv.1.

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

Please see my response to question 1.d.iv.1.

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?

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

Yes, where the law permits such alternatives.

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 that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.

That is my understanding. For example, it is my understanding that the sentencing requirements established by Congress for criminal convictions involving crack and powder cocaine have resulted in racial disparities. It is my understanding that Congress has taken measures to reduce these disparities. The Constitution plainly prohibits judges from discriminating on the basis of race and, if I am fortunate enough to be confirmed, I am committed to resolving all cases fairly and impartially without regard to race or any other improper consideration.

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

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

Yes.

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

If I am fortunate enough to be confirmed, I am committed to giving serious consideration to qualified minorities and women for positions within my chambers and for any other positions where I am involved in the hiring process.