Nomination of Joel Carson to the U.S. Court of Appeals for the Tenth Circuit Questions for the Record
Submitted February 21, 2018

QUESTIONS FROM SENATOR

FEINSTEIN

1. In 2014, you represented Western Energy Alliance on an amicus brief filed in federal district court in New Mexico in the case, *Vermillion v. Mora County*, urging that a local ordinance banning hydraulic fracturing be struck down. The ordinance expressed concern that energy extractive practices compromised the safety of the community's water source. When the ordinance was struck down in a related case, you praised the ruling on your law firm's website, deeming it "important to property owners throughout the Western United States who have, in recent times, seen their valuable mineral rights essentially condemned by activist local and county governments." (*Local Government/Pre-emption*, Jan. 22, 2015.)

   a. What did you mean by "activist local and county governments"? Why was an ordinance, intended to protect a local community water and environment, an example of "activist" government?

   In that writing, I was referring to local and county governments that passed ordinances in areas where the legislature delegated to the State of New Mexico the authority to regulate in a certain area. The federal district court held that the local ordinances at issue were preempted by the laws of the State of New Mexico, which provided authority to a specific state agency to protect groundwater and the environment in relation to mineral development.

   b. What role do you believe local and county governments should have in ensuring the safety of their communities' water?

   The New Mexico Supreme Court has held that municipalities have only those powers that the State expressly confers on them. *City of Santa Fe v. Armijo*, 1981-NMSC-102.

2. In 2004, in *Bass Enterprises v. U.S.*, you argued that the federal government's delay in permitting an oil and gas company's extractive activities on federally-owned land amounted to a Fifth Amendment temporary takings and required compensation from the federal government. In the case, although the company had leased the land for extraction, such activities had the potential to disrupt nuclear waste stored underground, "thereby endanger[ing] the health and safety of the surrounding community." 381 F.3d 1360, 1367 (2004). Under the Waste Isolation Pilot Plant Land Withdrawal Act (WIPP), interagency coordination was needed to ensure the safety of the company's plans, which were ultimately approved. In rejecting the takings claim, the Federal Circuit wrote that "given that the [Bureau of Land Management] was faced with a possible environmental and health hazard, we do not want to 'encourage hasty decisionmaking' by the Government. Bass

underemphasizes the importance of ensuring the safety of the nuclear waste facility developed under the WIPP Act." *Id.* at 1367.

a. Do you agree that your argument that a temporary takings had occurred "underemphasize[d] the importance of ensuring the safety of the nuclear waste facility"?

Along with my partner, I represented the plaintiff-appellants in a longstanding dispute regarding the condemnation of a federal oil and gas lease. We advanced arguments on behalf of our client in good faith, based on applicable law and not contrary to precedents decided by the Supreme Court of the United States or the United States Court of Appeals for the Federal Circuit. The Federal Circuit rejected our arguments.

b. How do concerns for public welfare, including health and safety, factor into a takings (*Penn Central*) analysis?

As a sitting judge and nominee to the United States Court of Appeals for the Tenth Circuit, it would be inappropriate for me to give my opinion as to the manner in which certain factors are analyzed under a *Penn Central* analysis. If confirmed, I will faithfully apply *Penn Central*, as well as all takings precedent of the Supreme Court and the Tenth Circuit.

3. In 1998, you authored an article proposing a mechanism for the federal government to compensate cattle owners following the U.S. Fish and Wildlife Service's program to reintroduce Mexican wolves, an endangered species, into New Mexico and Arizona. You wrote, "The framers of the Constitution strongly supported private property rights and believed that the government was morally obligated to compensate property owners when it interfered with their private property rights. Those beliefs were formalized in the 'Takings Clause' of the Fifth Amendment to the Constitution."

a. What limits, if any, do you believe the framers envisioned on the moral obligations to compensate property owners when the government takes actions impacting private property to protect the public's health and safety?

I wrote that article in 1998 as a student at the University of New Mexico School of Law. At that time, I analyzed legal issues related to the reintroduction of the Mexican wolf and concluded that there should be an administrative procedure to compensate livestock owners and that the procedure should be fair, efficient, and respectful of the Constitution. Twenty years later, as a nominee to the United States Court of Appeals for the Tenth Circuit, it would be inappropriate for me to give my personal opinion as to how courts should consider public welfare, health, and safety in a takings analysis of private property.

4. In response to Question 11 of the Senate Judiciary Questionnaire, you listed your membership in the Mountain States Legal Foundation (MSLF) from 2014-2016. In addition

to indicating membership and dates of participation, Question 11 asks nominees to "indicate any office you held." At your hearing, Senator Coons asked you about your role on MSLF's Board of Litigation. You testified "my role would have been to look at cases [] and determine whether the legal theories that might have been proposed by staff counsel had merit."

a. Your Senate Questionnaire does not indicate that you served on MSLF's Litigation Board. Did you in fact serve on the board? If so, please indicate the dates of service and explain why your board membership was not listed. Please also indicate any other positions you held with MSLF.

Under Question 11, I listed my association with the Mountain States Legal Foundation (MSLF) from 2014 to 2016. In response to Senator Coons, I explained that I served on the "Litigation Board." MSLF is a nonprofit, public-interest legal foundation governed by a board of directors. I did not serve on the board of directors or on any other policy-making board at MSLF. The "Litigation Board" consists of dozens of attorneys who volunteer their time to screen and review potential cases for MSLF. I participated in that process and, as a volunteer attorney, provided feedback regarding legal theories under consideration in various cases.

b. Please list all cases in which you were involved and the nature of your involvement during your service on MSLF's Litigation Board.

In general, I primarily reviewed cases involving natural resources and property law. I did not have any decision-making authority as to legal strategy or participation by MSLF. The Board of Directors approves MSLF's litigation, and I did not serve on that board. I simply provided an assessment of potential cases and legal theories. As with all of my clients in private practice, my role was as an attorney offering advice and opinions in the context of confidential and privileged legal communications. The attorney-client privilege prevents me from providing more information.

c. Specifically, did you work on or review MSLF's amicus briefs filed in *North Carolina State Conference of the NAACP v. McCrory* (Fourth Circuit, 2016) or *Evenwel v. Abbott* (2015)?

No.

d. Were there any cases you reviewed in your capacity as a member of the MSF Litigation Board where you determined that the legal theories staff counsel had proposed did <u>not</u> have merit?

Not that I recall. For the cases I reviewed, I recall that the arguments had a good-faith basis in the law.

e. Why did MSLF – which describes itself as being "dedicated to individual liberty, the right to own and use property, limited and ethical government, and the free

enterprise system" – decide to file a brief supporting the ability of North Carolina to erect obstacles that make it more difficult for citizens to vote?

I am not aware of why MSLF filed such a brief.

5. 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?

   I understood I was supposed to fully disclose all responsive publications truthfully and to the best of my ability. My discussions occurred only with attorneys.

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

   No.

   c. Have you ever 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.

   I have never authored anything under a pseudonym. Based upon my understanding of the Questionnaire, I am not aware of any responsive material that I have not provided to the Committee.

   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.

   I do have a private Facebook page for friends and family that has privacy settings. I did review my privacy settings to ensure privacy for my children, friends, and family members. I did not delete or edit my statements made on Facebook.

6. 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 do not label myself as being "originalist." In analyzing the Constitution, a circuit judge on the United States Court of Appeals for the Tenth Circuit must first determine whether the question at issue has been addressed by the Supreme Court or the Tenth Circuit. If it has been addressed, that ends the inquiry. In the rare case that no precedent exists, the judge must analyze the constitutional issue based upon the text, structure and history of the Constitution consistent with the approach applied by the Supreme Court beginning with Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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

Under existing Tenth Circuit precedent, legislative history may be relevant where the statutory text is ambiguous. *Allen v. Geneva Steel Co.*, 281 F.3d 1173 (10th Cir. 2002).

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

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

Never.

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

A district court judge should faithfully apply all precedent of the Supreme Court and the relevant circuit court. A district court judge might question Supreme Court or relevant circuit court precedent in an effort to determine whether it applies to the particular case or controversy before it. If the precedent applies, however, the district court must follow it.

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

As a practitioner for more than twenty years whose clients included criminal defendants that made life-altering plea deals and other citizens that made important business decisions based upon existing court precedents, I strongly believe in adherence to the doctrine of stare decisis. As a nominee to an inferior federal court, however, it would be inappropriate for me to express an opinion regarding when it would be appropriate for the Supreme Court to overturn its own precedent.

9. 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?"**

As a nominee to the Tenth Circuit, *Roe v. Wade* and all other cases decided by the Supreme Court are binding precedent to which I will faithfully adhere.

b. **Is it settled law?**

Yes.

10. 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, it is settled precedent. If I am confirmed, I will apply it.

11. 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?**

On the date of my hearing, a terrible school shooting occurred in Florida. Since that time, the news has contained reports that members of Congress and other elected officials wish to legislate in this area. In light of my status as a nominee to the Tenth Circuit and the possibility that legislation in this area could be litigated in federal courts, it would be inappropriate for me to comment on whether I agree or disagree with Justice Stevens' dissent. If I am confirmed, I must follow all Supreme Court precedent, including *Heller*.

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

"Like most rights," the Supreme Court explained that "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Supreme Court did not "undertake an exhaustive historical analysis" as to "the full scope of the Second Amendment," but it did explain that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* As with all precedent of the Supreme Court, *Heller* is binding and I would follow it.

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

Please see answers to 11(a) and 11(b) above.

12. 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 at outside groups—about loyalty to President Trump? If so, please elaborate.

No.

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

I reviewed the questions. After reviewing the questions, I consulted my questionnaire and reviewed the statutes and reported decisions referenced in my answers. I then answered the questions to the best of my ability. I received some comments from lawyers at the Department of Justice, Office of Legal Policy. After considering their comments, I finalized my answers.

Nomination of Joel M. Carson III to the
United States Court of Appeals
For the Tenth Circuit
Questions for the Record
Submitted February 21, 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?

      Yes. Although the analogy is not precise, I believe it is a fair way of describing a judge's constitutional duty to apply or interpret the laws as written by Congress. The Judicial Oath makes clear that a judge is to faithfully and impartially discharge and perform his or her duties—much like an umpire—without respect to persons and to do equal right to the poor and rich.

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

      Generally, the legislative branch is best suited to consider the practical consequences of any law. The Supreme Court has held, however, that judges may consider the practical implications of the law in certain equitable proceedings, such as applications for preliminary injunction where the judge must determine whether the applicant will suffer irreparable injury. Thus, there are certain instances where practical consequences play a role in judicial decision-making.

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

      A judge's role is to interpret and apply the laws passed through bicameralism and presentment regardless of a judge's subjective personal opinions regarding those laws. That said, judges are not devoid of empathy or human emotion. Compassion and empathy are reflected, however, in the laws that judges must apply such as 18 U.S.C. § 3553(a). That statute, which requires the judge to "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," incorporates considerations where empathy and compassion for the person being sentenced may play a role.

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

      A judge's person life experience may give rise to an understanding of the facts and circumstances of a particular case. The judge cannot, however, disregard the rule of law based upon personal beliefs or preferences. The

judge must fulfill the judicial oath by applying the law evenhandedly to all persons appearing in his or her court.

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. Given your extensive history of working on behalf of the oil and gas industries, do you believe you can be neutral and objective when considering cases involving those industries? What steps will you take to ensure that?

   Yes. If confirmed, I will dutifully adhere to precedent of the Tenth Circuit and Supreme Court. As required by 28 U.S.C. § 453, "I will faithfully and impartially discharge and perform all duties incumbent upon me … under the Constitution and laws of the United States," regardless of the parties appearing in the case. In the event of an appearance of a conflict of interest in a case, I will analyze my participation as a judge in the case under 28 U.S.C. § 455 and, if appropriate, recuse from the case.

Senate Judiciary Committee
"Nominations"
Questions for the Record
February 14, 2018
Senator Amy Klobuchar

Questions for Joel Carson, Nominee to the United States Court of Appeals for the Tenth Circuit

- How do you view the importance of adhering to precedent, and how would you approach a case in which there was a relevant precedent that you felt was wrongly decided if you are confirmed to the Tenth Circuit?

  I strongly believe in strict adherence to precedent. The doctrine of stare decisis is critical in our judicial system. As a practitioner who has represented clients in matters from complex commercial transactions to federal criminal matters, I believe certainty and consistency are of the utmost importance to the persons involved in the judicial process. Circuit Judges on the United States Court of Appeals for the Tenth Circuit are bound by all precedent from the Supreme Court of the United States and the Tenth Circuit. Circuit Judges cannot overturn decisions of the Supreme Court and must follow those decisions – even if the Judges believe a decision is wrongly decided. One panel of the Tenth Circuit cannot overrule a decision of another panel absent en banc reconsideration or a superseding contrary decision by the United States Supreme Court. *See Burlington Northern & Santa Fe Ry. Co. v. Burton*, 270 F.3d 942, 947 (10th Cir. 2001).

- If you are confirmed, you will be hearing cases as part of a panel of judges. In your view, is there value to finding common ground – even if it is slightly narrower in scope – to get to a unanimous opinion on appellate courts?

  Yes.

Questions for the Record for Joel M. Carson III
From Senator Mazie K. Hirono

1. 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. In your Senate Judiciary Questionnaire, you noted that you are currently a member of several oil and gas associations and organizations and have been for many years. Some of these organizations, such as the New Mexico Oil & Gas Association, include hundreds of members and advocate for policies to benefit oil and gas companies.

   a. Will you remain a member of these organizations if you are confirmed as a federal court of appeals judge?

   No.

   b. Will you recuse yourself from cases involving (1) any companies or entities that are part of any oil or gas trade association with which you are currently affiliated or (2) any organizations of which you are currently a member?

   I will analyze recusal on a case-by-case basis utilizing the terms and provisions of 28 U.S.C. § 455. If analysis of 28 U.S.C. § 455 makes recusal appropriate with respect to the named organizations or their members, I will recuse from the case at issue.

   c. For how long will you recuse yourself from these matters?

   Please see answer to 2(b) above.

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QUESTIONS FROM SENATOR BOOKER

1. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[1] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[2]

    a. Do you believe there is a direct link between increases of 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 am generally aware of the study referenced in this question, but I have not had the opportunity to perform careful, independent research on the issue. I likewise have not had the opportunity to examine the basis for the study's conclusions. In general, a wide range of factors could affect crimes rates. As a current judge and nominee, it would be inappropriate for me to comment on any of those factors.

    b. Do you believe there is a direct link between decreases of 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.

    Please see my response to Question 1a.

2. 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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[1] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

[2] *Id.*