Nomination of Ryan Holte to the U.S. Court of Federal Claims
Questions for the Record
Submitted February 21, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. 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?

   According to statistical information and court messages posted on the Court of Federal Claims website, the court's docket has increased steadily over the last two years and the docket is expected to reach a 12-year peak this fiscal year. Numerous news articles and statistical reports concerning the court have also mentioned the hundreds of cases, and multiple class actions, filed in recent months related to alleged loss and taking of private property as part of the Army Corps of Engineers' decision to open flood-control reservoirs in Houston, Texas toward the end of Hurricane Harvey.

   Of the 16 active judges authorized for the court, there are now six vacancies and the Chief Judge has recalled Senior Judges to assume a 100% assignment from both the general jurisdiction and bid protest dockets. It is also my understanding that the court will have additional vacancies as there are five judges whose 15-year active service terms end before August 2018—for a total of 11 vacancies of the 16 active judges.

   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"?

   I am not sufficiently familiar with Sen. Cotton's statement nor the facts and circumstances in 2015 that it might relate to. Further, it would be

inappropriate and a violation of the judicial canons for me to comment on a political question, such as this, as a judicial nominee.

2. In your Senate Questionnaire, in response to a question about the number of cases you have tried to verdict, judgment or final decision, you wrote, "I have not tried a case." You also wrote that you "appeared before a district court, on one TRO [Temporary Restraining Order] hearing" and that you were "chief counsel on one appellate matter that reached final appellate decision."

a. Have you ever litigated a matter before the U.S. Court of Federal Claims?

I began my legal career as a law clerk to Judge Loren Smith on the Court of Federal Claims (former Chief Judge from 1986-2000). I was admitted to practice before the court, and the Court of Appeals for the Federal Circuit, during my clerkship and have been closely connected with legal matters and issues covered under the jurisdiction of the Court of Federal Claims at numerous points throughout my professional career. Further, while clerking for Judge Smith, I was able to observe and assist the court with complete coverage of docket matters, including one damages trial which is rare for the court's cases—since the court's docket is all civil, with no juries, most issues are resolved on dispositive motions. While I have not personally served as counsel of record on a matter before the court, in private practice I advised clients regarding issues covered under the court's unique jurisdiction. Further, in my work since 2012 as chief counsel to a defense technology company, I have worked for over five years within the primary exclusive areas of law the Court of Federal Claims has jurisdiction over, including: the various phases of the Federal Acquisition Regulations System; negotiations and contracting with the Department of Defense and primary DoD contractors; and federal government takings. By way of example, as part of this chief counsel work in 2015 and 2016, I negotiated the release of an electrical engineering defense technology patent I am co-inventor of that was held under DoD secrecy order pursuant to the Invention Secrecy Act of 1951—while there was no litigation, the governing law and application in practice is of the very unique variety only applicable to the Court of Federal Claims. 35 U.S.C. §§ 181–188. Finally, my empirical academic research since 2013 has included the review and coding of hundreds of intellectual property cases, including many on the Court of Federal Claims docket. As noted in response to Question 2.g. below, it has been my ongoing job responsibility to stay current and active on the law, rules, and cases of the court.

b. How many times have you appeared in court to represent a client?

I do not have detailed records from when I worked in private practice, or served as a trial attorney at the Federal Trade Commission, to provide a precise numerical answer to this question. Further, my practice experience focused on areas of civil litigation that rarely required a court-argued motion or trial—just the same as the issues before the Court of Federal Claims. Motions in these subject areas are often

argued and decided by courts on the briefs, rather than in person. This is particularly true in areas of law regarding technical contracts or intellectual property maters, involving complex areas of law and lengthy records. Based on my best recollection, I have appeared in court approximately fifteen times. During my time clerking on the Court of Federal Claims, I attended all proceedings with Judge Smith, although most were telephonic as is the usual practice of the Court of Federal Claims.

c. How many motions have you argued in court?

I do not have detailed records from when I worked in private practice, or served as a trial attorney at the Federal Trade Commission, to provide a precise numerical answer to this question. Further, my practice experience focused on areas of civil litigation that rarely required a court-argued motion or trial—just the same as the issues before the Court of Federal Claims. Motions in these subject areas are often argued and decided by courts on the briefs, rather than in person. This is particularly true in areas of law regarding technical contracts or intellectual property maters, involving complex areas of law and lengthy records. Throughout my career working in civil litigation, I have been involved in drafting dozens, if not hundreds, of motions.

d. How many depositions have you taken? How many depositions have you defended?

I do not have detailed records from when I worked in private practice, or served as a trial attorney at the Federal Trade Commission, to provide a precise numerical answer to this question. Further, during my time at the Federal Trade Commission, in addition to deposition work, as part of preparation for case filing and request for temporary restraining order, I gathered and took many sworn affidavits for evidence disclosing proposed witness testimony. Based on my best recollection, I have taken part in approximately 30 depositions and evidentiary affidavits.

e. What in your background makes you qualified to join the Court of Federal Claims at this point in your career?

In addition to qualifications described above in answer to Question 2.a., and my Senate Questionnaire, other aspects of my legal and professional career qualify me to join the Court of Federal Claims. First, the work of a Court of Federal Claims judge is in large part spent reviewing lengthy administrative or contracting records and drafting detailed opinions to decide dispositive motions on the briefs. For the last five years I have worked as an academic with significant research time spent on the analysis of vast volumes of legal and court record information before drafting academic publications—articles in excess of 25,000 words, thoroughly researched and written to withstand tenure and peer review on a continuous basis by top national scholars in my fields. As I know from my time clerking on the

court, a judge must decide cases, and draft opinions, in a diligent, thorough, and timely manner. Primary concern must be on clarity and thoroughness in legal opinions to follow precedent and provide justice for the individual parties. Further, my work as an academic in the classroom has focused on teaching property law and intellectual property subjects, and the most recent caselaw in these areas. I teach many of the primary precedential appellate and Supreme Court opinions of Federal Claims jurisdiction cases in my classes, and my empirical research centers around analyzing the appellate law of the Federal Circuit—the primary area for Federal Claims precedent. Accordingly, my last five years of academic work would serve as a unique and valuable asset to the court—legal research and writing diligence plus subject matter expertise in property law and IP subjects. Further, my academic position as an endowed chair and director of the law school's IP Center, has provided me with legal management responsibilities valuable to managing judicial chambers: I am the lead administrator for the law school's LLM degree and IP certificate; I oversee a number of endowed account budgets; I manage and plan the annual IP edition of the Akron Law Review and IP Symposium conference; I plan and lead IP Advisory Council meetings and activities (a Council with multiple federal judges); and I lead planning and management of multiple activities each month to support the student body and local bar with IP legal education.

Regarding other subject matter areas of the court, as noted in response to Question 2.a., my work since 2012 as chief counsel to a defense technology company, has covered many of the primary exclusive areas of law the Court of Federal Claims has jurisdiction over, including: the various phases of the Federal Acquisition Regulations System; negotiations and contracting with the Department of Defense and primary DoD contractors; and federal government takings. I personally understand the day-to-day operations of a defense contracting business and the uniqueness and "language" of that world. Further, I am an inventor in scientifically technical areas often part of government contracting, and my pre-law professional experience includes sailing internationally as a Merchant Marine oiler-engineer on United States Maritime Administration (MARAD) vessels and working for a large defense contractor on DoD engineering contract projects. Just the same as when I clerked on the court, this scientific expertise and background would serve as a key asset to understanding the often dense technical subjects that come before the court, and the unique government litigation defendants—like MARAD—that are regular parties before the court. In addition to legal experience, I have significant practical experience with Court of Federal Claims issues.

My civil litigation experience is directly applicable to Court of Federal Claims practice and subject matter. Beyond beginning my legal career as a law clerk on the court, as detailed in my response to Question 2.c. above, my legal practice experience focused on areas of civil litigation with principal work on written dispositive motions practice. This is the primary legal work of a Court of Federal Claims judge—all civil law, issues decided by the judge and no juries. As a law

firm associate, my non-pro bono practice was all civil law with focus on intellectual property subjects and complex contract disputes. The actions I litigated in district courts centered on intellectual property and contract subject matter which covers primary areas of the Court of Federal Claims' docket (takings, contracts/bid protests, and intellectual property); the civil litigation procedures in these areas are further essentially the same. While serving as a trial attorney at the Federal Trade Commission, my practice was all civil, I gained experienced working as lead counsel for the government on various actions and leading civil investigations, and court dispositions were primarily on the pleadings. Finally, my experience clerking on a United States Court of Appeals was instrumental to understand the operations of the federal appellate system, to review and analyze countless federal civil trial records and legal issues on appeal, and to strengthen my legal research and writing skills from the federal appellate perspective—invaluable to understanding the entire federal legal system.

Thomas Halkowski was nominated by President Obama to the same seat to which you are now nominated. Mr. Halkowski began his legal career by clerking on the Court of Federal Claims; had been admitted to practice before the Court of Federal Claims for 24 years by the time he was nominated; had litigated numerous cases in front of the Court of Federal Claims during his time as a trial attorney at the Department of Justice (indeed, on his Senate Judiciary Questionnaire, four of his top ten cases were litigated in the Court of Federal Claims); and had worked on almost 140 cases during his combined tenure at the Department of Justice and his law firm.

f. How do you believe your qualifications for this position compare with Mr. Halkowski's?

As a judicial nominee, it would be inappropriate for me to comment or compare my qualifications to that of another person. I am very grateful to the President for nominating me and the trust he has placed in me. It is my hope that this Committee, and the Senate, will consider my nomination based on my qualifications for the position.

g. What are you already doing – and what do you plan to do – to prepare yourself to serve on this very important court if you are confirmed?

I have been blessed to have two of the finest judges in the country as my greatest legal mentors—the judges for whom I clerked, Loren Smith on the Court of Federal Claims and Stanley Birch on the Eleventh Circuit. The wisdom I have learned from both of them, as well as their support and mentorship throughout my career and this nomination process, has been invaluable. I have been in touch with them regularly throughout this process and received continuous guidance on the best steps in immediate preparation in the event that I am confirmed. I have further been acquainted with many of the judges on the Court of Federal Claims since

my clerkship, including the Chief Judge, and I have been in touch with many regarding guidance on my nomination and preparation for joining the court in the event I am confirmed. Since my clerkships, private practice, and throughout my academic career, I have continuously studied recent opinions of the Court of Federal Claims, Rules of the United States Court of Federal Claims and recent changes thereto, the Federal Rules of Evidence, and current applicable cases in the United States Court of Appeals for the Federal Circuit and Supreme Court. As an academic with teaching and research focused on property and intellectual property issues, it has been my ongoing job responsibility to stay current and active on the law, rules, and cases of this very important court. Finally, since my nomination, the Administrative Office of the Courts has provided me with volumes of materials for use by new judges which I have diligently studied and continue to do so.

3. The American Bar Association (ABA) does not evaluate nominees to the Court of Federal Claims. Nevertheless, in considering nominees for federal district and appellate courts, the ABA has stated that "a prospective nominee to the federal bench ordinarily should have at least twelve years' experience in the practice of law." You graduated from law school in 2008, and then clerked for two years (one on the Court of Federal Claims and one on the Eleventh Circuit Court of Appeals) before starting to practice law.

   a. What is the minimum number of years of legal experience that you think federal judicial candidates ought to have?

   As a judicial nominee, it would be inappropriate for me to comment as to the qualifications that the political branches, namely the President or Senate, should consider in nominating and confirming judges.

   b. If you had been nominated to a federal district or appellate court, you would have less experience than the ABA typically expects of those nominees. Do you believe Senators should hold nominees to the Court of Federal Claims to a lower standard than nominees to other federal courts?

   I have not taken part in the ABA's adoption of recommendations for minimum years of experience prospective Article III court nominees ordinarily have, nor why the ABA has never evaluated nominees to the Article I Court of Federal Claims. I cannot comment on their standards or reasons, nor would it be appropriate for me to do so.

4. In May 2017, you co-delivered a presentation for a Bench & Bar Seminar at the U.S. District Court for the Eastern District of Missouri. You provided the Judiciary Committee with slides from the presentation. Referring to the Senate Judiciary Committee's hearing for Justice Neil Gorsuch in the spring of 2017, one of the slides notes that Democratic Senators had asked "loaded and indignant" questions,

and Republican Senators had asked "softballs and oddballs."

a. Please provide a list of the questions from Democratic Senators that were "loaded" and/or "indignant."

As noted in my Judicial Questionnaire, and this question, this May 2017 presentation was co-delivered and organized with an academic colleague from Southern Illinois University School of Law. We put two sets of materials together in one PowerPoint presentation. I took no part in drafting the slide referenced, preparing for the material related to the slide, nor delivering the slide at the presentation. I do not recall any detail regarding what my colleague presented for this slide. My portion of the presentation primarily related to updating the district court judges and local attorneys on recent Supreme Court cases related to intellectual property issues.

b. Please provide a list of the questions from Republican Senators that were "softballs" and/or "oddballs."

Please see the response to Question 4.a. above.

5. In your Senate Questionnaire, you indicate you volunteered with the Donald Trump for President Campaign in 2016. **Please describe the nature of the volunteer work you performed.**

My individual involvement consisted of volunteer Election Day communications work organized through my local county Republican Party and the Illinois Republican National Lawyers Association group. During the 2016 campaign season, my wife served as an elected Williamson County Illinois Republican precinct committeewoman, and in that capacity I had indirect involvement assisting her with various local-county social events, general fundraisers, and parade gatherings for all Republicans on the 2016 ballot. In all cases, my work was volunteer and county-local.

6. In your Senate Questionnaire, you list that you have been a member of the Taneo Network since 2009. The group does not appear to maintain a currently publicly accessible website. A 2015 archived Taneo Network webpage notes: "Through our regional and national activities, we build relationships among the country's most accomplished young conservatives and libertarians." (Available at: https://web.archive.org/web/20150312125202/teneonetwork.com/about.php#mission.)

a. Please explain the mission of the Taneo Network. Does the group "build relationships among the country's most accomplished young conservatives and libertarians"?

In responding to this question I assume it relates to the "Teneo Network" as indicated on page six of my Senate Questionnaire.

I did not author that statement nor do I recall having ever read it. I understand the Teneo public website to be www.teneonetwork.com. Teneo is a 510(c)(3) nonpartisan, and nonprofit, organization that gathers members from a variety of professional backgrounds for dinners and social activities to discuss current events.

b. Why did you join the Taneo Network?

In responding to this question I assume it relates to the "Teneo Network" as indicated on page six of my Senate Questionnaire.

Teneo gathers members from a variety of professional backgrounds for dinners and social activities to discuss current events. I enjoy discussion and debate regarding national and global issues. Especially as an academic, I support diversity of opinion and debate regarding the issues of the day. As a member of Teneo, I have encountered a wide range of opinions at Teneo events.

c. Please describe your involvement in the group and any positions held.

In responding to this question I assume it relates to the "Teneo Network" as indicated on page six of my Senate Questionnaire.

My involvement with the group has been only to attend discussion dinners and social activities. I have held no position in the group, but in a volunteer capacity I have organized five to ten dinners with guest speakers to learn about and discuss current events and issues.

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

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

Without disclosing any specific advice from attorneys, my understanding was that I was required to disclose all responsive material truthfully and to the best of my ability.

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

material you were told you did not need to disclose.

It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet" and I have done so truthfully and to the best of my ability.

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

No. It was and remains my understanding that I was required to disclose responsive material, including material "published only on the Internet" and I have done so truthfully and to the best of my ability.

d. Once you decided to seek a federal judicial nomination or became aware that you were under consideration for a federal judgeship, have you taken any steps to delete, edit, or restrict access to any statements previously available on the Internet or otherwise available to the public? If so, please provide the Committee with your original comments and indicate what edits were made.

No, I have taken no such steps.

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

It would be improper for me to state my personal views about an appropriate mode of constitutional interpretation. The Supreme Court has used various tools when interpreting the Constitution in different contexts. Should I be fortunate enough to be confirmed as a judge on the Court of Federal Claims, I will apply any appropriate binding precedents regarding the methods to be employed when interpreting a constitutional provision in question. I would be bound by oath to interpret the Constitution by applying all precedents of the Supreme Court, the Court of Appeals for the Federal Circuit, and the pre-1982 United States Court of Claims, without regard to any label assigned to constitutional interpretation approach.

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

When construing a statue, there is generally no need to go beyond its text when its meaning is clear and unambiguous. If the text is not clear and unambiguous, judges should follow the canons of statutory construction, and other tools, to assist in determination of meaning. Depending on applicable precedent, legislative history may be consulted when the relevant statutory text is ambiguous. As a lower court judge, I would impartially apply binding precedent that considered legislative history in construing a statute.

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

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

    It is never appropriate for a district court, or the Court of Federal Claims, to depart from Supreme Court or relevant circuit court precedent.

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

    It is never appropriate for a district court judge, or a Court of Federal Claims judge, to depart from Supreme Court or relevant circuit court precedent. In very rare circumstances—while still applying Supreme Court or circuit precedent—a lower court judge may respectfully raise a developing legal issue or suggest a need for clarification from a higher court.

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

    As a nominee to a lower court, it would be inappropriate for me to comment on what circumstances might justify the Supreme Court to overturn its own precedent.

11. 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?"**

    For a Court of Federal Claims judge, there is no distinction between precedent of the Supreme Court. All Supreme Court precedent, including *Roe*, is equally binding.

    b. **Is it settled law?**

    Please see my response to Question 11.a. above.

12. 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?**

Obergefell is binding precedent of the Supreme Court, and should be applied fully and faithfully by judges of lower courts including the Court of Federal Claims.

13. 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?

It would be improper for me to state my personal views about a legal issue that may come before me should I be confirmed as a judge. I will pledge to apply any applicable binding precedent, including *Heller*.

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

The majority opinion in *Heller* states that the "right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court further stated: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id*. at 626-27. It would be improper for me to state anything regarding my personal policy views about a legal issue that may come before me. As a judge I will pledge to apply any applicable binding precedent, including *Heller*.

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

I have not studied *Heller* nor the history of Second Amendment caselaw to sufficiently opine on this. Further, under the Code of Conduct for United States Judges, as a Court of Federal Claims judicial nominee, it would be inappropriate for me to offer a personal opinion regarding a specific Supreme Court opinion.

14. You indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 2005 and serve on the organization's Executive Committee's Intellectual Property Practice Group (2014-present). The Federalist Society's "About Us" webpage

states that, "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." The same page states that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I did not write those statements and cannot speak for the Federalist Society as to their meaning.

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

Please see my response to Question 14.a. above.

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

Please see my response to Question 14.a. above.

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

No.

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

I received the questions on the evening of Wednesday February 21, 2018. After reviewing the questions I drafted answers and conducted limited research where necessary. I shared my answers with the Department of Justice Office of Legal Policy (OLP) attorneys. After conferring with attorneys at OLP I finalized my responses and authorized OLP to submit on my behalf.

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QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

    a. Do you agree with Justice Roberts' metaphor? Why or why not?

    Yes. While the metaphor is not a complete description of the role of a judge, it does convey a fundamental responsibility of judicial work—impartially applying governing law to the facts of a case without regard to personal preferences or personal beliefs.

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

    Practical consequences of a particular decision should only be taken into account if the law governing a case requires that consideration, for example decisions concerning equitable relief. In most decisions, a judge's role is to apply the law to the facts of a case without regard to practical consequences, even consequences the judge may disfavor.

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

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

    I agree that a judge, and all people, can benefit from empathy to better listen and understand those they interact with personally or professionally, amongst other things. In the courtroom, a federal judge takes an oath to "administer justice without respect to persons, and do equal right to the poor and rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States" 28 U.S.C. § 453. A judge is obligated to make decisions and apply the law without regard to an individual party's circumstances.

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

    A judge's personal life experiences can assist them in better listening and understanding the particular facts or circumstances of a case. Decisions, however, must be based on impartially applying governing law to the facts of a case without regard to personal life experience or preference.

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement,

or issue an order that is contrary to an order from a superior court?

No.

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

I am committed to upholding the administration of justice "without respect to persons, and do equal right to the poor and rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States" as required under the oath I would take as a judge. 28 U.S.C. § 453. This oath would require me, as a judge, to uphold the interests of the "little guy" with few resources just the same as a large corporation, or the United States government, the defendant in the Court of Federal Claims. As I quoted from Abraham Lincoln in my introductory statement at my Judiciary Committee hearing: "Concerning the original Court of Claims, President Lincoln said in his 1861 address to Congress, 'It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.' It is the honor of my legal career to receive nomination to serve that national justice, at the Court of Federal Claims, and have my nomination for a 15-year term considered by this Committee."

Further, my legal background and experience should provide assurances that I would render decisions impartially with personal understanding and respect for all litigants that could come before me. As a law professor I have taught and mentored hundreds of law students from a myriad range of diverse educational and cultural backgrounds. My academic research has, in part, shined light through case studies on "little guy" (or gal) inventors attempting to compete against large competitors with patent rights. As a multiple small business owner, and most recently partner and chief counsel of a small defense technology company, I am well-acquainted with scarce resources in a field consisting almost entirely of large corporations. At the Federal Trade Commission, I focused my litigation practice on consumer protection actions working on behalf of consumers from around the country defrauded in schemes related to financial and sales fraud, working personally with hundreds of those individuals throughout my time at the Commission. In private practice, my clients included large and small entities equally and I devoted significant pro bono time to represent indigent criminal defendants (approximately 25% of my time at the firm). Finally, throughout my legal career, and teaching, I have assisted in advancing the programs of bar associations and small business development centers to provide legal and non-legal services to those without representation.

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

      The rules of federal courts have long recognized that such tactics are not

acceptable and are problematic. As notes to the Federal Rules of Civil Procedure proclaim, a judge should apply the rules of procedure "in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party." Directly applicable to the Court of Federal Claims, in 2016, the Rules of the United States Court of Federal Claims, Rule 26(b) was amended (corresponding to FRCP 26 changes effective in 2015) to give judges additional means of ensuring the scope of discovery "proportional to the needs of the case, considering the importance of the issues at stake in the action."

5. As a member of the Teneo Network, did you agree with its goal to "establish conservativism as the most relevant, most responsive and most effective political ideology"? If confirmed, will you maintain your membership in this network?

   I did not author that statement nor do I recall having ever read it. As I noted in response to Ranking Member Feinstein's Question 6, Teneo is a 510(c)(3) nonpartisan nonprofit organization that gathers members from a variety of professional backgrounds for dinners and social activities to discuss current events. As a member of Teneo, I was never asked to adopt a particular position on any issue and have actually encountered a wide range of opinions at Teneo events. If confirmed, I would evaluate my membership in this organization, and every organization I am a part of, under the Code of Conduct for United States Judges.

6. Do you believe it is the role of a judge to "establish conservativism as the most relevant, most responsive and most effective political ideology"? If confirmed, what steps will you take to assure litigants that you will make decisions based on the law and facts, and not a political ideology?

   As stated in response to Question 5, I did not author that statement nor do I recall having ever read it. Further, I do not believe that statement reflects anything about the role of a judge. As stated in response to Question 4, I am committed to upholding the administration of justice "without respect to persons, and do equal right to the poor and rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States" as required under the oath I would take as a judge. 28 U.S.C. § 453. This oath would require me, as a judge, to impartially apply governing law to the facts of a case without regard to personal preferences or personal beliefs. In addition to abiding by this oath, if confirmed, I would abide by the Code of Conduct for United States Judges and all Canons including avoiding impropriety or even the appearance of impropriety, fairness, impartiality, removal from engagement in extrajudicial activity that is not consistent with the office, and refraining from political activity.

Questions for the Record for Ryan T. Holte
From Senator Mazie K. Hirono

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.

Nomination of Ryan Holte to the
United States Court of Federal Claims
Questions for the Record
Submitted February 21, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute 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.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] 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.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[4]

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

    My general understanding is that numerous empirical studies have shown racial disparities and biases in the criminal justice system, however, as a judicial nominee it would be inappropriate for me to give the impression I have prejudged one particular study over another. I believe that, unfortunately, racial disparities and biases continue to exist in our society. If I am fortunate enough to be confirmed as a judge on the Court of Federal Claims, I am committed to doing whatever the law allows a Federal Claims judge to do in preventing illegal bias motivated by racism.

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

    Please see my answer to Question 1.a. above.

    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.

    My academic research focuses on civil law issues primarily related to intellectual property law. I have not studied the criminal justice system, either academically or personally.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.[5] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.[6]

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

    My understanding is that many factors contribute to crime rates and incarceration. As a Federal Claims judicial nominee it would be inappropriate for me to give the impression I have prejudged one particular study over another.

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

    Please see my answer to Question 2.a. above.

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

    As a judicial nominee, it would be inappropriate for me to comment as to the qualifications that the political branches, namely the President or Senate, should consider in nominating and confirming judges. I note though, that I am the son of a Middle Eastern religious refugee and should I be fortunate enough to be confirmed as a judge on the Court of Federal Claims, I believe my background would contribute to demographic diversity within the judicial branch.

4. Please describe why you believe you are qualified to serve as a judge on the Court of Federal Claims even though you have not litigated a case before that court.

    Please see my response above to Question 2. a-e. from Ranking Member Feinstein.

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

[6] *Id.*