

**Nomination of Kathryn C. Davis to the United States Court of Federal Claims
Questions for the Record
Submitted February 19, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. You served as lead counsel on two cases in which you defended President Trump’s decision to rescind the “Deferred Action for Childhood Arrivals” program, or DACA. (*NAACP v. Trump; Trustees of Princeton University v. United States*) DACA provides a generation of young people—who did nothing wrong and stayed out of trouble—the ability to work and pursue an education here. The President told Dreamers he supported DACA, but then moved to end the program when Congress wouldn’t give him money for his border wall. Dreamers revealed their status to the government in good faith, believing they would be treated fairly.

a. Did you volunteer to work on this case?

As a career Justice Department attorney, the cases I handle are assigned to me by my supervisors. I was asked by my supervisor to join a team of attorneys handling the DACA-rescission cases filed in multiple jurisdictions. I accepted the assignment and took lead responsibility for the cases filed in the U.S. District Courts for the District of Columbia and Maryland.

i. If not, were you given the opportunity to decline to work on this case?

In my career at the Department, I have never declined to take a case that I was assigned to work on, nor have I sought to work on cases that I was not assigned to work on, either because I agreed or disagreed with the underlying policy or decision at issue. As a career attorney who has worked across three Presidents and five Attorneys General, I believe it is vitally important to the Department’s mission to have a cadre of career attorneys who defend the interests of the United States according to the law without regard to their political views. It has been my practice to accept assignments, so long as my work load permits and there are no ethical issues that would prohibit my representation.

b. Do you believe it’s appropriate to penalize these Dreamers after they had voluntarily revealed their status based on the good faith belief that the program would continue?

The cases to which this question pertains are currently pending before the Supreme Court. Respectfully, as a judicial nominee and Justice Department attorney who represented the Government in DACA-rescission cases, I do not believe it would be appropriate for me to comment on this on-going litigation.

- c. Didn't the President's statements supporting DACA suggest to Dreamers that they could rely on the continued existence of the program?**

Please see my response to question 1.b. above.

- d. Do you believe that all Dreamers must be deported?**

Please see my response to question 1.b. above.

- e. Did you work on the Trump administration's initial memos arguing that DACA was illegal?**

It is not clear to me the memoranda to which this question refers. Insofar as it relates to the September 5, 2017 memorandum of then-Acting Secretary Duke, that memoranda was issued before I joined in October 2017 the team of Justice Department attorneys handling litigation challenging the rescission of DACA.

- f. Did you work on the Trump administration's later memos arguing that, even if the program was legal, the President can end it if he wants to and the courts cannot review that decision?**

It is not clear to me the memoranda to which this question refers. Insofar as it relates to the June 22, 2018 memorandum of then-Secretary Nielsen, as a Justice Department attorney who represented the United States Government in the above-referenced litigation, my interactions with the defendant-agencies, as well as internally with other Justice Department attorneys involved in the DACA-rescission litigation, are subject to various privileges and protections from disclosure, including the deliberative process privilege, attorney-client privilege, and attorney work product doctrine. The decision to assert these privileges belongs to the agency-client, and in the case of the deliberative process privilege the agency-client and Justice Department. Moreover, I have an ethical duty to keep confidential "information protected by the attorney-client privilege under applicable law" and "other information gained in [a] professional relationship that the client has requested be held inviolate . . ." D.C. Bar Rule of Professional Conduct 1.6(b). Absent limited circumstances not relevant here, an attorney may reveal client confidences or secrets only with the client's informed consent. *Id.* 1.6(e).

Having consulted with the appropriate officials, I am authorized to state generally that I provided legal advice related to that memorandum but the nature of that advice is subject to privilege that is not mine to waive.

- g. As noted above, the Trump administration initially argued that the program was illegal, and then later pivoted to arguing that even if the program was legal, the President can end it if he wants to and the courts cannot review that decision. When did the administration first develop this new justification for the President's decision? Is it correct that it was after he had already ended the DACA program?**

Please see my response to 1.b. above.

- h. Do you think six-months' notice is enough time to tell someone who has spent their whole life in this country—and has been legally living, working, and studying here for years without doing anything wrong—that they must remove themselves to another country that they barely know?**

Please see my response to question 1.b. above.

2. You worked on a case in which you defended President Trump's declaration of a national emergency in order to use funds to build a wall on the southern border. By wide margins, both houses of Congress passed a joint resolution—which President Trump vetoed—to terminate the President's national emergency declaration. The Senate voted 59 to 41 in favor of the resolution. (H.J. Res. 46; Senate Vote 49 (Mar. 14, 2019); House Vote 94 (Feb. 26, 2019)) Twenty-five Republican members of Congress—Senators and Representatives—voted for the joint resolution. Senator Lamar Alexander said, “Never before has a president asked for funding, Congress has not provided it, and the president then has used the National Emergencies Act of 1976 to spend the money anyway. . . . Our nation's founders gave to Congress the power to approve all spending so that the president would not have too much power. This check on the executive is a crucial source of our freedom.” Senator Jerry Moran said, “I believe the use of emergency powers in this circumstance violates the Constitution. . . . This continues our country down the path of all powerful executive — something those who wrote the Constitution were fearful of.” (Emily Cochrane and Glenn Thrush, *Senate Rejects Trump's Border Emergency Declaration, Setting Up First Veto*, NEW YORK TIMES (Mar. 14, 2019))

- a. Did you volunteer to work on this case?**

As a career Justice Department attorney, the cases I handle are assigned to me by my supervisors. I was asked by my supervisor to join a team of attorneys handling suits challenging the President's February 15, 2019 declaration of a national emergency and subsequent federal agency actions to construct barriers at the southern border filed in multiple jurisdictions. I accepted the assignment and took lead responsibility for two cases filed in the U.S. District Court for the District of Columbia.

- i. If not, were you given the opportunity to decline to work on this case?**

Please see my response to question 1.a.i. above.

- b. Please explain why the Republican Senators quoted above are wrong.**

The cases to which this question pertains are currently pending before the Fifth, Ninth, and D.C. Circuit Courts of Appeals, and the several district courts. Respectfully, as a judicial nominee and Justice Department attorney who represents

the Government in these cases, I do not believe it would be appropriate for me to comment on this on-going litigation.

3. According to your Questionnaire for the Senate Judiciary Committee, you are not currently admitted to the U.S. Court of Federal Claims. Further, you did not list any matters that you have handled before that court.

a. Have you argued or appeared before the U.S. Court of Federal Claims?

The Justice Department component for which I work does not typically handle litigation filed in the U.S. Court of Federal Claims. As a result, I have not had the opportunity to practice before the Court.

In my capacity as a career Justice Department attorney, however, I have spent over 11 years representing the United States in civil suits in federal courts across the country. As such, I have gained firsthand experience with many special issues that arise only in litigation involving the Government as defendant, which are precisely the types of cases handled in the Court of Federal Claims. For example, whether a suit identifies a valid waiver of sovereign immunity or a cause of action against the Government is a threshold issue in the Court of Federal Claims, just as it is in district court, because the Tucker Act waives sovereign immunity for only certain types of claims and does not provide an independent right of recovery. Likewise, I have handled a number of Administrative Procedure Act claims involving the arbitrary-and-capricious review standard, which the Court of Federal Claims applies in certain cases, such as bid protests. My cases also frequently raise governmental privilege issues, which arise in the Court of Federal Claims, including the deliberative process, law enforcement, presidential communications, and state secrets privileges.

Additionally, as an attorney in the Federal Programs Branch, I have litigated suits in district courts across the country challenging a wide range of actions by various federal agencies. In that role, I have been called upon to get up to speed quickly on new areas of law and to handle cases on a number of different subject matters. I believe my skills and experience have prepared me to preside over cases before the Court of Federal Claims, which has a diverse docket.

i. If yes, please detail the cases that you argued or in which you appeared before the Court of Federal Claims.

Please see my response to question 3.a. above.

4. In May 2014, President Obama nominated five individuals to open seats on the Court of Federal Claims—Judge Nancy Firestone, Thomas Halkowski, Patricia McCarthy, Jeri Somers, and Armando Bonilla. All of them received hearings in June and July 2014, and were voice-voted out of Committee between June and August of 2014. Nevertheless, their nominations were blocked by Senator Tom Cotton, who argued that the Court of Federal

Claims' workload did not justify confirming any nominees to those vacancies. Senator Cotton stated, "The reason we should not confirm new judges to the Court of Federal Claims has little to do with these nominees and more to do with the court itself. It doesn't need new judges. We should keep in mind that the number of active judges authorized for the Court of Federal Claims by statute, 16, isn't a minimum number, it is a maximum. It is our duty as Senators to determine if the court needs that full contingent and to balance judicial needs in light of our obligation to be good stewards of taxpayer dollars.... [It] makes no sense to spend more taxpayer dollars on judges that the court simply does not need." (Floor statement, July 14, 2015)

a. What is your understanding of the court's current caseload and its need for judges?

I am aware that in Fiscal Year 2019 approximately 1,300 new cases were filed in the U.S. Court of Federal Claims, and during the same time period approximately 800 cases were resolved. Respectfully, as a judicial nominee, I do not believe it would be appropriate for me to comment on the Court's need for judges. The decision to appoint judges to the Court is for the President to make, with the advice and consent of the Senate.

b. Do you agree with Senator Cotton that "it makes no sense to spend more taxpayer dollars on judges that the court simply does not need"?

Please see my response to question 4.a. above.

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

a. When, if ever, is it appropriate for the Court of Federal Claims to depart from Supreme Court or relevant circuit court precedent?

It is not appropriate for a trial court to refuse to apply binding precedent of higher courts.

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

The Supreme Court has identified several factors that it weighs in deciding whether to overturn its own precedent, including "the quality of [the prior case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018).

6. 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”?

Regardless of any superlatives used to describe it, *Roe v. Wade* is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply it and all other binding Supreme Court and Federal Circuit precedent.

b. Is it settled law?

Yes. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Roe v. Wade*.

7. 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. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Obergefell v. Hodges*.

8. 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?

Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on the correctness of any Supreme Court decisions, including dissenting opinions. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *District of Columbia v. Heller*.

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

The Supreme Court held in *District of Columbia v. Heller* that “the right secured by the Second Amendment is not unlimited.” 554 U.S. 570, 626 (2008). It specifically recognized prohibitions on “the possession of firearms by felons and the mentally

ill,” “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,” as well as “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *Id.* at 626-27.

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

The Supreme Court “conclude[d] that nothing in [its] precedents foreclose[d] [its] adoption of the original understanding of the Second Amendment” provided in *Heller*. 554 U.S. at 625.

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

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

The Supreme Court held that First Amendment political speech rights extend to corporations. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Citizens United*.

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

Please see my response to question 9.a. above.

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

The Supreme Court has not reached the issue of whether First Amendment free-exercise rights extend to corporations. *See Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 736 (2014). Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on a matter, like this, that may come before the courts.

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

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

To the best of my recollection, I was never asked about my “views on administrative law.” In light of my position as a career Justice Department attorney, I discussed in interviews during the selection process cases in which I litigated administrative law issues. To the best of my recollection, as part of that discussion, I mentioned examples of circumstances in which the Supreme Court has held that judicial deference to the executive is appropriate, including *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), *Auer v. Robbins*, 519 U.S. 452 (1997) (now modified by *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019)), and in matters that are particularly within the Executive’s expertise, such as national security.

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

No.

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

As I testified at my hearing, my experience as a career Justice Department attorney has given me a deep appreciation for the role the judicial branch plays in resolving suits against the federal government. Many of the cases I have handled at the Justice Department have involved administrative law issues, which have raised interesting questions of justiciability, the scope of judicial review, and appropriate remedies. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including precedent on administrative law cases.

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

No.

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

I have not studied this matter in sufficient detail to reach a conclusion of my own.

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

The Constitution explicitly recognizes an individual's right to equal protection of the laws, as well as an individual's right to the free exercise of religion. Both of these guarantees are cornerstones of our individual freedoms. If confirmed, I will fully and faithfully apply the Constitution consistent with all binding Supreme Court and Federal Circuit precedent.

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

Please see my response to question 13 above. Additionally, the Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) that "the freedom to marry or not marry[] a person of another race resides with the individual and cannot be infringed by the State."

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

Please see my responses to questions 13 and 14 above.

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

A court must first interpret statutory text according to the fair meaning of the words and phrases used in the text itself. If the text is ambiguous, however, the court may apply tools of statutory interpretation, including consideration of legislative history "to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

No.

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

I received these questions from the Department of Justice's Office of Legal Policy (OLP) on February 19, 2020. I reviewed the questions and drafted responses, performing brief legal research where necessary to prepare an answer. I conferred with officials at the Justice Department, including OLP counsel, and then finalized my responses for submission to the Committee.

Written Questions for Kathryn Celia Davis
Submitted by Senator Patrick Leahy
February 19, 2020

1. You have served as counsel of record in six cases that were tried to final judgment – serving as lead counsel in only one. Your Questionnaire does not cite to any matters you handled before the U.S. Court of Federal Claims.

(a) Have you ever practiced before the U.S. Court of Federal Claims?

The Justice Department component for which I work does not typically handle litigation filed in the U.S. Court of Federal Claims. As a result, I have not had the opportunity to practice before the Court.

In my capacity as a career Justice Department attorney, however, I have spent over 11 years representing the United States in civil suits in federal courts across the country. As such, I have gained firsthand experience with many special issues that arise only in litigation involving the Government as defendant, which are precisely the types of cases handled in the Court of Federal Claims. For example, whether a suit identifies a valid waiver of sovereign immunity or a cause of action against the Government is a threshold issue in the Court of Federal Claims, just as it is in district court, because the Tucker Act waives sovereign immunity for only certain types of claims and does not provide an independent right of recovery. Likewise, I have handled a number of Administrative Procedure Act claims involving the arbitrary-and-capricious review standard, which the Court of Federal Claims applies in certain cases, such as bid protests. My cases also frequently raise governmental privilege issues, which arise in the Court of Federal Claims, including the deliberative process, law enforcement, presidential communications, and state secrets privileges.

Additionally, as an attorney in the Federal Programs Branch, I have litigated suits in district courts across the country challenging a wide range of actions by various federal agencies. In that role, I have been called upon to get up to speed quickly on new areas of law and to handle cases on a number of different subject matters. I believe my skills and experience have prepared me to preside over cases before the Court of Federal Claims, which has a diverse docket.

(b) If not, what assurances can you give this Committee that you are prepared to handle the unique matters you will oversee?

Please see my response to question 1(a).

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

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

King v. Burwell is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *King*.

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

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

I cannot speak to what the President or Justice Gorsuch meant by the statements referred to in this question. As recognized in the first canon of the Code of Conduct for United States Judges, “[a]n independent and honorable judiciary is indispensable to justice in our society.” Indeed, an independent judiciary is fundamental to the framework of our government. *See* U.S. Const., art III. As such, a judge “should be faithful to . . . the law and should not be swayed by partisan interests, public clamor, or fear of criticism.” Code of Conduct for U.S. Judges, Canon 3(A)(1).

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

Please see my response to question 3(a) above.

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

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

The answer to this question depends on what type of national security decision is at issue. For example, the Supreme Court has held that a determination of when active hostilities have ceased is a political decision for the Executive to make, in the absence of a clear congressional declaration. *See Ludecke v. Watkins*, 335 U.S. 160, 168–70 & n. 13 (1948); *see also, e.g., Dep’t of Navy v. Egan*, 484 U.S. 518 (1988) (decision to deny or revoke security clearance was not reviewable). In a

different circumstance, the Supreme Court held that courts can review the Executive's detention decisions during a time of active hostilities. See *Boumediene v. Bush*, 553 U.S. 723 (2008). If confirmed, I will analyze the facts of the case before me and follow applicable binding Supreme Court and Federal Circuit precedent to resolve a legal question of this type.

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

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

Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on a hypothetical scenario in which a President fails to comply with a court order. If confirmed, and if this type of issue arose in a case before me, I would carefully examine the facts and circumstances and follow applicable Supreme Court and Federal Circuit precedent, and any other relevant authorities.

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

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

The Constitution grants Congress the power to declare war, and grants the President the powers to conduct military, national security, and foreign affairs. The Supreme Court recognized in *Hamdan v. Rumsfeld* that notwithstanding the President's constitutional authority, "he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." 548 U.S. 557, 593 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). If confirmed, I will fully and faithfully follow applicable Supreme Court and Federal Circuit precedent regarding this issue.

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

Please see my response to question 6(a) above.

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

Please see my response to question 6(a) above.

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

Please see my response to question 4(a) above. The Supreme Court has frequently been called upon to determine whether and how to review Executive actions implicating its national security expertise. If confirmed, I will fully and faithfully follow applicable Supreme Court and Federal Circuit precedent regarding this issue.

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

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

The Supreme Court has held that gender-based government action is subject to strict scrutiny under an equal protection analysis. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996) (ban on admission of women to a military college required an "exceedingly persuasive justification"). If confirmed, I will fully and faithfully apply this precedent.

9. Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"

I cannot speak to what Justice Scalia meant by that comment. I would not characterize the Voting Rights Act in that way.

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

The Foreign Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const., art. I, § 9, cl. 8. Respectfully, as litigation concerning the scope of the Emoluments Clause is currently pending, it would be inappropriate for me as a judicial nominee to offer further comment on this question.

11. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the

House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.”

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

As a general matter, the factual record before a trial court is developed by the parties themselves through submission of evidence. An appellate court typically reviews the record that was created before the trial court. *See* Fed. R. App. P. 32(b); Sup. Ct. R. 26. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including cases addressing this issue.

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

Congress has the power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments “by appropriate legislation.” U.S. Const., amend. XIII, § 2; U.S. Const., amend. XIV, § 5; U.S. Const., amend. XV, § 2. As the Supreme Court has explained, “[b]y adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created” in these amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966). If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including cases addressing this issue.

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

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

Lawrence v. Texas is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Lawrence*.

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

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

If confirmed, as a trial court judge, I would not be permitted to overturn or refuse to follow binding precedent of superior courts. The Supreme Court has identified several factors that it weighs in deciding whether to overturn its own precedent, including “the quality of [the prior case’s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.” *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018).

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

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

The Code of Conduct for United States Judges provides that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,” as well as in five other enumerated circumstances. 28 U.S.C. § 455(a), (b). In my responses to the Committee’s Questionnaire, I provided two specific examples in which I would recuse myself: (1) cases that my husband oversaw in his capacity as Deputy Associate Attorney General at the Department of Justice, and (2) cases stemming from the same underlying agency action at issue in any district court litigation in which I played a role in my capacity as a career Justice Department attorney.

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

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

The referenced footnote in *Carolene Products* marked the Supreme Court’s recognition that certain legislation—for example, statutes that restrict voting rights—should be reviewed under heightened scrutiny, whereas economic legislation—like the filled milk statute at issue in *Carolene Products*—should be reviewed under a less rigorous rational basis analysis. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including cases in this area.

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

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

Yes.

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

I have not studied this matter in sufficient detail to reach a conclusion of my own. If confirmed, and if this type of issue arose in a case before me, I would carefully examine the facts and circumstances and follow applicable Supreme Court and Federal Circuit precedent, and any other relevant authorities.

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

Article I grants Congress limited and enumerated powers, including the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const., art I, § 8. As explained in my response to question 12 above, Congress has the power to enforce the Fourteenth Amendment “by appropriate legislation.” U.S. Const., amend. XIV, § 5. The Supreme Court has been called upon to review the scope of Congress’s powers under these constitutional provisions in numerous cases. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including cases addressing these issues.

20. In *Trump v. Hawaii*, the Supreme Court allowed President Trump’s Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President’s reason for the ban was animus towards Muslims. Chief Justice Roberts’ opinion stated that “the

Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

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

Trump v. Hawaii is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Hawaii*. Respectfully, as litigation respecting the Executive Orders at issue in *Hawaii* is currently pending, it would be inappropriate for me as a judicial nominee to offer further comment on this question.

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

Quoting *Planned Parenthood v. Casey*, the Supreme Court in *Whole Woman's Health v. Hellerstedt* reiterated that a state regulation presents an "undue burden" when it creates a "substantial obstacle to a woman's choice in a large fraction of the cases in which it is relevant." 136 S. Ct. 2292, 2313 (2016). If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Casey*. Respectfully, as litigation respecting state regulation of abortion is currently pending, it would be inappropriate for me as a judicial nominee to offer further comment on this question.

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

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

The Supreme Court explained in *Pearson v. Callahan* that "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and

the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” 555 U.S. 223, 231 (2009). It protects officials from civil liability only “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including cases in this area.

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

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

The Supreme Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) recognized the risk to privacy rights that are posed by technological advances that reveal a person’s particular movements. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Carpenter*. Respectfully, as litigation in *Carpenter* is on-going, it would be inappropriate for me as a judicial nominee to offer further comment on this question.

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

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

I am currently representing the United States Government in litigation in federal district courts defending suits that challenge the President’s February 15, 2019 declaration of a national emergency and subsequent federal agency actions to construct barriers at the southern border. Cases to which this question pertains are currently pending before the Fifth,

Ninth, and D.C. Circuit Courts of Appeals, and several district courts. Respectfully, as a judicial nominee and Justice Department attorney who represents the Government in these cases, I do not believe it would be appropriate for me to comment on this on-going litigation. The Government's positions defending the President's February 15, 2019 declaration of a national emergency and subsequent federal agency actions to construct barriers at the southern border are set forth in the briefs filed in numerous suits challenging the lawfulness of those actions.

25. Can you discuss the importance of judges being free from political influence or the appearance thereof?

As recognized in the first canon of the Code of Conduct for United States Judges, “[a]n independent and honorable judiciary is indispensable to justice in our society.” Indeed, an independent judiciary is fundamental to the framework of our government, which establishes three separate but co-equal branches that provide checks and balances to each other's authority. The Constitution likewise recognizes the importance of judges being free from political influence by providing for lifetime appointment and guaranteeing judges fixed compensation. *See* U.S. Const., art III, § 1; *see United States v. Will*, 449 U.S. 200, 217-18 (1980) (“A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.”). As such, a judge “should be faithful to . . . the law and should not be swayed by partisan interests, public clamor, or fear of criticism.” Code of Conduct for U.S. Judges, Canon 3(A)(1). If confirmed, I will fully and faithfully uphold that duty.

Senator Dick Durbin
Written Questions for Davis
February 19, 2020

For questions with subparts, please answer each subpart separately.

Questions for Kathryn Davis

- 1. Have you ever practiced before the Court of Federal Claims? If so, please discuss the matters on which you worked.**

The Justice Department component for which I work does not typically handle litigation filed in the U.S. Court of Federal Claims. As a result, I have not had the opportunity to practice, seek admission to practice, or observe cases before the Court.

In my capacity as a career Justice Department attorney, however, I have spent over 11 years representing the United States in civil suits in a dozen federal courts across the country. As such, I have gained firsthand experience with many special issues that arise only in litigation involving the Government as defendant, which are precisely the types of cases handled in the Court of Federal Claims. For example, whether a suit identifies a valid waiver of sovereign immunity or a cause of action against the Government is a threshold issue in the Court of Federal Claims, just as it is in district court, because the Tucker Act waives sovereign immunity for only certain types of claims and does not provide an independent right of recovery. Likewise, I have handled a number of Administrative Procedure Act claims involving the arbitrary-and-capricious review standard, which the Court of Federal Claims applies in certain cases, such as bid protests. My cases also frequently raise governmental privilege issues, which arise in the Court of Federal Claims, including the deliberative process, law enforcement, presidential communications, and state secrets privileges.

Additionally, as an attorney in the Federal Programs Branch, I have litigated suits in district courts across the country challenging a wide range of actions by various federal agencies. In that role, I have been called upon to get up to speed quickly on new areas of law and to handle cases on a number of different subject matters. I believe my skills and experience have prepared me to preside over cases before the Court of Federal Claims, which has a diverse docket.

- 2. Are you currently admitted to practice before the Court of Federal Claims? If so, when were you admitted?**

Please see my response to question 1 above.

- 3. Have you ever observed cases before the Court of Federal Claims in person? If so, please discuss the cases you observed.**

Please see my response to question 1 above.

**Nomination of Kathryn Celia Davis
to the United States Court of Federal Claims
Questions for the Record
Submitted February 19, 2020**

QUESTIONS FROM SENATOR WHITEHOUSE

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

Yes. In preparing my responses, I read the article and listened to the recordings as requested.

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

Respectfully, in accordance with the Code of Conduct for United States Judges, it would be inappropriate for me as a judicial nominee to comment on the judicial nominations process or on politically-oriented issues.

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

Please see my response to question 1.b. above.

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

No.

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

Please see my response to question 1.b. above.

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

I cannot speak to what Justice Roberts meant by his statements. But I believe that the proper role of a judge is to say what the law is, not what it ought to be, and that a judge's rulings must be impartial and must comport with the limits of the court's jurisdiction.

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

A judge's duty is to faithfully apply the law, regardless of whether she personally agrees or disagrees with the consequences of the decision. The law does not, however, require a judge to completely ignore a ruling's practical effects. For example, such factor could be considered in determining whether to stay a decision pending appeal. *See, e.g., Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990).

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

No. As the Supreme Court explained in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), the "threshold inquiry" on summary judgment is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Where there is only one objectively reasonable conclusion, "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

4. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

- a. What role, if any, should empathy play in a judge's decision-making process?

A judge's duty is to faithfully apply the law, regardless of whether she personally empathizes with any litigant's circumstances. That being said, it is important for judges to be empathetic in their interactions with all individuals who come before the court and to treat individuals with dignity, respect, courtesy, and patience.

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

A judge's duty is to faithfully apply the law, regardless of whether she personally agrees or disagrees with the decision based on her own personal life experiences. As noted above, however, personal life experiences can inform a judge's ability to treat individuals who come before the court with dignity, respect, courtesy, and patience.

5. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court's decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act's individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, "came after weeks of negotiations and trade-offs among the justices."

- a. In your view, what is the role of negotiating with other judges when deliberating on a case?

If confirmed, I would typically preside over matters before the U.S. Court of Federal Claims as a single trial court judge. I do not think it would be inappropriate for trial judges, as colleagues, to consult each other on particular cases. In my experience, colleagues can be an invaluable resource. Discussion should, however, focus on the applicable binding Supreme Court and Federal Circuit precedent, other laws, rules, or practices of the Court.

- b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague's, in another?

Please see my response to question 5.a. above.

- c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

The proper role of a judge is to faithfully apply the law to the particular facts of each case and to administer justice impartially and objectively, treating all individuals equally before the law. These aspects of a judge's duty are non-negotiable.

6. 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.

7. What do you believe is the proper role of an appellate court with respect to fact-finding?

As a general rule, "appellate tribunals are not appropriate fora for initial fact finding." *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). An appellate court may "remand if it believes the district court failed to make findings of fact essential to the decision;" "set aside findings of fact it determines to be clearly erroneous;" or "reverse incorrect judgments of law based on proper factual findings; [b]ut it should not simply [make] factual findings on its own." *Id.* (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986)).

8. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Yes.

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

The Supreme Court has held that deference to congressional fact-finding may be warranted when courts review legislation related to securing individual constitutional rights, but that "the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); see *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("Although we review congressional factfinding under a deferential standard, . . . [t]he Court retains an independent constitutional duty to review factual findings where constitutional

rights are at stake.”). If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Federal Circuit, including cases addressing this issue.

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

- a. Have you read Advisory Opinion #116?

Yes. In preparing my responses, I read the opinion as requested.

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

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

If confirmed, I will determine on a case-by-case basis whether any seminar or conference I plan to attend conforms to the Code of Conduct for United States Judges, including by reviewing any relevant advisory opinions of the Committee on the Codes of Conduct. I will faithfully follow the requirements set forth in the Canons of the Code of Conduct.

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

Please see my response to question 10.b.i.

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

Please see my response to question 10.b.i.

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

Please see my response to question 10.b.i.

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

Please see my response to question 10.b.i.

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

If confirmed, I will determine on a case-by-case basis whether any educational program I plan to attend conforms to the Code of Conduct for United States Judges, including by reviewing any relevant advisory opinions of the Committee on the Codes of Conduct. I will faithfully follow the requirements set forth in the Canons of the Code of Conduct.

**Nomination of Kathryn C. Davis, to be
Judge of the United States Court of Federal Claims
Questions for the Record
Submitted February 19, 2020**

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?

I would consider the factors set forth in *Washington v. Glucksberg* and its progeny, including whether the asserted right is, “objectively, ‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” 521 U.S. 702, 720–21 (1997) (internal citations omitted).

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

Yes. The Supreme Court has incorporated many expressly enumerated rights against the States under the Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

- 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. I would consider the types of sources recognized in *Glucksberg* and its progeny, including Supreme Court precedent and the history of the law’s treatment of the asserted right.

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

Yes. I would fully and faithfully apply all binding Supreme Court and Federal Circuit precedent. If no controlling authority existed, I would also consider consulting persuasive authority of other courts.

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

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. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent, including *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

- f. What other factors would you consider?

I would consider any other factors that may be applicable under binding Supreme Court and Federal Circuit precedent.

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 held that gender-based and race-based government action is subject to strict scrutiny under an equal protection analysis. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (ban on admission of women to a military college required an "exceedingly persuasive justification"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (ban on interracial marriage required the "most rigid scrutiny"). If confirmed, I will fully and faithfully apply these precedents.

- 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?

Please see my response to question 2 above.

- 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?

Please see my response to question 2 above.

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

The Supreme Court in *Obergefell v. Hodges* held that the Fourteenth Amendment protects the exercise of a same-sex couple's "fundamental right to marry in all States." 135 S. Ct. 2584, 2607 (2015). The Supreme Court has not reached the issue of whether the Fourteenth Amendment prohibits discrimination against gay and lesbian couples in other contexts. Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate

for me as a judicial nominee to opine on a matter, like this, that may come before the courts.

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

The Supreme Court has not reached the issue of whether the Fourteenth Amendment prohibits discrimination against transgender people, and this question is the subject of ongoing litigation in lower courts. Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on a matter, like this, that is pending before the courts.

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

The Supreme Court has held that married and unmarried persons have a constitutional right to use contraceptives. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would fully and faithfully apply these precedents.

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

The Supreme Court has held that a woman's decision to obtain an abortion is protected by the constitution. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I would fully and faithfully apply these precedents.

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

The Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558 (2003) that the constitution protects such relations. If confirmed, I would fully and faithfully apply *Lawrence*.

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

Please see my responses to questions 3 through 3.b. above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher 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?

As a trial court judge, I would consider such evidence if instructed to do so by binding Supreme Court and Federal Circuit precedent.

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

Generally speaking, Federal Rule of Evidence 702, as well as cases including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), allow a judge to admit expert opinions from these disciplines into evidence. In evaluating the admissibility and weight of such evidence, I would fully and faithfully apply the Federal Rules of Evidence and Supreme Court and Federal Circuit precedents.

5. In the Supreme Court’s *Obergefell* opinion, Justice Kennedy explained, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.”

- a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

The Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), is binding Supreme Court precedent. If confirmed, I will fully and faithfully apply *Obergefell* and all Supreme Court precedent.

- b. When is it appropriate to apply Justice Kennedy’s formulation of substantive due process?

Please see my response to question 5.a. above.

6. 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.

- a. 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?

Regardless of the debate surrounding this issue, *Brown v. Board of Education* is binding Supreme Court precedent. As I testified at my hearing, I believe it was correctly decided and, if confirmed, I will fully and faithfully apply it.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘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-papers/democratic-constitutionalism> (last visited Feb. 19, 2020).

Please see my response to question 6.a. above.

- c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

Yes. If confirmed, I will fully and faithfully apply all binding Supreme Court and Federal Circuit precedent regardless of whether that precedent is based on the original public meaning of a constitutional provision.

- d. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to question 6.c. above.

- e. What sources would you employ to discern the contours of a constitutional provision?

I would consider the types of sources recognized by the Supreme Court and Federal Circuit as appropriate sources to discern the contours of a constitutional provision.

7. In *NAACP v. Trump* and *Trustees of Princeton University v. United States*, you have defended the Trump administration’s rescission of the Deferred Action for Childhood Arrivals (DACA) program.

- a. The Trump administration’s memorandum in support of its motion to dismiss asserted that the rescission policy is an exercise of enforcement discretion “‘presumed immune from judicial review’ . . . and particularly unfettered in the context of immigration.” Please explain if and when executive enforcement determinations regarding immigration may be subject to judicial review.

The matter to which this question pertains is currently pending before the Supreme Court. Respectfully, as a Justice Department attorney who represented the Government in this suit, it is not appropriate for me to comment on this on-going litigation. I refer the

Committee to the Government's briefs in that case, which fully set forth the Government's positions.

- b. After the U.S. District Court for the District of Columbia ruled that the administration's rescission of DACA was unlawful, the Department of Homeland Security issued a memorandum laying out a new rationale for rescinding DACA, which you defended in court. How did you determine that this new justification was the administration's true rationale for rescinding DACA, rather than a post hoc justification designed in an attempt to survive the court's scrutiny?

Please see my response to question 7.a. above.

8. Please describe any experience you have practicing in the Court of Federal Claims.

The Justice Department component for which I work does not typically handle litigation filed in the U.S. Court of Federal Claims. As a result, I have not had the opportunity to practice before the Court.

In my capacity as a career Justice Department attorney, however, I have spent over 11 years representing the United States in civil suits in federal courts across the country. As such, I have gained firsthand experience with many special issues that arise only in litigation involving the Government as defendant, which are precisely the types of cases handled in the Court of Federal Claims. For example, whether a suit identifies a valid waiver of sovereign immunity or a cause of action against the Government is a threshold issue in the Court of Federal Claims, just as it is in district court, because the Tucker Act waives sovereign immunity for only certain types of claims and does not provide an independent right of recovery. Likewise, I have handled a number of Administrative Procedure Act claims involving the arbitrary-and-capricious review standard, which the Court of Federal Claims applies in certain cases, such as bid protests. My cases also frequently raise governmental privilege issues, which arise in the Court of Federal Claims, including the deliberative process, law enforcement, presidential communications, and state secrets privileges.

Additionally, as an attorney in the Federal Programs Branch, I have litigated suits in district courts across the country challenging a wide range of actions by various federal agencies. In that role, I have been called upon to get up to speed quickly on new areas of law and to handle cases on a number of different subject matters. I believe my skills and experience have prepared me to preside over cases before the Court of Federal Claims, which has a diverse docket.

**Questions for Kathryn C. Davis
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, 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. You served as lead counsel in two consolidated cases in which you defended the Trump Administration's decision to rescind the Deferred Action for Childhood Arrivals, or DACA, program. In those cases, the district court found that the Administration failed to provide an adequate rationale for rescinding the program. The court then gave the Department of Homeland Security 90 days to develop a further rationale.

Please explain in detail your role in the drafting of then-Secretary Nielsen's memorandum providing an additional rationale for the Department's rescission of DACA.

As a Justice Department attorney who represented the United States Government in the above-referenced litigation, my interactions with the defendant-agencies, as well as internally with other Justice Department attorneys involved in the DACA-rescission litigation, are subject to various privileges and protections from disclosure, including the deliberative process privilege, attorney-client privilege, and attorney work product doctrine. The decision to assert these privileges belongs to the agency-client, and in the case of the deliberative process privilege the agency-client and Justice Department. Moreover, I have an ethical duty to keep confidential "information protected by the attorney-client privilege under applicable law" and "other information gained in [a] professional relationship that the client has requested be held inviolate . . ." D.C. Bar Rule of Professional Conduct 1.6(b). Absent limited circumstances not relevant here, an attorney may reveal client confidences or secrets only with the client's informed consent. *Id.* 1.6(e).

Having consulted with the appropriate officials, I am authorized to state generally that I provided legal advice related to that memorandum but the nature of that advice is subject to privilege that is not mine to waive.

3. You worked on and signed the Trump Administration's brief opposing a request for a preliminary injunction in a case brought by the House of Representatives related to President Trump's diversion of Department of Defense funds for his border wall. In that brief, you argued that "[t]he House had and continues to enjoy ample legislative power to alleviate its purported harm and is fully capable of defending its interests without resort to the Judiciary." You then

provided examples of what, in your view, the House could have done, including “decline to enact legislation or withhold funding for the President’s preferred programs.”

In fact, this is exactly what Congress did. In January 2019, a 35-day government shutdown ended when Congress passed and President Trump signed appropriations bills that did not include President Trump’s requested funding for his border wall.

In light of this fact, please explain how you did not violate your ethical duty of candor to the court by arguing that the House could stop the President by “declin[ing] to enact legislation or withhold[ing] funding for the President’s preferred programs.”

To ensure the fair administration of justice and the integrity of the legal system, I believe it is every attorney’s duty to uphold the applicable ethical standards of conduct in the practice of law. I have faithfully fulfilled that duty throughout my career.

The matter to which this question pertains is currently pending before the D.C. Circuit Court of Appeals. Respectfully, as a Justice Department attorney who represented the Government in this suit, it is not appropriate for me to comment on this on-going litigation. I refer the Committee to the Government’s briefs in that case, which fully sets forth the Government’s positions. The parties’ good faith disagreement about whether the challenged agency actions are authorized by law is a legal question in dispute in the case, and I do not believe it raises any ethical issues. I believe the Government’s arguments are fully consistent with the obligation to conduct litigation with candor toward the tribunal.

4. How many cases have you litigated before the Court of Federal Claims?

The Justice Department component for which I work does not typically handle litigation filed in the U.S. Court of Federal Claims. As a result, I have not had the opportunity to litigate cases before the Court. In my capacity as a career Justice Department attorney, however, I have spent over 11 years representing the United States’ interests in civil suits in federal courts across the country.

5. The Court of Federal Claims is a court of specialized jurisdiction. What experience or expertise do you have in the areas of law handled by the Court of Federal Claims?

In my over 11-years as a career Justice Department attorney, I have gained firsthand experience with many special issues that arise only in litigation involving the Government as defendant, which are precisely the types of cases handled in the U.S. Court of Federal Claims. For example, whether a suit identifies a valid waiver of sovereign immunity or a cause of action against the Government is a threshold issue in the Court of Federal Claims, just as it is in district court, because the Tucker Act waives sovereign immunity for only certain types of claims and does not provide an independent right of recovery. Likewise, I have handled a number of Administrative Procedure Act claims involving the arbitrary-and-capricious review standard, which the Court of Federal Claims applies in certain cases, such as bid protests. My cases also frequently raise governmental privilege issues, which arise in the Court of Federal Claims, including the deliberative process, law enforcement, presidential communications, and state secrets privileges.

Additionally, as an attorney in the Federal Programs Branch, I have litigated suits in district courts across the country challenging a wide range of actions by various federal agencies. In that

role, I have been called upon to get up to speed quickly on new areas of law and to handle cases on a number of different subject matters. I believe my skills and experience have prepared me to preside over cases before the Court of Federal Claims, which has a diverse docket.

6. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

- a. **Do you agree that training on implicit bias is important for judges to have?**

Given a judge's role as decision-maker, I believe that training on and awareness of issues that may affect the decision-making process, including implicit bias, would be beneficial.

- b. **Have you ever taken such training?**

Yes. In my capacity as a Justice Department attorney, I have taken training on understanding and overcoming implicit bias in decision-making.

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

The implicit bias training that I took as a Justice Department attorney was very informative. If confirmed, I would be happy to explore the types of trainings that are available to judges, including implicit bias training, and, if available, would consider taking additional training on this topic.

**Nomination of Kathryn C. Davis
United States Court of Federal Claims
Questions for the Record
Submitted February 19, 2020**

QUESTIONS FROM SENATOR BOOKER

1. Based on your Questionnaire responses, it is unclear whether you have practiced before the Court of Federal Claims.

- a. Have you ever practiced before the Court of Federal Claims?

The Justice Department component for which I work does not typically handle litigation filed in the U.S. Court of Federal Claims. As a result, I have not had the opportunity to practice before the Court.

In my capacity as a career Justice Department attorney, however, I have spent over 11 years representing the United States in civil suits in federal courts across the country. As such, I have gained firsthand experience with many special issues that arise only in litigation involving the Government as defendant, which are precisely the types of cases handled in the Court of Federal Claims. For example, whether a suit identifies a valid waiver of sovereign immunity or a cause of action against the Government is a threshold issue in the Court of Federal Claims, just as it is in district court, because the Tucker Act waives sovereign immunity for only certain types of claims and does not provide an independent right of recovery. Likewise, I have handled a number of Administrative Procedure Act claims involving the arbitrary-and-capricious review standard, which the Court of Federal Claims applies in certain cases, such as bid protests. My cases also frequently raise governmental privilege issues, which arise in the Court of Federal Claims, including the deliberative process, law enforcement, presidential communications, and state secrets privileges.

Additionally, as an attorney in the Federal Programs Branch, I have litigated suits in district courts across the country challenging a wide range of actions by various federal agencies. In that role, I have been called upon to get up to speed quickly on new areas of law and to handle cases on a number of different subject matters. I believe my skills and experience have prepared me to preside over cases before the Court of Federal Claims, which has a diverse docket.

- b. Why do you think you were nominated to sit on the Court of Federal Claims?

I am not aware of the specific reasons why the President nominated me, and I was not privy to the internal decision-making process within the White House. I believe my over 14 years of trial court experience, primarily litigating in federal court on behalf of the United States, have amply prepared me with the skills and experience necessary to be a U.S. Court of Federal Claims judge.

2. You stated in your Questionnaire responses: "It is possible that cases before the Court of Federal Claims will involve claims arising from related agency actions that were challenged

in district court cases that I handled at the Federal Programs Branch. I will recuse myself from any Court of Federal Claims litigation stemming from the same underlying agency action at issue in any district court litigation in which I have ever played a role.”¹

Your recent work at the Justice Department has included participating in the defense of President Trump’s declaration of a national emergency related to immigration at the U.S.-Mexico border in an effort to divert appropriated military funding to support border wall construction.²

Recognizing the limited jurisdiction of the Court of Federal Claims, please explain in concrete terms how your recusal pledge would apply to any litigation that could stem from this matter.

As noted in the question, I am currently representing the United States Government in litigation in federal district courts defending suits that challenge the President’s February 15, 2019 declaration of a national emergency and subsequent federal agency actions to construct barriers at the southern border. It is possible that litigation may arise in the U.S. Court of Federal Claims that is based on the same agency actions that are being challenged in district courts. For example, based on some brief legal research, I located a case in which an unsuccessful bidder for a contract to build border fencing challenged the U.S. Army Corps of Engineers’ decision to override a stay of contract performance triggered by the plaintiff’s bid protest. The override was based, at least in part, on the declared national emergency. *Fisher Sand & Gravel Co. v. United States*, 143 Fed. Cl. 247 (2019). Although the lawfulness of the national emergency declaration was not at issue, this is an example of a situation where my work as a career Justice Department attorney in district court litigation could counsel in favor of disqualification from Court of Federal Claims litigation under the Code of Conduct for United States Judges, 28 U.S.C. § 455.

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

I typically do not assign labels to myself. I understand originalism to mean that a court should interpret a law according to the fair meaning of the words and phrases used in the text, as those words and phrases were understood by the public at the time of the law’s enactment.

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

I typically do not assign labels to myself. I understand textualism to mean that a court’s interpretation of a law must be derived from the text of the law itself, not from speculation about the lawmakers’ intent or from the desire for a particular outcome.

¹ SJQ at 23.

² *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019); see SJQ at 20.

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

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

A court must first interpret statutory text according to the fair meaning of the words and phrases used in the text itself. If the text is ambiguous, however, the court may apply tools of statutory interpretation, including consideration of legislative history "to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

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

Please see my response to question 5.a. above.

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

Yes. I believe judicial restraint is important as it respects the fact that Article III (as well as Article I) courts are courts of limited jurisdiction. I understand judicial restraint to mean that a trial court should fully and faithfully apply binding precedent of higher courts, interpret the law according to the fair meaning of its text, and issue decisions consistent with the law rather than a desired result.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.³ Was that decision guided by the principle of judicial restraint?

Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on the correctness of any Supreme Court decisions. If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Federal Circuit, including *District of Columbia v. Heller*.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁴ Was that decision guided by the principle of judicial restraint?

Respectfully, in accordance with the Code of Conduct for United States Judges and the

precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on the correctness of any Supreme Court decisions. If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Federal Circuit, including *Citizens United v. FEC*.

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

Respectfully, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on the correctness of any Supreme Court decisions. If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Federal Circuit, including *Shelby County v. Holder*.

7. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁶ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.⁷

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

I have not studied this matter in sufficient detail to reach a conclusion of my own. Moreover, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on the correctness of any Supreme Court decisions or on politically-oriented issues.

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

Please see my response to question 7.a. above.

³ 554 U.S. 570 (2008).

⁴ 558 U.S. 310 (2010).

⁵ 570 U.S. 529 (2013).

⁶ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

⁷ *Id.*

⁸ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

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

Please see my response to question 7.a. above.

8. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.⁸ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁹ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.¹⁰ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹¹

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

I have never practiced criminal law, and I have not studied this matter in sufficient detail to reach a conclusion of my own.

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

Please see my response to question 8.a. above. Based on my brief review, the data provided in the cited reports suggests that there is a disproportionate rate and length of incarceration by race and ethnicity.

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

No.

⁹ *Id.*

¹⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹¹ *Id.*

¹² U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹³ Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

¹⁴ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁵ *Id.*

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹² Why do you think that is the case?

Please see my response to question 8.a. above.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹³ Why do you think that is the case?

Please see my response to question 8.a. above.

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

Given a judge's role as decision-maker, I believe training on and awareness of issues that may affect the decision-making process, including implicit bias, would be beneficial in both the criminal justice system as well as in civil matters.

9. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁴ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁵

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

I have never practiced criminal law, and I have not studied this matter in sufficient detail to reach a conclusion of my own.

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

Please see my response to question 9.a. above.

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

Yes. In my experience, a diversity of backgrounds and viewpoints enhances discussion and informed decision-making, whether it be in the class room, work place, or community.

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

Yes. A judge should treat all individuals who come before the court with dignity, respect, courtesy, and patience.

12. Do you believe that *Brown v. Board of Education*¹⁶ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As I testified at my hearing, in accordance with the Code of Conduct for United States Judges and the precedent set by prior nominees before this Committee, it would be inappropriate for me as a judicial nominee to opine on the correctness of any Supreme Court decisions. *Brown v. Board of Education*, however, was a landmark case that righted a grave social and moral injustice in our nation's history. Because of its uniqueness, I am comfortable saying it was correctly decided. If confirmed, I will fully and faithfully apply it.

13. Do you believe that *Plessy v. Ferguson*¹⁷ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. The Supreme Court correctly overruled *Plessy*. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). If confirmed, I will fully and faithfully apply the Supreme Court's decision in *Brown*.

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

No.

15. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."¹⁸ Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Each judge must determine for herself whether disqualification is required or warranted by the particular circumstances of each case before the court. If confirmed, I will determine on a case-by-case basis whether I must or should be recused from a matter consistent with the Code of Conduct for United States Judges, 28 U.S.C. 455, and all other laws, rules, and court practices governing the situation. Under that statute, a judge's race or ethnicity is not listed as a basis for recusal. *See id.*

¹⁶ 347 U.S. 483 (1954).

¹⁷ 163 U.S. 537 (1896).

¹⁸ Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

¹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

16. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”¹⁹ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court held in *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” If confirmed, I will fully and faithfully apply all binding precedent of the Supreme Court and Federal Circuit, including *Zadvydas*.

Questions for the Record from Senator Kamala D. Harris
Submitted February 19, 2020
For the Nomination of:

Kathryn C. Davis, to be a Judge of the United States Court of Federal Claims

1. 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. As stated in the Code of Conduct for United States Judges, the integrity and independence of the judiciary is dependent upon judges administering justice fairly and impartially, and treating all individuals equally before the law.

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

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

Yes. In my experience, a diversity of backgrounds and viewpoints enhances discussion and informed decision-making, whether it be in the class room, work place, or community.

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 confirmed, I would be happy to review the hiring policies and procedures of the U.S. Court of Federal Claims and, if it falls within my authority, give serious consideration to qualified minorities and women for leadership and/or supervisory positions.

Senator Josh Hawley
Questions for the Record

Kathryn C. Davis
Nominee, U.S. Court of Federal Claims

1. What role should the original public meaning of the Constitution's text play in federal courts' interpretations of its provisions?

A court's duty in interpreting constitutional text, or the text of any law, is to determine the fair meaning of the words and phrases used by the lawmakers as those words and phrases were understood by the public at the time of enactment. By doing so, the court respects the separation of powers by giving effect to the laws as they were adopted by the people's representatives.

2. As a judge, how would you approach a case involving an issue of first impression?

If I were presented with a legal issue for which there was no binding authority on point, I would look to controlling authority in any analogous cases, particularly if the higher court's reasoning would apply equally to the issue before me. I may also consult persuasive authority from other courts if those courts dealt with the same or substantially similar issues. If the issue were a matter of statutory interpretation, I would start by determining the fair meaning of the text as the words and phrases were understood by the public when the law was enacted. To the extent the text were ambiguous, I would consider relevant methods of statutory interpretation that have been recognized by higher courts.

3. Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?

The Supreme Court subsequently determined that *Lochner* was not correctly decided. *See, e.g., W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). If confirmed, I will fully and faithfully apply the Supreme Court's post-*Lochner* precedent.