Nomination of Robert Anthony Molloy to the United States District Court for the District of the Virgin Islands
Questions for the Record
July 3, 2019

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

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

   I do not believe that it is proper for a district court judge to question any decision of the Supreme Court whether it is precedent in a concurring opinion or a dissent.

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

   A district court is bound by the decisions of the Supreme Court and the circuit court of appeals for that district. However, a district court is not bound by any decisions of another district court.

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

   In *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989), the Supreme Court opined that it may overrule one of its own prior decisions. As a district court nominee, it would be inappropriate for me to state my view as to when it would be appropriate for the Supreme Court to overturn its own precedent.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

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

I believe that *Roe v. Wade* and every other precedential decision of the Supreme Court is super-stare decisis and superprecedent as it applies to district court judges. If confirmed, I pledge to faithfully and fully apply all Supreme Court precedent, including *Roe v. Wade*.

b. Is it settled law?

Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes. As a district court judge nominee, I consider all precedential decisions of the Supreme Court to be settled law. If confirmed, I pledge to faithfully and fully apply all Supreme Court precedent, including *Obergefell v. Hodges*.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

I do not believe that as a judicial nominee to a federal district court it would be appropriate for me to comment on the merits of a statement made by a justice or judge of a higher court. I believe that lower court judges commenting on the correctness or incorrectness of statements made by a higher court justice or judge can have a negative effect on the integrity of the judiciary.

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

In *Heller*, the Supreme Court stated that there was no doubt that both the text and history of the Second Amendment "conferred an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). The Supreme Court also stated that that "right was not unlimited" and that "[the Supreme Court] does not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation . . ." *Id*. The Court concluded by stating: "The Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence], including some measures regulating handguns." *Id*. at 636. If confirmed, I pledge to fully and faithfully follow all Supreme Court precedent, including *Heller*.

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

According to the Code of Conduct for United States Judges (which has been deemed to apply to judicial nominees), I believe that it would be inappropriate for me to comment on whether the *Heller* decision departed from decades of Supreme Court precedent. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

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

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

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., Amend. I. Both individuals and corporations are entitled to First Amendment freedom of speech protection. *See Citizen United v. Federal Elections Comm'n*, 558 U.S. 310, 342 (2010) (stating "First Amendment protection extends to corporations."). In *Citizens United*, the Court also stated that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id*. at 365. As a judicial nominee, I do not believe that it would be appropriate to comment on whether I believe corporations have First Amendment rights that are equal to, greater than, or lesser than individuals' First Amendment rights. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A). If confirmed, I pledge to fully and faithfully apply all Supreme Court 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 response to Question #5(a) above.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held, among others, that a closely-held corporation was a "person" and entitled to protections under the Religious Freedom Restoration Act of 1993 ("RFRA") in that the government may not substantially burden its exercise of religion except under certain circumstances. The Supreme Court also noted that "[b]y enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." *Id*. at 2768. Respectfully, as a judicial nominee, I do not believe that it would be appropriate to comment further on this issue. *See* Code of Conduct for United States

Judges, Canons 2(A) and 3(A)(6). If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent, including *Hobby Lobby*.

6. 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?

   No.

   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"?

   My views on administrative law is the same as with any other area of law. Just as with other areas of law, judges must apply the law fairly and impartially. With regards to administrative law, Congress granted administrative agencies the authority to promulgate regulations to govern its operations and conduct quasi-judicial proceedings. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), the Supreme Court held that federal courts must give deference to the decisions of administrative agencies when interpreting a legal issue within its authority and Congress has not spoken precisely on that issue. If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent, including matters concerning administrative law.

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

   A judge may consider legislative history in construing a statute only if the language of the statute is ambiguous. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000) ("When the statute's language is plan, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.").

8. 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, I have not.

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

I received the questions on Wednesday, July 3, 2019. In answering these questions, I reviewed my Senate Judiciary Questionnaire, conducted limited research, and re-familiarized myself with the Supreme Court cases mentioned in each question. I also reviewed the Code of Conduct for United States Judges which have been determined to apply to judicial nominees. *See* Code of Conduct for United States Judges, Canon 1, Commentary ("The Code is designed to provide guidance to judges and nominees to judicial office.").

Written Questions for Robert Molloy
Submitted by Senator Patrick Leahy
July 2, 2019

1. You have recused yourself from a significant number of cases while serving on the Superior Court of the Virgin Islands – over 80 in total. Any appearance of a conflict for a judge undermines not just the integrity of the judge's decisions, but of our independent judiciary more broadly, so I would not fault a judge for being cautious when weighing a recusal decision.

    (a) Do you foresee a similar rate of recusal as a District Court judge? If not, why do you anticipate a different outcome?

    I do not foresee a similar rate of recusal as a district court judge. A significant amount of my recusals were related to cases in which my brother, Attorney Jeffrey Moorhead, and my personal friend and family attorney, Attorney Kye Walker, appeared as counsel of record for litigants. This amounted to approximately 30% of all of my recusals.

    Another 15% of my recusals were because the litigant was an employee of the Superior Court who resided in the district of St. Croix. In order to avoid the appearance of impropriety and pursuant to Superior Court Rule 17, I recused myself from those cases and the matters were reassigned to another judge in our sister district, which is a customary practice in the Superior Court of the Virgin Islands. *See* Super. Ct. Rule 17 ("In any case in which a judge or Court employee from one judicial district is a party, a judge from the other district may be assigned to hear and determine the mater, except in uncontested matters."). I do not foresee this being an issue if I were to be confirmed as a district court judge.

    Additionally, another 10% of my recusals were due to the fact that I previously represented the Government of the Virgin Islands in litigation pending in the Superior Court. I do not foresee the issues litigated in those cases being raised in federal court.

2. The Insular Cases of the early 20th century created a legal regime wherein unincorporated territories of the United States do not automatically receive the full protections of the Constitution.

    (a) With the understanding that you are not being asked to comment on whether those cases were rightly decided, how would you describe the Virgin Islands' current protections under the U.S. Constitution? What parts of the Constitution apply in full force, what parts do not, and what is unclear or undecided?

As an unincorporated territory of the United States, not all provisions of the U.S. Constitution apply to individuals residing in the United States Virgin Islands. *See e.g.*, *Alston v. Alston*, 207 F.2d 667, 670 (3d Cir. 1953) (opining that "it seems to be settled that the entire Constitution does not extend of its own force to unincorporated areas."). Both the Supreme Court and the Third Circuit Court of Appeals have stated that only fundamental rights (natural or personal rights) embodied in the U.S. Constitution apply to residents of the Virgin Islands. As far back as 1921, the Third Circuit Court of Appeals stated in *Soto v. United States*, 273 F.628, 633 (3d Cir. 1921), that "[t]he only laws of the United States applicable to the Virgin Islands are the Act of Congress of Mach 3, 1917, and the fundamental law of the Constitution guaranteeing certain rights to all within its protection."

Many of the provisions found in the U.S. Constitution apply to individuals residing in the Virgin Islands through the Revised Organic Act of 1954, a federal statute. *See* 48 U.S.C. § 1541, *et seq*. I am aware that there is pending, and possibly, impending litigation on the issue of what parts of the U.S. Constitution should apply to individuals residing in the Virgin Islands and other U.S. territories. Thus, as a judicial nominee and current sitting judge, it would be inappropriate for me to comment any further on this issue. *See* Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

3. 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?

The statements referenced above are consistent with many decisions of the Supreme Court and are highly instructive as to when and how a judge is to interpret a statute. If confirmed, I will adhere to this rule of statutory interpretation as well as any other canon of statutory interpretation deemed appropriate by the Supreme Court and the Third Circuit Court of Appeals.

4. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(b) 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?

The public's confidence in the judiciary is of utmost importance and should always be maintained. It is also important that individuals who have gone through the advice and consent process mandated by the Constitution in order to become an Article III or Article IV judge be accorded the respect commensurate with that Office.

(c) 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 #4(b) above.

5. 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?

I am not aware of any constitutional provision or Supreme Court precedent that precludes judicial review of national security decisions.

6. 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?

There are many ways that a court can compel a litigant to comply with a valid order. For example, a court can issue a show cause order, hold the litigant in civil or criminal contempt, among others. As a judicial nominee and current sitting judge, I do not believe that it would be appropriate to comment any further. *See* Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canon 2(A) and 3(A)(6).

7. 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?

In *Hamdi v. Rumsfeld,* 542 U.S. 507, 536 (2004), the Supreme Court opined:

> "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Consttution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

If confirmed, I pledge to fully and faithfully follow all Supreme Court precedent, including *Hamdi.*

(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 #7(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 #7(a) above.

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

As a separate but co-equal branch of government, the courts should, as in all cases, fairly and impartially apply the applicable law in all cases and controversies, including matters involving national security and abuse of power.

9. 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?

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court stated that "a party seeking to uphold government action based on sex or gender must establish an 'exceedingly persuasive justification' for the classification." *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent.

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

    No. I do not agree that the Voting Rights Act is a perpetuation of racial entitlement. I am also not aware that the Supreme Court has adopted this characterization of the Voting Rights Act. If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent with regards to the Voting Rights Act.

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

    Article I, Section 9(8) of the U.S. Constitution provides, in relevant part: "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, if any kind whatever, from any King, Prince, or foreign State."

12. 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, an appellate court must affirm the factual findings of a trial court unless those findings are clearly erroneous. This questions arises out of issues decided in *Shelby County v. Holder*, 570 U.S. 529 (2013). In *Shelby County*, the Supreme Court recognized that "voting discrimination still exists." *Id*. at 536. The Court also stated that the Voting Rights Act "imposes current burdens and must be justified by current needs." *Id*. I am aware that this involves issues that are pending and impending, and thus, as a judicial nominee, it would be inappropriate to comment any further. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

13. **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"?**

    I would describe Congress's authority to enact laws to counteract racial discrimination under the Constitutional Amendments identified above as robust and remedial.

14. 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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court established personal autonomy as a fundamental right. If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent, including *Lawrence*.

15. 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?

Generally, the doctrine of *stare decisis* applies to a court's decision to follow one of its prior rulings based on a similar application of law. In *Lawrence v. Texas*, 539 U.S. 558, 577, (2013), the Supreme Court opined that "[the doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law."

A district court judge is bound by the precedential decisions of the Supreme Court and the appellate court that presides over that district. Similarly, federal appellate courts are bound by the precedential decisions of the Supreme Court. The Supreme Court, however, has stated that it may overrule one its own prior decisions. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). As a judicial nominee, I do not believe that it would be appropriate to comment any further on when the Supreme Court should not follow one of its prior rulings.

16. 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.

I interpret the recusal standard for federal judges as an ethical compass for judges to review on a regular basis to ensure the fairness and integrity of the judicial system. I strongly believe that the public must have the utmost

confidence in the integrity of the judiciary. This means that judges must hold themselves to a higher standard and refrain from presiding over cases in which his or her impartiality can reasonably be questioned.

In accordance with 28 U.S.C. § 455 and the Code of Conduct for United States Judges, I plan to recuse myself in all cases in which my brother, Attorney Jeffrey Moorhead, represents a litigant. I also intend to recuse myself from any case involving Attorney Kye Walker as she is my family attorney as well as a person friend. Additionally, I also intend to recuse myself in all cases in which I previously represented the Government of the Virgin Islands in any action or proceeding involving the same issues when I was the attorney in that particular case or controversy.

In all other cases, I would exercise due diligence in becoming aware of any potential conflict and disclose any potential conflict of interest to all counsel of record to provide them with the opportunity to place any objections to me continuing to preside over the case. I will evaluate any all objections on a case-by-case basis to determine whether recusal would be appropriate.

17. 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?

Courts play a crucial role in protecting the constitutional rights of all individuals. As a sitting trial court judge, I am keenly aware that, in many instances, the quality of legal representation has a direct correlation to a litigant's desired outcome in a case. Not surprisingly, this occurs quite often with self-represented litigants. Judges, however, must be careful not to abandon his or her role as a neutral and impartial decision-maker and cross over into the role as an advocate. Maintaining this impartiality is crucial in safeguarding the integrity of the judicial process. Judges can maintain this balance by working closely with court administrators to ensure that there are resources available to litigants consistent with the public's expectation for court services.

18. 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.

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

Article II, Section 2, Clause 1 of the United States Constitution provides that the President "shall have the Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." I have not had the opportunity to research the particular issue raised by this question. However, I am aware that this issue may be the subject of pending or impending litigation. Thus, as a judicial nominee, I do not believe that it would be appropriate for me to comment any further on this subject. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

20. **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?**

Under Article I, Section 8, Clause 3 of the United States Constitution, "The Congress shall have the Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause provides Congress with the authority "to enact laws for the protection and encouragement of commerce among the States." *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946).

Section 5 of the Fourteenth Amendment states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., Amend. XIV, § 5. In *City of Borne v. Flores*, 521 U.S. 507 (1997), the Supreme Court stated: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative sphere of autonomy previously reserved to the States.'" *Id*. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

If confirmed, I pledge to fully and faithfully apply all Supreme Court precedent on all matters that come before me, including the scope of congressional power under the United States Constitution.

21. 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?

If confirmed, I would be bound by all precedent established by the Supreme Court and the Third Circuit Court of Appeals on the appropriate weight that must be given to executive factual findings. As a judicial nominee, I do not believe that it would be appropriate to comment any further on this issue. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

22. **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.**

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) a plurality of justices of the Supreme Court stated that an "undue burden" exists when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id*. at 877. As a judicial nominee, I do not believe that it would be appropriate to comment any further or give specific examples as to what I believe would or would not be an "undue burden." *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

23. 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 doctrine of qualified immunity is a doctrine recognized by both the Supreme Court and the Third Circuit Court of Appeals. As stated by the Third Circuit in *Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165, 170 (3d

Cir. 2017), "State actors sued in their individual capacity . . . are entitled to qualified immunity 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting *Harlow v. Fitzgerald*, 47 U.S. 800, 818 (1982)). If confirmed, I will fully and faithfully apply all Supreme Court and Third Circuit precedent, including the application of the qualified immunity doctrine.

24. 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 Fourth Amendment establishes "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. Const., Amend. IV. It is well established that a search or seizure conducted without a warrant is presumed to be unreasonable. The Government can overcome that presumption by establishing an exception to the warrant requirement. The use of certain technology to collect information may be the subject of pending or impending litigation. Thus, as a judicial nominee, I do not believe that it would be appropriate to comment any further on this issue. *See* Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

25. 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 have not the opportunity to thoroughly research this issue. If confirmed, and if this issue were to come before me, I pledge to fully and faithfully apply all Supreme Court and Third Circuit precedent on this issue.

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

It is fundamental to the integrity of the institution of justice and to the judicial process that judges render decisions based on the facts of a particular case and the law as applied to those facts. Under no circumstances should judges render decisions based on political influence. Such decisions will erode the public's confidence in a judge's ability to be fair and impartial.

Nomination of Robert Anthony Molloy
to the District Court of the Virgin Islands
Questions for the Record
Submitted July 3, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. Recent reporting in the Washington Post ("A conservative activist's behind-the-scenes campaign to remake the nation's courts," May 21, 2019) 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?

        As requested, I read the Washington Post story and listened to the associated recordings of Mr. Leo.

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

        I believe that a fair and independent judiciary is necessary to maintaining the public's trust and confidence in the administration of justice. With that said, I do not believe that I have thoroughly researched this issue to intelligently comment on the matter.

    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?

        Based on my personal experience in going through this current judicial nomination process, I do not share the view that judicial confirmations are more like political campaigns.

    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.

        I do not.

    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?

I am not familiar with Mr. Leo or the circumstances that led him to make those statements. I do not know what Mr. Leo meant when he made those statements, and thus, I do not believe that I can intelligently comment on the matter.

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 would agree with this metaphor to the extent Chief Justice Roberts was characterizing that one role of a judge is to be an impartial and neutral third party applying a set of rules to a dispute and not acting as an advocate for one side or the other.

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

        A judge should render rulings based on the law as applied to the facts of a particular case. A judge should not be concerned about the practical consequences of a particular ruling unless the applicable law, rule or regulation requires such an analysis.

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?

    In ruling on a summary judgment motion, the determination is subjective to the extent that a trial judge must look at the evidence in a light most favorable to the nonmoving party. This determination must, however, be made based on a thorough review of the evidence in the record of the case. A judge should not determine whether a factual dispute exists based on his or her subjective belief, but rather based on the evidence submitted by the parties and an application of substantive law.

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?

        Empathy may assist in helping a judge understand why a person acted in a particular manner. This can be particularly helpful in criminal cases when determining the appropriate sentence and after considering the circumstances of the offense and the history and characteristics of the defendant. *See* 18 U.S.C. § 3553(a).

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

        A person's life experience helps form the basis of the character of an individual. A person draws from his experience in conducting his every day affairs. However, a judge must be careful not to render decisions based on his or her personal view of a particular case. The outcome of a case should be based on what the law dictates as applied to the facts of that particular case. While a judge's personal life experiences can assist the

judge in drawing reasonable inferences where appropriate, ultimately, the judge must apply the law fairly and equitably, without regard to his or her personal views.

c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

As an African-American male, who mentors young adolescent males from underprivileged communities, I can certainly empathize and understand what it is like to live under less than ideal circumstances. Many times, I have had to interact with the families of my mentees. This experience has allowed me to see first-hand the many challenges faced by a significant number of children in this community. From limited parental involvement, low regard for formal education, and exposure to illegal drugs at a very young age, these are just a few examples of these challenges. Many of these individuals are forced to grow up at a very young age and take on adult responsibilities while still being a child. In my experience as a sitting trial court judge, my personal experiences in interacting with certain members of the community has assisted me in fashioning sentences that take into consideration the history and characteristics of the individual while achieving the goals of sentencing.

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

It is never appropriate for a lower court judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a higher court.

6. The Seventh Amendment ensures the right to a jury "in suits at common law."
   a. What role does the jury play in our constitutional system?

Through the jury system, members of the community sit and hear the evidence at a trial and determine the facts of the case. This is a crucial and integral part of our constitutional system.

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

Judges should always be concerned about the applicability of any constitutional right, including the application of the Seventh Amendment. As a sitting trial court judge and a judicial nominee, I do not believe it would be appropriate to comment any further on this issue. *See* Code of Conduct for United States Judges, Cannon 2(A) and 3(A)(6).

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my response to Question #6(b) above.

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

In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court stated that it reviews congressional factfinding under a deferential standard but reserves the right to determine whether such findings are entitled to dispositive weight. *Id*. at 165. The Supreme Court also stated that it "retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Id.*

8. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.
    a. Have you read Advisory Opinion #116?

        Yes.

    b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?
        i. Determining whether the seminar or conference specifically targets judges or judicial employees.

            I commit that I will carefully review potential involvement in any educational seminar to ensure that I am acting in accordance with my ethical obligations.

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

            Please see my response to Question #8(b)(i) above.

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

            Please see my response to Question #8(b)(i) above.

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

            Please see my response to Question #8(b)(i) above.

        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 #8(b)(i) above.

    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?

        Please see my response to Question #8(b)(i) above.

Questions for the Record from Senator Kamala D. Harris
Submitted July 3, 2019
For the Nomination of

Robert Anthony Molloy, to the U.S. District Court of the Virgin Islands

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

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

   Before sentencing a defendant, I will review the entire record (including the indictment/information, the presentence report, victim impact statements), listen to the arguments of the prosecution and the defense, and pronounce an equitable and fair sentence that best comports with the interest of justice taking into consideration the goals of sentencing in accordance with 18 U.S.C. § 3553.

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

   As a new federal judge, I plan to determine what constitutes a fair and proportional sentence similar to the way I sentence criminal defendants as a sitting judge of the Superior Court of the Virgin Islands. In addition to my response to Question #1(a) above, I will endeavor to ensure that individuals who commit the same crimes receive substantially the same sentence without regard to race, sex, nationality, socio-economic status, or any other non-pertinent factor.

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

   Pursuant to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the application of the Sentencing Guidelines is advisory. The procedure for departing from the Sentencing Guidelines was set forth in *Gall v. United States*, 552 U.S. 38 (2007). There, the Supreme Court stated that the district court judge "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Id*. at 50. A district court judge may depart from the Sentencing Guidelines after making an individualized assessment based on the facts presented and "if [the district court judge] decides than an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id*. "After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* If confirmed, I pledge to fully and fairly follow all Supreme Court precedent, including *Gall.*

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

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

Congress has enacted legislation establishing mandatory minimum sentences for many criminal offenses. I am aware of several articles and publications advocating for and against mandatory minimum sentences. Additionally, as a sitting judge of the Superior Court of the Virgin Islands, I have had to sentence criminal defendants to offenses that imposed a mandatory minimum. As a current sitting judge and a federal district court judicial nominee, I do not believe that it would be appropriate to publicly comment on the propriety of mandatory minimum sentences. *See* Virgin Islands Code of Judicial Conduct, Canons 2 and 3; Code of Conduct for United States Judges, Canons 2(A) and 3(A)(6).

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

Please see response to Question #1(d)(i) above.

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

Please see response to Question #1(d)(i) above.

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

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

If confirmed, I will always seek to impose sentences that are fair and just within the bounds of the law. If I am confronted with this issue, I would evaluate the matter on a case-by-case basis and give considerable thought as to the best way to approach the matter.

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf
[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

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

   The decision to charge individuals with criminal conduct and the establishment of charging policies rests with the executive branch and its respective prosecutorial authorities. I do not believe that it would be appropriate for a judicial officer to encroach upon that authority unless such charging policies raises ethical concerns.

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

   Any decision to grant clemency to an individual rest solely with the executive branch. I do not believe that it would be appropriate for a district court judge to be involved in that decision-making process.

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

   Yes.

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

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

      Yes.

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

      Yes.

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

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

      Yes.

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

Yes. Throughout my career, I have mentored many individuals, many of whom were minorities and/or women. Many of these individuals have progressed through their careers and currently hold supervisory and highly influential positions in their chosen field.