

**Nomination of Richard Hertling to the United States Court of Federal Claims
Questions for the Record
Submitted October 31, 2018**

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?**

The response depends on the particular type of case. In general, it is never appropriate for a lower court to depart from Supreme Court precedent. When the Supreme Court itself has undercut a precedent through a subsequent ruling, it may be appropriate for a lower court to adhere to the principle of the more recent ruling. Similar to the Court itself undercutting a precedent, if Congress has amended a statute that the Supreme Court has previously interpreted in a manner that undercuts the Supreme Court's earlier interpretation, then it would be appropriate for a lower court to follow the newer statute.

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

In statutory cases in which Congress can revise a Supreme Court decision, it is difficult to imagine a case in which the Court should overturn a prior interpretation of a statute, absent intervening congressional action. The harder questions arise in the context of constitutional interpretation. Scholars, judges, commentators and others have expended reams of paper discussing that question and will continue to do so far into the future. I have no fixed view but can state with confidence that, as a nominee to a lower court, if the Senate confirms me I would have no difficulty abiding by and applying Supreme Court precedent, whether old or new, whether or not I agree personally with it.

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 textbook 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 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"? "superprecedent"?**

As a nominee to a lower court, my view is that any Supreme Court decision is super-stare decisis. A lower court judge should not be in the business of ranking

precedents. If confirmed, I will faithfully apply all Supreme Court precedents.

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

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?

The Supreme Court rejected Justice Stevens's interpretation by a 5-4 vote. If confirmed, I would apply the holding of the majority of the Court to any case to which *Heller* is relevant, regardless of my personal views on whether the majority or dissenting opinions made a better case for its position.

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

The Court's opinion speaks for itself. The Court held that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." It also expressly ratifies laws barring possession of firearms by felons and the mentally ill and in sensitive locations. Given the Code of Conduct for United States Judges, it is inappropriate to go further than the Supreme Court did in *Heller* in outlining what types of restrictions would pass constitutional muster, and it is inappropriate for a judicial nominee to opine on what might be "common-sense" regulations.

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

The Supreme Court's precedents as relevant to *Heller* were debated extensively in the majority and lead dissenting opinions. As a nominee to a lower court, it would be inappropriate for me to take sides in that debate, because the legislative imposition of various regulations could come before the courts in the future.

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 Supreme Court has determined that the First Amendment applies to corporate speech in certain contexts. In some instances, such as commercial speech, the right is not as extensive as an individual's right. See *Central Hudson Gas & Electric v. Public Service Commission*. Corporations' political speech has been given First Amendment protection by the Supreme Court. E.g., *NAACP v. Button*. The breadth of the application of the First Amendment to corporate speech in the political context remains a subject of judicial consideration. It would be inappropriate under the Code of Conduct for United States Judges, applicable to judicial nominees, for me to express a view on the subject.

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

Because the scope of the competing First Amendment interests at stake in the context of regulating corporations' political speech remains a live issue in the courts and in Congress, it would be inappropriate to respond to this question, aside from noting that in the event I am confirmed and confronted with a case involving such matters, I will apply the law as determined by the Supreme Court and Court of Appeals.

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

The Supreme Court has held in *Burwell v. Hobby Lobby* that closely-held corporations enjoy certain rights to the free exercise of religion. Because the scope of the right remains a subject of legislative and judicial consideration, it is inappropriate for me, under the Code of Conduct for United States Judges, applicable to nominees, to express a view on the subject.

6. In May 2014, President Obama nominated five individuals to open seats on the Court of

Federal Claims—Judge Nancy Firestone, Thomas Halkowski, Patricia McCarthy, Jeri Somers, and Armando Bonilla. All of them received hearings in June and July 2014, and were voice-voted out of Committee between June and August of 2014. Nevertheless, their nominations were blocked by Senator Tom Cotton, who argued that the Court of Federal Claims’ workload did not justify confirming any nominees to those vacancies. Senator Cotton stated, “The reason we should not confirm new judges to the Court of Federal Claims has little to do with these nominees and more to do with the court itself. It doesn’t need new judges. We should keep in mind that the number of active judges authorized for the Court of Federal Claims by statute, 16, isn’t a minimum number, it is a maximum. It is our duty as Senators to determine if the court needs that full contingent and to balance judicial needs in light of our obligation to be good stewards of taxpayer dollars.... [It] makes no sense to spend more taxpayer dollars on judges that the court simply does not need.” (Floor statement, July 14, 2015)

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

I have reviewed the Court’s caseload statistics and note the increase in filings since 2014. I would further note that the number of vacancies existing in 2014 has increased now to 11, a fact that no doubt has a further impact on the Court’s ability to remain current with its caseload. Aside from noting these facts, the question calls for a policy judgment that is best left to the judgment of the Senate, which has the constitutional responsibility to advise and consent to nominations. Involving as it does a policy judgment, the question is not one that it is appropriate to answer pursuant to the Code of Conduct for United States 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”?

The question calls for a policy judgment that is best left to the judgment of the Senate, which has the constitutional responsibility to advise and consent to nominations. Involving as it does a policy judgment, the question is not one that it is appropriate to answer pursuant to the Code of Conduct for United States Judges.

7. According to your Senate Judiciary Questionnaire, you have not practiced in a federal trial court since 1990, when you left the Justice Department’s Federal Programs Branch. In the four years you spent in that office, you served as co-counsel in only one trial, and you never appeared before the Court of Federal Claims.

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

No

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

During my time at the Department of Justice, several dozen; since 1990, I have not appeared in court, although I have drafted some briefs and filed a brief on behalf of a *pro bono* client before the Board of Veterans Appeals.

c. How many motions have you argued in court?

I would have to estimate -- approximately two dozen.

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

To the best of my recollection, I took two depositions and defended two. I also participated in several transcribed witness interviews, as a staff member in the course of congressional oversight investigations. I estimate I participated in more than two dozen such interviews, which are the equivalent of depositions. I also represented a witness during my time in private practice in a congressional oversight interview conducted under oath.

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

Over the past months, I have thought long and hard about my qualifications for the position to which I have been nominated. I keep returning to the qualities and skills desired in a judge. First is probity; a republic can survive lazy or nasty judges, but it cannot survive corrupt ones. Then comes temperament, the ability to deal with lawyers, litigants, colleagues and staff with courtesy and equanimity. A judge needs to bring an open mind to each case and not prejudge it; the judge for whom I clerked had a sign in our chambers reading “audi alteram partem” – hear the other side. A judge must treat all parties fairly, but a judge should also be decisive and prompt in reaching decisions. Judges should be smart, with a broad perspective and should be willing to work hard to keep the court’s docket reasonably current. Ultimately, what we want from a judge is the ineffable, perhaps undefinable qualities of wisdom and judgment.

I believe these various qualities can be developed not only by a career in litigation, but through other career paths. In that respect, we do not require our umpires to be able to hit the curve ball, or the referee to be able to score three-point baskets. Sports officials must know the rules and keep a level head in difficult circumstances, much like a judge. These qualities can be intrinsic or learned, but typically are a combination of both.

Often, indeed, litigators tend to specialize and develop a narrower focus. They are prosecutors or criminal defense lawyers, tort litigators, antitrust litigators, labor and discrimination litigators, and on and on. They may know the rules of evidence, but their knowledge of substantive law outside their areas of specialization is often limited.

My experience in the realm of public policy is directly relevant to the position to which I have been nominated. To begin with, I have an exceptionally broad familiarity with substantive federal law. There is practically no area of federal law that I have not had occasion to have to address during my career, from antitrust to tax, I have advised senators, House members, or executive branch officials.

Of most direct relevance to the jurisdiction of the Court of Federal Claims, I served as senior counsel and subsequently as Republican staff director of the then-Senate Governmental Affairs

Committee. That Committee has legislative and oversight jurisdiction over federal civilian procurement and personnel laws, issues that form the core of the Court's cases. On the Judiciary Committees in the Senate and House I advised my principals on takings issues and helped develop and enact the Leahy-Smith America Invents Act to reform the patent system, two more issues that appear before the Court with frequency. I became familiar with vaccine claims that the Court oversees, and have an understanding of the criminal justice system, so have an awareness of erroneous convictions that underpin claims that the Court entertains. I even had occasion, though limited, to be immersed in the unique status of Indian tribes under federal law, another area of relevance to the Court's jurisdiction.

In addition, having served four different senators and a House member, I had occasion frequently to interact with a wide range of constituents from a range of states. Through that engagement I developed a sense of the impact of federal policies and decisions on the American people. That experience will be particularly useful on the Court of Federal Claims, which stands as a cornerstone of the country's commitment to a republican form of government: the government may be liable to its citizenry and must adhere to the rules too, without special favor.

My experience in congressional oversight is also quite relevant. Whether as a staff member or at the Justice Department, I was involved in hundreds of fact-finding oversight hearings, analogous to the fact-finding conducted by courts. Legislative staff work is also quite relevant to the judicial function. When persons would come to Congress seeking legislation, the first step is typically to determine what the current law applicable to the situation is. Good legislative staff work is objective, just as is required of a judge.

In addition, the Court of Federal Claims is one of limited and discrete jurisdiction established by Congress. Much of its work derives from the interpretation of statutes and regulations. Most of my career has been spent doing just that, trying to interpret statutes and drafting statutes in a way that they may be comprehended and applied. In addition, when at the Office of Legal Policy, I helped to oversee the Justice Department's rule-making functions, gaining experience in drafting and interpreting regulations.

True, I will have to learn how to be a judge, but all lawyers who have not previously served as judges must learn those arts upon confirmation. And I maintained over the years a familiarity with the applicable rules of the federal courts. I reviewed, pursuant to the Rules Enabling Act proposed amendments to the federal rules of procedure and evidence when proposed by the Supreme Court. I was also involved in legislation that directly affected the federal rules.

The Senate in the past has confirmed judges with similarly limited litigation experience to trial courts, including both district courts and special federal courts like the Court of Federal Claims. Indeed, the Court of Federal Claims has drawn four judges from the ranks of the staff of this Committee during the past three decades, and only one of them had prior litigation experience. Many of the current or recent judges of the Court of Federal Claims, even if they had extensive litigation experience, had limited experience with cases in the Court of Federal Claims itself.

As a staffer to several senators, I assisted them in the consideration of candidates who sought to serve as federal judges. Litigation experience was something I advised my principals to seek,

but there were other characteristics that the senators for whom I worked considered even more important – those I noted above: honesty, intellect, temperament, and judgment. I believe through the course of my career, I have developed the breadth and depth of knowledge and experience relevant to serving successfully as a judge on the Court of Federal Claims.

8. In 2016, you filed an amicus brief submitted by 207 Republican Members of Congress supporting the petitioners in *Zubik v. Burwell*, which challenged an accommodation to the Affordable Care Act’s contraceptive coverage requirement that exempted employers with religious objections from covering contraceptives as part of their employer-sponsored health insurance plans, so long as the employer submitted a notice stating their objections on religious grounds. The amicus brief you submitted argued that this accommodation itself violated the Religious Freedom Restoration Act (RFRA) by requiring employers to undertake the affirmative step of submitting a notice of their religious objections to the requirement. (Brief of 207 Members of Congress as Amici Curiae, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016))

a. How did you become involved in the filing of this amicus brief?

I do not recall specifically. A partner at the firm had agreed to prepare the brief as a *pro bono* matter and inquired as to whether I would be interested in assisting in its preparation. Wanting to fulfill my obligation to render *pro bono* service for clients and having the opportunity to work on a matter of legal importance before the Supreme Court, I agreed to assist in the preparation of the brief. To my best recollection, my primary contributions were detailed line edits to several drafts of the brief, which reflected the position of our *pro bono* clients, the 207 members of Congress who joined the brief.

b. How does the act of submitting a one-page form that simply states the employer’s religious belief constitute a substantial burden on religious exercise under RFRA?

The Supreme Court remanded the case after the parties narrowed their differences. To my knowledge, the cases remain pending, although I have not been following them as they proceed. Because the matters remain pending in various federal courts, under the Code of Conduct for United States Judges, applicable as well to nominees to serve as federal judges, it would be inappropriate to provide a response. I would note that I would not hesitate to apply in any case before me as a judge to which it is relevant the ultimate rule determined by higher courts.

c. Is there any religious accommodation that would *not* constitute a substantial burden on religious exercise under RFRA where the accommodation would lead to employees having coverage for contraceptives?

The Supreme Court remanded the case after the parties narrowed their differences. To my knowledge, the cases remain pending, although I have not been following them as they proceed. Because the matters remain pending in various federal courts, under the Code of Conduct for United States Judges,

applicable as well to nominees to serve as federal judges, it would be inappropriate to provide a response. I would note that I would not hesitate to apply in any case before me as a judge to which it is relevant the ultimate rule determined by higher courts.

9. In 2008, the Justice Department's Office of Inspector General (OIG) issued a report regarding the firing of nine U.S. Attorneys in 2006 for improper political reasons. According to that report, in your capacity as Acting Assistant Attorney General of the Justice Department's Office of Legislative Affairs, you signed letters to Senators that were "misleading." For instance, OIG found that a February 23, 2007, letter you signed and sent to Senators Reid, Schumer, Durbin, and Murray "made three affirmative statements" about the firing of Bud Cummins, who had been U.S. Attorney for the Eastern District of Arkansas, and that "[a]ll three of these statements were misleading." (*An Investigation into the Removal of Nine U.S. Attorneys in 2006*, OIG (Sept. 2008))

a. At the time that you sent these letters to Senators, were you aware that they contained inaccurate or misleading statements?

As the Department of Justice Inspector General and the Office of Professional Responsibility determined in their report, I was not aware the letters contained misleading information at the time I signed the letters.

b. Before signing your name to these letters, did you seek to determine whether the information contained within the letters was accurate? If not, why not?

Consistent with the findings of the Justice Department Inspector General and the Office of Professional Responsibility, at the time the letters were drafted and sent, I neither knew nor had reason to know or suspect that they contained misleading information. The responsibility for drafting the letters rested with the Attorney General's chief of staff, who had been involved in the decisions to terminate the United States Attorneys. The points recounted in the draft letter were consistent with his oral presentations to congressional staff and to Justice Department colleagues. He was the best source of the information within the Department and I had no reason to question the accuracy of any point contained in the letters (the text of all letters was identical).

c. When did you learn that the letters contained inaccurate or misleading statements?

During the course of producing documents requested by the Senate Judiciary Committee, it became apparent to me based on information contained in some of the documents being produced that the letters contained misleading statements.

d. When you learned that the letters contained inaccurate or misleading statements, what remedial steps did you take to ensure that accurate information was provided to the Senate?

Once I made the determination that the letters contained misleading information, I proactively drafted and sent to the senators who had received the initial letters a new letter acknowledging the inaccuracies of the first letter and correcting the record. I also worked with others at the Justice Department to ensure that documents that were responsive to the Committees' document requests but would typically have been withheld from production as "memos on memos" (internal documents discussing how to respond to congressional inquiries or requests) were in fact produced to the Committees, thereby establishing a precedent creating an exception to the "memos on memos" doctrine when misstatements to Congress are made.

e. What steps did you take to ensure that the Justice Department would not provide any additional misleading or inaccurate information with respect to the U.S. Attorney firing scandal to the Senate?

It became difficult to verify information when some of those most knowledgeable about the firings left the Justice Department. I endeavored to ensure the Department was responsive to document requests and ensured the Department provided witnesses, as requested by the Committees, for interviews and hearings.

f. Did you have any involvement in the decision to terminate nine U.S. Attorneys for political reasons? If yes, please state the nature of your involvement.

At the time the decision was made to terminate the United States Attorneys and they were informed of that decision, I was still serving in the Office of Legal Policy. In that capacity, I had no role in the decision to terminate the United States Attorneys and was in fact unaware of the terminations until I had moved to the Office of Legislative Affairs in January 2007.

10. In 2008, you were counsel of record on an amicus brief submitted by several Republican Members of Congress in *Committee on the Judiciary v. Miers*. The case concerned the House Judiciary Committee's investigation into the role of officials in the Bush White House in the political firing of nine U.S. Attorneys. The Committee issued subpoenas to compel White House Counsel Harriet Miers and White House Chief of Staff Josh Bolten

to cooperate with its investigation, but both Miers and Bolten asserted that executive privilege made them “absolutely immune” from the investigation. The Committee asked a federal district court in Washington, D.C. to enforce the congressional subpoenas.

The amicus brief you filed urged the court to dismiss the Committee’s request for lack of ripeness. You argued that the Committee had failed to exhaust non-judicial means of obtaining the information sought, including negotiations with the White House. You also wrote that the Committee’s request bears “the hallmarks of partisan gamesmanship rather than a thorough investigation.” (Memorandum Amici Curiae of Representatives John Boehner et al. in Opposition to Plaintiff’s Motion for Partial Summary Judgment, *Committee on the Judiciary v. Miers*, 2008 WL 2443292 (D.D.C. June 12, 2008))

- a. **You filed this brief only a short time after you personally were involved in the Justice Department’s response to congressional inquiries about the U.S. Attorney firing scandal. Before working on this brief, did you consult any ethics officials about the propriety of undertaking this representation?**

When I joined the staff of the House Judiciary in March 2008, the committee’s inquiry had progressed beyond the Justice Department and was focused on what role, if any, White House officials had played in the decision. With the subpoena enforcement matter filed, the Ranking Member, Rep. Lamar Smith, in consultation with House Republican leadership, decided to submit an *amicus* brief to the district court. To the best of my recollection, I was not involved in drafting the brief. When the time came to file the brief, however, it turned out I was the only staff member on the House Judiciary Committee minority staff who had maintained an active bar membership and could therefore sign the brief. As I recall, we consulted with Rep. Smith and reviewed the D.C. Bar rules. I recall that those rules contained a provision that may have been applicable had I gone from the Justice Department to private practice, but instead I had moved to another public sector position. In such an instance, there was no express prohibition on my signing the brief. At Rep. Smith’s direction, in the absence of any express prohibition, I signed the brief. I do not recall consulting any outside ethics expert, although Rep. Smith had previously been Chairman of the House Ethics Committee. As I recall, it was understood that the counsel who had drafted the brief would reactivate his bar membership and replace me as counsel of record once that had occurred, and that is what happened. The brief itself, while related to a matter with which I had been involved at the Justice Department, addressed a discrete separation-of-powers issue between the executive and legislative branches that I had not dealt with while at the Justice Department, and thus had not worked on that particular aspect of the matter while at the Justice Department. The district court rejected the position advocated in the brief and ruled for the committee majority.

- b. In what ways did the Committee’s attempt to enforce a congressional subpoena bear “the hallmarks of partisan gamesmanship?” How is the use of a subpoena by Congress an act of “partisan gamesmanship”?**

I do not have a copy of the brief but assume you are quoting from it. Although I did not draft it, I did sign it and assume responsibility for its contents. The point we were trying to make was that as the minority we believed there remained informal avenues to pursue through negotiations that could secure compliance with the subpoena by the administration short of a court order. At the time, we took the position that because informal avenues had not been exhausted, the filing of the enforcement action was driven more by politics than by need. We were concerned, needlessly, as the case turned out, that a court might rule against the committee and not enforce the subpoena, an outcome that would have harmed the House’s and the committee’s institutional interests. We therefore sought to give the district court an intermediate approach to resolving the case. As noted, the district court rejected our position and ordered the subpoenas enforced.

11. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), 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 questions regarding administrative law were broached with me at any point in the process.

- 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?**

Outside of personnel from the Office of Counsel to the President, I never spoke with anyone about my interest in the judgeship, and, as noted, no one from that office ever asked me any questions about any aspect of administrative law.

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

The question is exceptionally broad. I start from the premise that the modern regulatory state as developed by Congress and the executive since the late 19th century depends on a body of laws and judicial rulings that taken together form our administrative law. I am aware that there are specifically some judicially created doctrines that are under scrutiny today from legislators, judges, and academics. Because these issues, primarily involving the degree of deference courts owe to agency interpretations of their own rules or of the relevant statutory authorities (*Auer* and *Chevron* deference), are being actively litigated in the federal courts, it is inappropriate, pursuant to the Code of Conduct for United States Judges, applicable to federal judicial nominees, to provide my views on these issues. I would not hesitate to apply the governing standards, as determined by the Supreme Court or the Federal Circuit, to any case before me, in the event the Senate confirms my nomination.

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

I accept the now-common approach that statutory interpretation begins with the text of the statute. If the statutory language is not ambiguous, then there ought to be no recourse to legislative history. The difficulties arise when the statutory text is ambiguous. I think legislative history can be a useful guide to determining what problem the legislature thought it was solving by enacting the statute. I think that is probably the best use of legislative history in attempting to determine the meaning of ambiguous statutory text.

13. 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

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

I received the five sets of written questions on the evening of October 31, 2018. I drafted responses during November 1 and November 2, 2018 and submitted my responses to the Office of Legal Policy, which made formatting edits. I did not consult with anyone else in preparing these responses, although my wife read my draft responses to some questions.

**Nomination of Richard Hertling to the
United States Court of Federal Claims
Questions for the Record
October 31, 2018**

QUESTIONS FROM SENATOR BLUMENTHAL

I am concerned about public faith in the judiciary's impartiality and integrity. Please address the following question in light of our nation's constitution, laws, and code of conduct for the judiciary.

- 1. Do you believe that a sitting judge or justice who is shown to have committed perjury or substantially misled the Senate Judiciary Committee about the truth of a matter should continue to serve on the bench?**

Witnesses before the Senate Judiciary Committee owe a duty of candor to the Committee. A decision on whether a sitting federal judge who perjures himself or herself or otherwise testifies misleadingly to the Senate Judiciary Committee should remain in office is a question vested in both houses of Congress under the Constitution's impeachment clause. As a question ultimately vested in the legislative branch, the decision is a political one. Because the question calls for a view on a matter within the purview of the legislative branch and hence a political one, under the Code of Conduct for United States Judges, applicable to nominees for federal judicial positions, it was be inappropriate for me to answer it.

The concerns I have about the impartiality and integrity of the judiciary extend far beyond that of a judge or justice who is shown to have committed perjury or misled the Senate Judiciary Committee. Those concerns encompass the people's faith in the rule of law, that the system of justice is not merely an extension of politics. You spent 13 years as a high level Republican staffer in the U.S. Senate, including serving as Deputy Chief of Staff and Legislative Director to Senator Lamar Alexander, Minority Staff Director of the Senate Governmental Affairs Committee, and Minority Chief Counsel and Staff Director to various subcommittees within the Senate Judiciary Committee, among other positions. As you know, the Code of Conduct for United States Judges commands, "A Judge Should Refrain from Political Activity." The Code provides that "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of justice." In light of your professional record, please address the following questions.

- 1. Should the American people have confidence in *your* integrity and independence?
Why?**

Yes.

- 2. Please explain why the American people should trust that *your* judicial approach**

will not involve politics?

Precisely because of my significant experience in the executive and legislative branches of government, I have a deep understanding of and appreciation for the differences between those political branches and the judicial branch. I share 100 percent the view you express about the importance of an independent judiciary making decisions based on the facts and the law applicable to those facts in the specific case being considered. Even during my partisan policy-related activities, I believe I was often viewed as an honest broker who could bring an objective view to any question. As such, I was occasionally consulted even by Democratic staff on some matters, including questions of what the law is on a particular subject. I can recall one instance in which I wrote a hearing memorandum for committee members of both parties on a subject of partisan controversy, and after reviewing the memorandum the lead Democratic staff member handling the hearing told me the memorandum was so even-handed and fair that he saw no reason to add a separate Democratic memorandum for the minority committee members. I fully understand and appreciate that in the event the Senate confirms my nomination, I leave all politics behind for the remainder of my career.

In 2016 you filed an amicus brief on behalf of 207 Republican members of Congress supporting the petitioners, nonprofit religious employers, in the case of *Zubik v. Burwell*. As you know, the case concerned the Affordable Care Act's contraceptive coverage mandate, which requires employers to cover certain contraceptives as part of their health plans unless they submit a notice to their insurer or the federal government stating they object on religious grounds. You argued that the requirement of completing a form or sending a notice that would result in a chosen carrier providing employees with contraceptive coverage was an affirmative act that substantially burdened the exercise of religion and the Religious Freedom Restoration Act (RFRA)

1. Do you believe *Griswold v. Connecticut* was correctly decided?

Griswold is the law of the land and has never been overturned by the Supreme Court; indeed, it stands as a seminal case for other decisions of the Court. As such, I would have no difficulty applying it to any case before me in which the decision was applicable. I believe, however, that it would be inappropriate under the Code of Conduct for me to express a view on whether the case was rightly decided.

2. Do you believe there is a hierarchy amongst the rights protected by the constitution and federal statutes?

It is a fundamental principle of American law since *Marbury v. Madison* that constitutional rights overcome statutory provisions to the extent the statutory provision is in conflict. To that extent, I recognize a hierarchy of rights as between the Constitution and statutory law. Questions involving the competing claims of constitutional provisions are, of course, among the most challenging ones that come before the courts.

3. If so, do you believe the “right to marital privacy” must defer absolutely to the free exercise of religion?

On the second question, The precise contours of the issue raised in *Zubik* remain a subject of litigation, to the best of my knowledge. Because the question is before other federal courts, it is inappropriate for me to express a view on the subject. I would, however, have no hesitation in applying to any case before me the ultimate rule as determined by higher courts on the issue.

The Office of the Inspector General (OIG) of the Department of Justice conducted an investigation into the removal of nine United States Attorneys in 2006 for allegedly political reasons. The OIG issued its report in 2008.

1. At the time of the OIG investigation, you were serving as Acting Attorney General of the Office of Legislative Affairs, but at the time the nine United States Attorneys were fired, you were working in the Office of Legal Policy as Principal Assistant Attorney General. In that capacity, did you have any role in the firings?

In my capacity at the Office of Legal Policy, I had no role in the decision to terminate the United States Attorneys and was unaware of the terminations until I had moved to the Office of Legislative Affairs. One clarification to the question: I was serving as Acting Assistant Attorney General for Legislative Affairs at the time the OIG/OPR investigation commenced, but I had left the Department by the time it was concluded and the report issued.

The OIG report mentioned you, by name, 40 times. The report concluded, in part, that several letters signed by you on behalf of the Department of Justice to Senators during the Senate’s investigation of the firings had been misleading or inaccurate.

1. At the time you signed those letters, did you know or have reason to believe the information contained therein was misleading or inaccurate?

Consistent with the findings of the Justice Department Inspector General and the Office of Professional Responsibility, at the time the letters were drafted and sent, I neither knew nor had reason to believe at the time I signed the letters that they contained misleading information (although several letters were sent, the text of each was identical). The responsibility for drafting the text of the letter rested with the Attorney General’s chief of staff, who had been involved in the decisions to terminate the United States Attorneys. The points recounted in the draft letter were consistent with his oral presentations to congressional staff and to Justice Department colleagues.

2. At any point after you had signed the letters and before the OIG report was issued, did you know or have reason to believe the information contained therein was misleading or inaccurate? If so, did you do anything to correct the information?

After the letters had been transmitted to the recipients, the Judiciary Committee began an inquiry into the firings and requested documents. During the course of producing the requested documents, it became apparent to me based on information in those

documents that the letters contained misleading or inaccurate statements. Once I made that determination, I drafted and sent to the senators who had received the letter a new letter acknowledging the inaccuracies of the first letter in order to correct the record. I also worked with others at the Department to ensure that documents that were responsive to the Committee's requests but would otherwise have been withheld from production under the "memos on memos" principle (internal documents reflecting how to respond to congressional inquiries or requests) were in fact produced to the Committee, creating an exception to the "memos on memos" principle for when misstatements are alleged to have been made to Congress.

The report also concluded, in part, that you had participated in meetings with Senate staff. During those meetings, other members of the Department of Justice made misleading statements about the firings.

1. During those meetings, did you know or have reason to believe that the statements your colleagues made were misleading? If so, did you do anything to correct their misleading statements?

I did accompany the Attorney General's chief of staff to a couple of meetings with staff to two Democratic members of the Judiciary Committee, Senator Feinstein and Senator Schumer. During those meetings, the Attorney General's chief of staff provided the information, inasmuch as I knew nothing about the decisions and the process used to reach them. Because I had not been involved in any way with the decision to terminate the United States Attorneys, I had no personal, independent knowledge of the facts that were discussed during those meetings. I also attended a briefing the Deputy Attorney General did for Judiciary Committee members. Again, I had no separate, independent basis of knowledge of the facts to be aware of whether any claims made during any of the meetings was inaccurate or misleading. Only later, as the documents were produced, did I learn of erroneous statements. By that time, the documents spoke for themselves, so I took no additional steps to correct the record beyond sending the letter discussed above and working to ensure that documents that would normally have been withheld from production as "memos on memos" were in fact produced to the Committee.

2. At any point after those meetings and before the OIG report was issued, did you know or have reason to believe that the statements your colleagues made were misleading? If so, did you do anything to correct their misleading statements?

Please see my answer above.

Questions for the Record for Richard Hertling
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
 - a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No
 - b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No
2. The United States Court of Federal Claims has special jurisdiction over certain claims against the federal government including, but not limited to, contract disputes, bid protests, takings claims, tax refund suits, patent and copyright matters, Indian claims, civilian and military pay cases, and vaccine cases. A review of your record does not demonstrate an expertise in any of these areas. While you have had a long and diverse career in law, only a small portion of your experience relates to litigation. And, you do not appear to have ever litigated a case before the Court of Federal Claims. Moreover, all of the cases you listed in your Senate Judiciary Questionnaire as the ten most significant litigated matters you personally handled are from the late 1980s or the early 1990s. Your most recent work, however, involves lobbying on behalf of various companies or organizations. You reported that you have registered as a lobbyist for at least 33 companies or entities.

Please explain why your background and experience qualify you to serve as a judge on the U.S. Court of Federal Claims.

Over the past months, I have thought long and hard about my qualifications for the position to which I have been nominated. I keep returning to the qualities and skills desired in a judge. First is probity; a republic can survive lazy or nasty judges, but it cannot survive corrupt ones. Then comes temperament, the ability to deal with lawyers, litigants, colleagues and staff with courtesy and equanimity. A judge needs to bring an open mind to each case and not prejudge it; the judge for whom I clerked had a sign in our chambers reading “audi alteram partem” – hear the other side. A judge must treat all parties fairly, but a judge should also be decisive and prompt in reaching decisions. Judges should be smart, with a broad perspective and should be willing to work hard to keep the court’s docket reasonably current. Ultimately, what we want from a judge is the ineffable, perhaps undefinable qualities of wisdom and judgment.

I believe these various qualities can be developed not only by a career in litigation, but through other career paths. In that respect, we do not require our umpires to be able to hit the curve ball, or the referee to be able to score three-point baskets. Sports officials must know the rules and keep a level head in difficult circumstances, much like a judge. These qualities can be intrinsic or learned, but typically are a combination of both.

Often, indeed, litigators tend to specialize and develop a narrower focus. They are prosecutors or criminal defense lawyers, tort litigators, antitrust litigators, labor and discrimination litigators, and on and on. They may know the rules of evidence, but their knowledge of substantive law outside their areas of specialization is often limited.

My experience in the realm of public policy is directly relevant to the position to which I have been nominated. To begin with, I have an exceptionally broad familiarity with substantive federal law. There is practically no area of federal law that I have not had occasion to have to address during my career, from antitrust to tax, I have advised a senator, House member, or executive branch official.

Of most direct relevance to the jurisdiction of the Court of Federal Claims, I served as senior counsel and subsequently as Republican staff director of the then-Senate Governmental Affairs Committee. That Committee has legislative and oversight jurisdiction over federal civilian procurement and personnel laws, issues that form the core of the Court's cases. On the Judiciary Committees in the Senate and House I advised my principals on takings issues and helped develop and enact the Leahy-Smith America Invents Act to reform the patent system, two more issues that appear before the Court with frequency. I became familiar with vaccine claims that the Court oversees, and have an understanding of the criminal justice system, so have an awareness of erroneous convictions that underpin claims that the Court entertains. I even had occasion, though limited, to be immersed in the unique status of Indian tribes under federal law.

In addition, having served four different senators and a House member, I had occasion frequently to interact with a wide range of constituents from a range of states. Through that engagement I developed a sense of the impact of federal policies and decisions on the American people. That experience will be particularly useful on the Court of Federal Claims, which stands as a cornerstone of the country's commitment to a republican form of government: the government may be liable to its citizenry and must adhere to the rules too, without special favor.

My experience in congressional oversight is also quite relevant. Whether as a staff member or at the Justice Department, I was involved in hundreds of fact-finding oversight hearings, analogous to the fact-finding conducted by courts. Legislative staff work is also quite relevant to the judicial function. When persons would come to Congress seeking legislation, the first step is typically to determine what the current law applicable to the situation is. Good legislative staff work is objective, just as is required of a judge.

In addition, the Court of Federal Claims is one of limited and discrete jurisdiction established by Congress. Much of its work derives from the interpretation of statutes and regulations. Most of my career has been spent doing just that, trying to interpret statutes and drafting statutes in a way that they may be comprehended and applied. In addition, when at the Office of Legal Policy, I helped to oversee the Justice Department's rule-making functions, gaining experience in drafting and interpreting regulations.

True, I will have to learn how to be a judge, but all lawyers who have not previously served as judges must learn those arts upon confirmation. And I maintained over the years a familiarity with the applicable rules of the federal courts. I reviewed, pursuant to the Rules Enabling Act proposed amendments to the federal rules of procedure and evidence when proposed by the Supreme Court. I was also involved in legislation that directly affected the federal rules.

The Senate in the past has confirmed judges with similarly limited litigation experience to trial courts, including both district courts and special federal courts like the Court of Federal Claims. Indeed, the Court of Federal Claims has drawn four judges from the ranks of the staff of this Committee during the past three decades, and only one of them had prior litigation experience. Many of the current or recent judges of the Court of Federal Claims, even if they had extensive litigation experience, had limited experience with cases in the Court of Federal Claims itself.

As a staffer to several senators, I assisted them in the consideration of candidates who sought to serve as federal judges. Litigation experience was something I advised my principals to seek, but there were other characteristics that the senators for whom I worked considered even more important – those I noted above: honesty, intellect, temperament, and judgment. I believe through the course of my career, I have developed the breadth and depth of knowledge and experience relevant to serving successfully as a judge on the Court of Federal Claims.

3. You authored an amicus brief in *Zubik v. Burwell* in which you argued against the federal

government's efforts to require religious nonprofits to comply with the contraception coverage requirements of the Affordable Care Act based on the Religious Freedom Restoration Act (RFRA). Specifically, you argued that requiring certain religious-affiliated institutions to "complet[e] a form or send[] a notice that includes names and contact information of their insurance carriers" in order to opt out of providing contraceptive coverage to its employees represented a substantial burden on the religious beliefs of those institutions, and thus violated RFRA.

If requiring a religious-affiliated organization to complete a one-page form or send a simple letter imposes a substantial burden on that organization's religious beliefs, what types of requirements would you characterize as insubstantial burdens?

The position advocated in the Supreme Court brief *amicus curiae* my firm drafted was submitted on behalf of our *pro bono* clients, the 207 members of Congress who joined the brief. The views in the brief reflect the position of our clients. As you know, the Supreme Court remanded the cases after the parties narrowed their differences. To my knowledge, the cases remain pending, although I have not been following them as they proceed. Because the matters remain pending in various federal courts, under the Code of Conduct for United States Judges, applicable as well to nominees for federal judgeships, it would be inappropriate to provide a response. I would note that I would not hesitate to apply in any case before me as a judge to which it is relevant the ultimate rule determined by higher courts.

4. In June 2008, you served as counsel of record on an amicus brief on behalf of Republican Representatives John Boehner, Roy Blunt, Lamar Smith, and Chris Cannon in Committee on the Judiciary v. Miers, a case relating to the House Judiciary Committee's investigation into the role of Bush Administration officials in the firing of nine U.S. Attorneys by the Justice Department. You served in this role despite having worked as Acting Assistant Attorney

General in the Justice Department's Office of Legislative Affairs in 2007 where you were actively involved in responding to the Senate's investigation of the firings.

- a. Why did you feel it was appropriate to serve as counsel of record on the amicus brief in view of your prior role at the Justice Department?

When I joined the staff of the House Judiciary Committee, the committee's inquiry had moved on from the Justice Department's process to a review of whether the White House had been involved in the decision to terminate the United States Attorneys. As the committee's inquiry progressed and the subpoena enforcement matter was filed, the Ranking Member, Rep. Lamar Smith, in consultation with House Republican leadership, decided to submit an *amicus* brief to the district court. As I recall, I was not involved in drafting the brief. When the time came to file the brief, however, it turned out I was the only staff member on the House Judiciary Committee minority staff who had maintained an active bar membership and could therefore sign the brief. We consulted with Rep. Smith and reviewed the D.C. Bar rules. Those rules contained a provision that may have applied had I gone from the Justice Department to private practice, but instead I had moved to another public sector position. In such an instance, my recollection is that there was no express prohibition on my signing the brief. At Rep. Smith's direction, in the absence of any express prohibition, I signed the brief. As I recall, it was understood that the counsel who had drafted the brief would reactivate his bar membership and replace me as counsel of record once his bar membership had been reactivated, and that is what happened. The brief itself, while related to the underlying matter with which I had been involved at the Justice Department, addressed a discrete separation-of-powers issue between the executive and legislative branches that arose following the Committee's focus on the Justice Department and with which I had not dealt while at the Justice Department, and thus had not worked on that particular aspect of the matter while at the Justice Department. The district court rejected the position advocated in the brief and ruled for the committee majority.

- b. Under what circumstances would you recuse yourself from a case if you are confirmed to the Court of Federal Claims? If confirmed, will you recuse yourself from any matter involving or implicating a company or entity you represented as a lobbyist?

I will recuse myself whenever the laws or Codes of Conduct require recusal. In addition, I will recuse myself from any case involving my wife's agency and for a period of time from any case involving my current firm. With respect to former clients, I will recuse if the case touches upon any matter as to which I have personal knowledge or any involvement, and for a period of time to be determined in consultation with the other judges and the Judicial Conference I would alert the parties to my former representation of a litigant I have represented and, if recusal is not mandated, would allow a party to object to my presiding.

Nomination of Richard Hertling
United States Court of Federal Claims
Questions for the Record
Submitted October 31, 2018

QUESTIONS FROM SENATOR BOOKER

1. As you no doubt noticed, one side of the dais at your October 24 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.

- a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, *and* without the minority's consent—which the Committee has never done before?

The decision to proceed with a hearing is question of internal Senate procedure, and pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate for me to respond to the question.

- b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

The decision to proceed with a hearing is question of internal Senate procedure, and pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate for me to respond to the question.

- c. At the October 24 hearing, you received a total of 1 question from a single Senator. Your entire live questioning lasted less than 2 minutes. Do you think that is appropriate and consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

The decision to proceed with a hearing is question of internal Senate procedure, and pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate for me to respond to the question.

- d. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the scheduling of your confirmation hearing?

I did not consider it appropriate to make any objection. As a nominee, I believe it is my obligation to appear when scheduled by the Committee. The decision to proceed with a hearing is question of internal Senate procedure, and pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, it would be inappropriate for me to respond to the question.

2. Have you ever tried a case before the Court of Federal Claims?

No. I tried one case in federal district court.

3. What is the most difficult experience you have had making an oral argument before the Court of Federal Claims, and why?

I have never had made an oral argument in the Court of Federal Claims. With respect to other arguments I have presented in court, I believe the most challenging argument I ever had to make was before a judge of the Tax Court, who appeared strongly predisposed to reject the government's position during most of the argument. Ultimately, I was able to get the judge not to rule adversely to the government and in further appearances managed to prevail on the procedural argument I was making.

4. What is the most difficult experience you have had writing a brief for the Court of Federal Claims, and why?

I have never written a brief before the Court of Federal Claims. The most challenging experience I had writing a brief came in a series of cases involving the implementation date of the Food Security Act of 1985. There was very little relevant law, and the government's position depended on the practice of the agency, which Congress had understood and never repudiated but left unclear. The difficulty of the issue was reflected in the fact that the district courts that heard the cases split 2-2 and the courts of appeals split 2-1 against the government, with the one court ruling for the government ultimately changing its position.

5. Please describe your most significant experiences litigating before the Court of Federal Claims.

I have never litigated before the Court of Federal Claims.

6. As a practicing attorney, have you ever worked on any matters pending before the Court of Federal Claims?

No

7. What do you believe best prepares you to be a judge on the Court of Federal Claims?

Over the past months, I have thought long and hard about my qualifications for the position to which I have been nominated. I keep returning to the qualities and skills desired in a judge. First is probity; a republic can survive lazy or nasty judges, but it cannot survive corrupt ones. Then comes temperament, the ability to deal with lawyers, litigants, colleagues and staff with courtesy and equanimity. A judge needs to bring an open mind to each case and not prejudge it; the judge for whom I clerked had a sign in our chambers reading "audi alteram partem" – hear the other side. A judge must treat all parties fairly, but a judge should also be decisive and prompt in reaching decisions. Judges should be smart, with a broad perspective and should be willing to work hard to keep the court's docket reasonably current. Ultimately, what we want from a judge is the ineffable, perhaps undefinable qualities of wisdom and judgment.

I believe these various qualities can be developed not only by a career in litigation, but through other career paths. In that respect, we do not require our umpires to be able to hit the curve ball, or the referee to be able to score three-point baskets. Sports officials must know the rules and keep a level head in difficult circumstances, much like a judge. These qualities can be intrinsic or learned, but typically are a combination of both.

Often, indeed, litigators tend to specialize and develop a narrower focus. They are prosecutors or criminal defense lawyers, tort litigators, antitrust litigators, labor and discrimination litigators, and on and on. They may know the rules of evidence, but their knowledge of substantive law outside their areas of specialization is often limited.

My experience in the realm of public policy is directly relevant to the position to which I have been nominated. To begin with, I have an exceptionally broad familiarity with substantive federal law. There is practically no area of federal law that I have not had occasion to have to address during my career, from antitrust to tax, I have advised senators, House members, or executive branch officials.

Of most direct relevance to the jurisdiction of the Court of Federal Claims, I served as senior counsel and subsequently as Republican staff director of the then-Senate Governmental Affairs Committee. That Committee has legislative and oversight jurisdiction over federal civilian procurement and personnel laws, issues that form the core of the Court's cases. On the Judiciary Committees in the Senate and House I advised my principals on takings issues and helped develop and enact the Leahy-Smith America Invents Act to reform the patent system, two more issues that appear before the Court with frequency. I became familiar with vaccine claims that the Court oversees, and have an understanding of the criminal justice system, so have an awareness of erroneous convictions that underpin claims that the Court entertains. I even had occasion, though limited, to be immersed in the unique status of Indian tribes under federal law, another area relevant to the Court's jurisdiction.

In addition, having served four different senators and a House member, I had occasion frequently to interact with a wide range of constituents from a range of states. Through that engagement I developed a sense of the impact of federal policies and decisions on the American people. That experience will be particularly useful on the Court of Federal Claims, which stands as a cornerstone of the country's commitment to a republican form of government: the government may be liable to its citizenry and must adhere to the rules too, without special favor.

My experience in congressional oversight is also quite relevant. Whether as a staff member or at the Justice Department, I was involved in hundreds of fact-finding oversight hearings, analogous to the fact-finding conducted by courts. Legislative staff work is also quite relevant to the judicial function. When persons would come to Congress seeking legislation, the first step is typically to determine what the current law applicable to the situation is. Good legislative staff work is objective, just as is required of a judge.

In addition, the Court of Federal Claims is one of limited and discrete jurisdiction established by Congress. Much of its work derives from the interpretation of statutes and regulations. Most of my career has been spent doing just that, trying to interpret statutes and drafting statutes in a way

that they may be comprehended and applied. In addition, when at the Office of Legal Policy, I helped to oversee the Justice Department's rule-making functions, gaining experience in drafting and interpreting regulations.

True, I will have to learn how to be a judge, but all lawyers who have not previously served as judges must learn those arts upon confirmation. And I maintained over the years a familiarity with the applicable rules of the federal courts. I reviewed, pursuant to the Rules Enabling Act proposed amendments to the federal rules of procedure and evidence when proposed by the Supreme Court. I was also involved in legislation that directly affected the federal rules.

The Senate in the past has confirmed judges with similarly limited litigation experience to trial courts, including both district courts and special federal courts like the Court of Federal Claims. Indeed, the Court of Federal Claims has drawn four judges from the ranks of the staff of this Committee during the past three decades, and only one of them had prior litigation experience. Many of the current or recent judges of the Court of Federal Claims, even if they had extensive litigation experience, had limited experience with cases in the Court of Federal Claims itself.

As a staffer to several senators, I assisted them in the consideration of candidates who sought to serve as federal judges. Litigation experience was something I advised my principals to seek, but there were other characteristics that the senators for whom I worked considered even more important – those I noted above: honesty, intellect, temperament, and judgment. I believe through the course of my career, I have developed the breadth and depth of knowledge and experience relevant to serving successfully as a judge on the Court of Federal Claims.

8. Do you believe there are any gaps in your resume regarding your preparation to be a judge on the Court of Federal claims? How do you intend to address those gaps?

As explained in response to question 7, I think I am quite well prepared to assume the office of Judge of the Court of Federal Claims, with an unusual breadth of exposure to relevant areas of substantive and procedural federal laws. With respect to the gaps specific to the Court of Federal Claims, I have been seeking to address those proactively. I have been reading through the text book *Court of Federal Claims: Jurisdiction, Practice and Procedure*, M. Solomson ed. (2016) and the *Deskbook for Practitioners*, 6th ed. (2017), published by the Court of Federal Claims Bar Association. I have also been reading all of the published decisions of the judges of the Court since my nomination, as well as all relevant decisions of the Court of Appeals for the Federal Circuit. I have also consulted with lawyers at my firm who practice before the Court or who recently clerked on the Court.

9. In 2008, you filed an amicus brief with the U.S. Court of Appeals for the Eleventh Circuit on behalf of the Minority of the House Judiciary Committee in the case of *U.S. v. Farley*.¹ The case dealt with the constitutionality of a 30-year mandatory minimum sentence for aggravated sexual abuse of minors under the age of 12.²

- a. Why was the Minority of the House Judiciary Committee interested in the case?

The issue of concern was the constitutional authority of Congress to establish criminal penalties. The committee sought to vindicate its authority under our constitutional framework.

- b. Do you believe a 30-year mandatory minimum was appropriate in that case?

The committee's interest was not in the particular sentence in that case but rather in the authority of Congress to set criminal penalties. I did not retain a copy of the brief in my papers, but my recollection is that the government argued the appropriateness of the sentence. The committee's argument went solely to the respective constitutional authorities of the legislative and judicial branches.

- c. Have you ever seen a mandatory minimum that you believed was unjust? If yes, please provide one example and explain why you thought it was unjust.

Yes, I have seen any number of mandatory minimum penalties that I believed were unjust under the circumstances and facts of the case. One noted example was the case of Weldon Angelos.

10. As Principal Deputy Assistant Attorney General and Deputy Assistant Attorney General the Office of Legal Policy at the U.S. Department of Justice, you handled criminal justice policy among a variety of issues.³

- a. In this capacity, did you ever advocate for any mandatory minimum sentences? If so, what crimes did you believe should have a mandatory minimum sentence?

To the best of my recollection, I did work on legislation that contained mandatory minimum sentencing provisions. The only instance I can recall is the PROTECT Act, which included mandatory minimum sentencing provisions for sexual assaults on minors.

- b. In your Senate Judiciary Committee Questionnaire, you said you worked on reentry policies.⁴ Please describe the reentry policies you worked on while at the Office of Legal Policy.

I had arrived at the Justice Department with a record of involvement on reentry policies. Working for the Judiciary Committee, on behalf of Senator Specter, I was involved in setting up the Office of Correctional Education and the Office of

Correctional Job Training and Placement. I worked on expanding drug treatment and on the establishment of and federal funding for drug courts. I also worked, less successfully, on seeking to preserve Pell Grants for inmates. As a result of this background work, when I arrived at the Office of Legal Policy, I was tasked with putting together a working group, composed of other Justice Department officials, to make recommendations to the Attorney General on improving the reentry process for federal offenders. I oversaw the production of a report to the Attorney General making recommendations for improving Justice Department and Bureau of Prisons efforts on improving prisoner reentry. I also worked on proposals to establish diversion courts for the mentally ill, akin to drug courts.

11. When you were Acting Assistant Attorney General of the Office of Legislative Affairs at the U.S. Department of Justice, you signed onto letters regarding the removal of U.S. Attorneys in 2006 for political reasons that turned out to be misleading.⁵ You also participated in meetings with Senate staff with other members of the Department of Justice who provided misleading information about the dismissals of the U.S. Attorneys.⁶ With respect to a letter about the dismissal of Bud Cummings and the appointment of Tim Griffin, you said “at the time [you] signed the response [you] were unaware that the facts stated in the letter were not accurate.”⁷

- a. What was your reaction when you found out that you signed letters that contained misleading information about the dismissal of U.S. Attorneys in 2006?

I was angry but also concerned for the reputation of the Justice Department and for my own reputation. I promptly undertook to draft a letter correcting the misleading statements made in the first letter and was authorized to transmit the correction. I also undertook to work with others at the Justice Department to ensure that documents that ordinarily would have been withheld from production to Congress were in fact produced to the committee, thereby creating an exception to the general rule of not releasing “memos on memos” (documents reflecting internal discussions on responding to congressional inquiries or requests).

- b. Did you discipline any employees as a result of this scandal?

No, the person who drafted the text of the letters containing the misleading statements was the chief of staff to the Attorney General. He did not work for me and I had no authority over him; he left the Department early in the course of the Senate’s inquiry.

¹ SJQ at 20.

² *U.S. v. Farley*, 607 F.3d 1294 (11th Cir. 2010).

³ SJQ at 14, 19.

⁴ *Id.* at 19.

⁵ *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, U.S. Department of Justice

19 (Sept. 2008), <https://oig.justice.gov/special/s0809a/final.pdf>.

⁶ *Id.*

⁷ *Id.* at 140.

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

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

I think there is implicit racial bias in our society, and I think such bias is reflected in the criminal justice system.

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

Yes, the data are clear.

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.

During my time working in government, I did study the issue. Most recently, when serving as staff director and chief counsel of the House Judiciary Committee, we looked at the growing disparities in federal sentences in the wake of the Supreme Court's holding in *Booker v. United States* that the Sentencing Guidelines were no longer mandatory. Since leaving government, I worked on papers being prepared by Covington & Burling lawyers for our *pro bono* client Lawyers Committee for Civil Rights Under Law regarding disproportionate impacts of collateral effects of criminal convictions. I have not done any recent work in the area and, because the Court of Federal Claims has no criminal jurisdiction, I have not reacquainted myself with these issues in preparation for my potential confirmation.

13. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹² In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹³

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

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

The evaluation of the data cited in the preamble to the questions and their relevance to policy debates surrounding sentencing reform and criminal justice and enforcement policies implicate political and policy questions vested by the Constitution in the legislative and executive branches of the federal government, in addition to state governments (the sources of the data cited and the primary actors in criminal justice matters). Because the questions call for judgments on matters of policy, it is inappropriate for me, pursuant to the Code of Conduct for United States Judges, applicable to judicial nominees, to respond to these questions.

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

Yes.

15. Do you believe that *Brown v. Board of Education*¹⁴ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown is a seminal case and a crucial moment in U.S. constitutional history. I would have no difficulty applying it to any case before me in which the decision was applicable. I believe, however, that it would be inappropriate for me, as a judicial nominee, to express a view as to whether *Brown* or any decision of the Supreme Court was correctly decided. If confirmed, my role as a judge on a lower federal court will be to apply all Supreme Court decisions to the cases before me after briefing and, in appropriate instances, oral argument, and I will do so.

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

⁹ *Id.*

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

¹¹ *Id.*

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

¹³ *Id.*

¹⁴ 347 U.S. 483 (1954).

16. Do you believe that *Plessy v. Ferguson*¹⁵ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Plessy is no longer good law or sound constitutional doctrine. Just as with the question about *Brown*, however, it is not for judges or nominees to lower federal courts to question whether Supreme Court decisions are correct or not, it is to apply them faithfully. With *Plessy*, there is nothing to apply, it is a dead letter in its result and its rationale.

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

No, my perspective on whether to respond to these questions derives from my reading of the Code of Conduct for United States Judges and whether it is appropriate to indicate in the abstract a view on specific judicial and legal principles. Just as the federal courts do not provide advisory opinions, nominees should not opine in the abstract about legal principles. All I can do is commit to you and to the Senate that I will faithfully apply all governing precedents relevant to each specific case before me if the Senate sees fit to confirm my nomination.

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

As your question notes, the President appears to be proposing a change from current procedures, established by Congress, for processing asylum claims. In light of the President’s comment, it is likely that there will be legislative debate and potential judicial consideration of the extent different classes of immigrant may be entitled to different levels of process before removal. Inasmuch as the question seeks a view on impending legislative and judicial matters, it would be inappropriate for me under the Code of Conduct for United States Judges, equally applicable to judicial nominees, to respond to the question.

¹⁵ 163 U.S. 537 (1896).

¹⁶ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted October 31, 2018
For the Nomination of**

Richard Alan Hertling, to the U.S. Court of Federal Claims

1. In a 2016 case called *Zubik v. Burwell*, you filed an amicus brief on behalf of 207 Republican members of Congress in support of non-profit religious employers. The case addressed the constitutionality of the Affordable Care Act’s contraception coverage mandate. In opposition to that mandate, your brief argued that employers’ religious freedom was substantially burdened, in violation of the Religious Freedom Restoration Act, where employers had to complete a form that would compel insurance carriers to provide contraception coverage.

- a. **Do you still agree with your position in *Zubik*—that completion of a form constitutes a substantial burden on religious freedom?**

The position advocated in the brief *amicus curiae* submitted to the Supreme Court in *Zubik* by my firm reflected the position of the firm’s *pro bono* clients, who were the 207 members of both houses of Congress who joined the brief. I advanced the positions in the brief on behalf of the clients. Because the issue in *Zubik* remains a live one in the federal courts, it is inappropriate for me to express a view on it, other than to say that I would not hesitate to apply the ultimate ruling on the issue in any case before me to which it is relevant if I am confirmed.

- b. **Do you agree that comprehensive health care must include access to contraception?**

The question calls for an opinion on a policy question, and it is therefore inappropriate for me, under the Code of Conduct for Federal Judges, applicable to nominees for federal judicial positions, to provide a response.

- c. **Do you believe the government has a compelling interest in ensuring access to affordable contraception coverage?**

The question calls for an opinion on a policy question, and it is therefore inappropriate for me, under the Code of Conduct for Federal Judges, applicable to nominees for federal judicial positions, to provide a response.

2. In September 1990, when you served as counsel on the Senate Judiciary Committee, a group of abortion rights advocates visited the office of Senator Arlen Specter to challenge his support for then-Judge David Souter. A local Pennsylvania newspaper—the Allentown Morning Call—reported that a student from the University of Pittsburgh said that Senator Specter did not support her rights as a woman. The article reported that, in response, you “snapped back, ‘Then elect a president to get your point of view [on the Supreme Court].’”

- a. **Is this account accurate? If the answer is “no,” please describe the incident from your perspective.**

I have no independent recollection of the event. I would not dispute the account provided in the article, although I do not think I would have “snapped” at constituents; I believe that is a characterization employed to lend some color or controversy to the exchange. The substance of the point I was making is that elections have consequences, a point I believe is fundamental to democratic government and a view I continue to hold today.

3. In 1990, you represented the government in *United States v. Krc*, which concerned the government’s termination of a member of the foreign service who was involved in a same-sex intimate relationship while posted in Yugoslavia. You filed a brief in that case arguing that the firing was security-related and therefore unreviewable. The district court ruled in your favor. On appeal, however, the D.C. Circuit remanded for further development of Mr. Krc’s claim that he was terminated based on his sexual orientation.

Although *United States v. Krc* involved a termination decision, it also implicated broader questions about how the government can treat members of the LGBTQ community, and when the government should be held accountable for alleged discrimination against LGBTQ individuals.

In deciding how closely to look at discriminatory laws, the U.S. Supreme Court often considers two things: (1) is the group being discriminated against defined by immutable characteristics, and (2) has the group faced discrimination in the past. If a group has those characteristics, the Court has said it should be more suspicious of laws that harm them.

- a. **Is being gay or lesbian an immutable characteristic?**

I do not have a basis on which to provide a response to the question. I am aware of articles in the popular media reporting on articles in scientific media supporting the genetic basis of sexual preference, but I have insufficient knowledge to make a judgment. I am further aware that my gay and lesbian friends strongly believe that their sexual preference reflects an immutable characteristic.

- b. **Have gay and lesbian Americans been subject to discrimination in the past?**

Yes

- c. **Is being transgender an immutable characteristic?**

I do not have a basis on which to provide a response to the question.

- d. **Have transgender Americans been subject to discrimination in the past?**

Yes

- e. **If you believe that LGBTQ Americans have faced discrimination in the past, do you believe they should be protected by federal anti-discrimination laws?**

The question posed presents a policy and political question regarding pending federal legislation; it also implicates pending litigation in various federal courts. As a result, it is inappropriate for me, under the Code of Conduct for United States Judges, applicable to nominees for federal judicial positions, to provide a response.