Nomination of Neomi Rao to the United States Court of Appeals for the D.C. Circuit
Questions for the Record
February 6, 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. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

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

As noted above, a circuit court is always bound by Supreme Court precedent. There may, however, be rare occasions where a circuit court judge would note in a concurring opinion or dissent that Supreme Court precedent should be reconsidered. This does not alleviate the responsibility of the circuit court judge to follow the relevant precedent.

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

It is never appropriate for one circuit panel to overturn prior circuit precedent. A circuit may only consider overruling its own precedent when sitting *en banc*. *See, e.g., Davis v. U.S. Sentencing Com'n*, 610 Fed.Appx. 1, 3 (D.C. Cir. 2015) ("Absent *en banc* review, the court is bound by its precedent.") (quotes omitted).

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

In deciding whether to overturn one of its own prior precedents, the Supreme Court generally considers a number of factors, including whether the precedent at issue was rightly decided; the question at issue is statutory or constitutional; the precedent has given rise to significant reliance interests; the precedent has been consistently applied; and the precedent has been eroded by other related decisions. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 233-36 (2009); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of the Roe case law as "super-stare decisis." One text book on the law of judicial precedent, co-authored by Justice 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"? "superprecedent"?

If I am confirmed, I would faithfully apply *Roe v. Wade* and all other Supreme Court precedent without regard to whether such precedent is labeled "super-stare decisis" or "superprecedent."

b. Is it settled law?

Roe v. Wade is binding precedent of the Supreme Court. If confirmed, I would faithfully apply *Roe* and all other Supreme Court precedents.

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?**

Obergefell v. Hodges is binding precedent of the Supreme Court. If confirmed, I would faithfully apply *Obergefell* and all other Supreme Court precedents.

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?

It would not be appropriate for me to offer an opinion concerning the merits of Justice Stevens' dissent. If I am confirmed, I will adhere to *Heller* and all precedent established by the Supreme Court.

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

The Court's decision in Heller states that "[n]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). Beyond this, it would be inappropriate for me to answer this question as litigation concerning the constitutionality of firearm regulation is currently pending in federal courts including the Supreme Court. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

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

It would not be appropriate for me to offer an opinion concerning the merits of *Heller* or whether it departed from previous Supreme Court precedent. If confirmed, I will adhere to *Heller* and all other Supreme Court precedent.

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?

Litigation concerning the scope of the Supreme Court's decision in *Citizens United* is currently pending. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

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

Please see my response to Question 5.a.

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

Please see my response to Question 5.a.

6. In 2016 – while you were a law professor – you testified that much of what agencies do is unconstitutional. Specifically, you said that congressional "[d]elegation to agencies, combined with deference to agency interpretation, has allowed for much of administration to operate outside of the checks and balances of the constitution." (*Examining Agency Use of Deference*, Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management (Mar. 17, 2016))

a. Which agencies do you believe have been operating "outside of the checks and balances of the constitution"?

This testimony focused on deference afforded to administrative agencies by courts. I explained that considering the scope of judicial deference implicates the non-delegation principle. As an academic commentator, I suggested that judicial deference is a reaction to the court generally permitting Congress to provide administrative agencies with open-ended authority. In my scholarship, I have explained how the non-delegation principle is a cornerstone of separation of powers. *See, e.g.*, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015).

b. Please provide specific examples in which these agencies have operated "outside of the checks and balances of the constitution," and how those agency

operations violated the Constitution.

Please see my response to Question 6.a.

c. When it comes to complex technical issues – like fuel economy standards – Congress creates a framework, which allows agencies some flexibility. Do you expect Congress to pass laws with such specificity that there can't be updated rules based on advancements in science and technology?

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that an agency is entitled to deference in its reasonable interpretation of ambiguous statutes governing regulations it administers. Agencies are entitled to this deference in part because of their expertise, including their ability to recognize and account for advancements in science and technology.

7. In a 2014 law review article, you wrote that – under the Constitution – "the President must be able to remove at will all principal officers," and you added that this included "the heads of the so-called independent agencies." You also wrote that your views "will strike many as a radical departure from the current administrative state, which includes countless independent agencies whose heads can be removed only for cause." (*Removal: Necessary and Sufficient for Presidential Control,* Alabama Law Review (2014)).

Under your view, what would prevent a President from firing the Federal Reserve Chair and appointing someone who would push monetary policies designed to personally benefit the President?

In that article, written when I was an academic, I noted that a number of constraints limit the President's ability to remove officers including political constraints. If I am confirmed, I would be bound by and adhere to all Supreme Court precedent concerning the removal power of the President.

8. Very early in the Trump administration, the President's chief strategist, Steve Bannon, said that cabinet appointees were chosen in order to pursue "the deconstruction of the administrative state." You have said something similar, stating that the President's cabinet appointees were chosen because they were focused on "getting rid of regulation." (*Deregulation Reform Ramps Up, Could Include SEC,* Pensions & Investments (Jan. 26, 2018))

a. Before your nomination, did you have any discussions with anyone in the Trump Administration — or anyone advising the Administration — about your view that the President should be able to fire the heads of independent agencies?

I have spoken publicly about the fact that the Administration was considering the question of whether regulations promulgated by traditionally independent agencies should be subject to OIRA review (a question considered by every administration since President Reagan). I was part of those discussions.

b. Before your nomination, did you have any discussions with anyone in the

Trump Administration — or anyone advising the Administration — about your views on specific rules or statutes that you believe are unconstitutional?

As Administrator of OIRA, I have on occasion discussed constitutional concerns raised by draft regulations as part of the review process. These discussions took place in my capacity as Administrator of OIRA. I have not had any such discussions in connection with this nomination, and I have made no promises or commitments with respect to how I would decide a case or controversy that might come before me.

9. During your confirmation hearing, Senator Blackburn asked you what you thought your "primary contribution" was with respect to "deregulation." You responded: "One of the things we've been most focusing on is moving forward with regulatory reform in a way that gets government out of the way where it's not working." You also added that "we're looking to pull back the things that are no longer working."

Please identify each regulation that has gone through OIRA under your leadership that you believe is "no longer working." For each, please specify how that regulation is "no longer working."

The response to Senator Blackburn referred to certain regulations that were issued by previous Administrations and which were "no longer working." Those regulations have not passed through OIRA under my leadership, although regulations to amend some of them have done so.

10. During your hearing, you acknowledged that OIRA had evaluated the Department of Education's proposed rule regarding sexual assault and sexual harassment under Title IX. Sexual assaults are already dramatically underreported, and these rules would make it much worse. The proposed rules would allow cross-examination of survivors by a representative chosen by the attacker, and the Administration itself estimated that the proposed changes would cause the number of investigations into campus sexual assault to decrease. (Notice of Proposed Rulemaking, Federal Register (Nov. 29, 2018)) Your office clearly had an important role in approving these rules. According to your website, your staff in the Office of Information and Regulatory Affairs participated in 45 formal meetings on this rule before it was published.

a. Do you believe that students who are the survivors of sexual assault should be required to undergo a live hearing during which they are cross-examined by their attacker's representative? If so, why do you believe it is appropriate to force student survivors to endure that live cross-examination?

The Department of Education has primary responsibility for setting regulatory policy under the statutes it administers. Regulations, such as the Title IX notice of proposed rulemaking, are developed by agency experts in line with legal requirements and administration priorities. OIRA coordinated review of the Title IX proposed rule under Executive Order 12866. This review includes, *inter alia*, consideration of whether the regulation is consistent with law, provides substantial net benefits to the public, and furthers presidential priorities. OIRA's role is not to set policy, but to review regulations according to longstanding standards. Other agencies and White House

policy councils also participated in the review before the Department of Education published the rule. The comment period for the proposed rule ended on January 30, 2019, and the Department of Education will consider relevant comments in the course of drafting a final rule.

b. How did you conclude that the benefits of this policy outweigh the costs, considering that the administration's own analysis – which OIRA signed off on – states that there would be fewer incidents reported?

While OIRA reviewed this proposed rule, it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. To the extent the question seeks information about the costs, benefits, and transfer effects of the proposed rule, I refer you to the rule's preamble and regulatory impact analysis.

11. The proposed rules governing sexual assault and sexual harassment on campus – which OIRA approved – state that there can be a higher standard of proof for sexual harassment allegations than for other types of serious allegations. This is appropriate – the rules state – because there is a "heightened stigma" associated with being accused of sexual harassment. (Notice of Proposed Rulemaking, Federal Register (Nov. 29, 2018))

Why should victims of sexual harassment be required to meet a higher standard of proof than the one that is required for other serious forms of misconduct?

Please see my response to Question 10.a. As I noted above, the Department of Education has primary responsibility for setting regulatory policy under the statutes it administers. Regulations, such as the Title IX notice of proposed rulemaking, are developed by agency experts in line with legal requirements and administration priorities.

12. As Administrator of OIRA, you have helped gut the Obama administration's efforts to address climate change. The Trump administration's proposed rules – which OIRA approved – would result in up to 1,400 premature deaths annually by 2030 – due to an increase in the fine particulate matter that is linked to heart and lung disease. These rules would also result in up to 48,000 new cases of exacerbated asthma and 15,000 new cases of upper respiratory problems. These numbers come from the administration's own analysis. (*Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, New York Times (Aug. 21, 2018))

Given these statistics, how did you come to the conclusion that these costs of the new regulations were outweighed by the benefits?

The cost-benefit assessment in a proposed rule is tentative, not final, and an agency must respond adequately to comments on its assessment in any final rule. While OIRA reviewed this proposed rule, it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. To the extent the question seeks information about the costs, benefits, and transfer effects of the proposed rule, I refer you to the rule's preamble and regulatory impact analysis.

13. The *Ten-in-Ten Fuel Economy Act*, which I authored with Senator Olympia Snowe, requires fuel economy standards to be set at the "maximum feasible level" based on extensive

analysis of available technology. Congress does not conduct that analysis – instead, we appropriate funds for the Environmental Protection Agency (EPA) and Department of Transportation to hire experts to conduct that analysis. They did so in 2016, in a publicly vetted report. However, this Administration appears not to have used that report in its proposal to cancel the planned improvements in fuel economy and vehicle emissions standards starting in 2021. (*The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*) Instead, this Administration substituted its own justifications for this proposal, and the regulatory analysis was ultimately riddled with mathematical errors and incorrect assumptions. This has been demonstrated by economists in a peer-reviewed study, in internal EPA documents, and in the public comments of at least one large automaker. (See Robinson Meyer, *The Trump Administration Flunked Its Math Homework,* THE ATLANTIC (Oct. 31, 2018))

You have stated that OIRA works with agencies to "ensure the high quality of information that agencies collect" and use. (Notes for speech, American Bar Association Administrative Law Conference (Oct. 19, 2017))

As OIRA Administrator, why did you allow this proposal to be published in the Federal Register with such flaws in the regulatory analysis?

The Department of Transportation and the EPA have primary responsibility for setting these standards under the statutes they administer, working with agency experts to ensure regulations comply with law and meet administration priorities. OIRA coordinated review of this proposed rule under Executive Order 12866. This review includes, *inter alia*, consideration of whether the regulation is consistent with law, provides substantial net benefits to the public, and furthers presidential priorities. OIRA's role is not to set policy, but to review regulations according to longstanding standards. Any final rule sent to OIRA will similarly have to meet these standards and take into account relevant public comments regarding the regulatory analysis in the proposed rule.

14. The *Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026* asserts that California's existing vehicle emission standards should be preempted. However, the proposal's legal justifications for preemption are not supported by the law, are contradicted by a clear record of legislative intent, and in some cases have already been rejected by the courts.

When you allowed this proposal to be published, were you aware that the Administration's legal justification for preempting California's vehicle emission standards relied on unprecedented interpretations of the *Clean Air Act* and an interpretation of the *Energy Policy Conservation Act* that had been rejected by two federal courts in 2007?

This proposed rule was reviewed by OIRA, but it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. In the review of any final rule, OIRA will consider whether EPA and the Department of Transportation have taken into account relevant public comments and OIRA will also coordinate review of the legal justifications with other executive branch lawyers.

15. During your confirmation hearing, in response to questions from Senator Leahy, you stated that there is "an overwhelming scientific consensus" that climate change exists and you acknowledged that human activity contributes to climate change.

Please explain how "overwhelming scientific consensus" on the existence of climate change and scientific evidence of human contribution to climate change factored into OIRA's cost-benefit analysis of the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026.

Please see my response to question 13.

16. During your confirmation hearing, I asked you about your decision as OIRA Administrator to withdraw the Equal Employment Opportunity Commission's (EEOC) revised EEOC-1 form, which aims to identify wage discrimination on the basis of race or gender by collecting wage data from certain private employers. You responded that you based your decision on the *Paperwork Reduction Act*'s standards regarding information collection and noted that such collections should be "minimally burdensome" and have "practical utility."

a. How, specifically, is the EEOC's revised EEOC-1 form in violation of the *Paperwork Reduction Act*'s standards on information collection?

This matter is currently in active litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

b. What evidence did you have, and what specific criteria did you use, in determining that the form was overly burdensome?

Please see my answer to Question 16.a.

17. In 2013, the West Fertilizer plant in Texas exploded and killed 15 first responders. In the aftermath of the tragedy, the Obama administration proposed new safety rules. But in 2018, the Environmental Protection Agency – with OIRA's approval – proposed new regulations, rescinding the Obama administration's proposed safety rules. The Mayor of West, Texas – Tommy Muska – was harshly critical of the decision. He said, "With all due respect to Scott Pruitt, he's never lost 15 firefighter friends. . . . I'm as pro-business as anyone, but some things are way, way, way more important than too much regulation, and that includes the safety of these chemical plants." (*Mayor of West Feels Anger Over EPA Plan*, Austin-American Statesman (May 19, 2018)) *The Houston Chronicle* cited this decision in calling for Scott Pruitt's resignation, writing, "[t]oo many lives are at risk to leave a man like Pruitt in charge." (*Remember The West Disaster, Because Pruitt Doesn't*, Houston Chronicle (May 25, 2018))

Why did OIRA approve Pruitt's proposed rule?

The EPA has primary responsibility for setting regulatory policy under the statutes it administers. This proposed rule was reviewed by OIRA, but it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. In the review of any final rule, OIRA will consider whether EPA has taken into account relevant public comments made

regarding the proposed rule. To the extent the question seeks information about the justification advanced in the proposed rule, I refer you to the text of the proposal's preamble.

18. In 2018, the Interior Department's Bureau of Safety and Environmental Enforcement proposed a regulation that rescinded the safety rules put in place after the Deepwater Horizon oil rig disaster in 2010 – a disaster that killed 11 people and caused the worst oil spill in American history. The new rules – which OIRA approved – no longer require oil companies to design their safety equipment to withstand the most extreme scenarios, such as severe weather, high winds, or extreme heat. The new rules also no longer require independent inspections of offshore drilling safety equipment.

How did you reach the conclusion that the benefits of rescinding these safety rules outweighed the costs?

The Department of Interior has primary responsibility for setting regulatory policy under the statutes it administers. This proposed rule was reviewed by OIRA, but it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. In the review of any final rule, OIRA will consider whether the agency has taken into account relevant comments made regarding the proposed rule. To the extent the question seeks information about the costs, benefits, and transfer effects of the proposed rule, I refer you to the rule's preamble and regulatory impact analysis.

19. In 2016, reporting revealed that the Center for the Study of the Administrative State – which you founded and led as director – received large financial contributions from the Charles Koch Foundation and also from a foundation headed by Leonard Leo of the Federalist Society. The reporting also revealed that both the Koch brothers and Leonard Leo were involved in faculty selection at George Mason University. (*What the Koch Brothers' Money Buys,* Slate (May 2, 2018))

a. Did you have any discussions with Charles Koch, David Koch, Leonard Leo, or their representatives before you became a professor at George Mason University?

No.

It is important to note that the article you cite includes material errors. To the best of my knowledge, the Center did not receive any money from the Koch Foundation or from the Federalist Society.

b. Did you have any discussions with Charles Koch, David Koch, Leonard Leo, or their representatives before you were appointed director of the Center for the Study of the Administrative State at the Antonin Scalia School of Law?

In the course of founding the Center, I spoke with many individuals familiar with administrative law as well as individuals who have successfully run non-profit centers, including Mr. Leo. I did not have any discussions with Charles or David Koch or their representatives when founding the Center.

c. Have you discussed your views on administrative law with Charles Koch, David Koch, Leonard Leo, or their representatives?

I spoke with many people while running the Center—other professors, judges, practitioners, government officials, and individuals at non-profit organizations. As I recall, in general conversations with Mr. Leo we spoke about the Center and its progress, but at no time did he seek to influence the programming, speakers, or topics studied by the Center. I have never met Charles or David Koch. I have met representatives of the Koch Foundation and discussed with them generally the mission of the Center.

20. According to your public financial disclosure, the Federalist Society paid you $10,000 in 2017 for your work on the group's Article I Project.

What services did you provide to the Federalist Society in return for this payment?

The Article I project of the Federalist Society seeks, according to its website, "to restore Congress to its rightful place in the Constitutional order. The Initiative is non-partisan; we aim to bring the left and the right together to ensure that the Constitutional balance leans heavily towards the institution which is meant to be most representative of the American people." This payment supported my ongoing research on the collective Congress, which was ultimately published as *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 Fla. L. Rev. 1 (2018).

21. During an interview on the Hugh Hewitt radio show, Mr. Hewitt argued that the regulations governing Special Counsel Mueller are "an attempt to use a regulation to limit the executive authority of the president, which I believe defeats the unitary executive theory." You strongly suggested that you agreed, concluding, "That is absolutely true." Hewitt went on to specifically ask you, "in terms of the administrative state, everybody who is not an independent agency answers to the president. And therefore, the president can direct them how to act, can he not?" You responded, "That is certainly true. I mean, Article II of the Constitution vests all executive power in the president. . . . So yes, he does have the ability to direct his subordinates." (The Hugh Hewitt Show (Dec. 15, 2017))

Given that you have clearly expressed a view on this matter, will you commit to recusing yourself if a case comes before you regarding the President's authority to remove – or order the Attorney General to remove – Special Counsel Mueller?

In context, this conversation referred to the general authority of the President to oversee execution of the laws under Article II of the Constitution; but I declined to provide an opinion on any specific regulation or matter. Regardless, if I am confirmed to the D.C. Circuit, whether I recuse will depend on the facts and issues presented in specific cases or controversies. I would take seriously the obligations of recusal and follow the standards in 28 U.S.C § 455 and the practices of the D.C. Circuit, and consult with my colleagues.

22. In a 2018 speech, you said, "I think there's no constitutional reason to treat independent agencies as distinct at least insofar as they are issuing regulations." (*What's Next for Trump's Regulatory Agenda: A Conversation with OIRA Administrator Neomi Rao,* Brookings

Institution (Jan. 26, 2018)) In another 2018 speech, you said that having OIRA review the regulations of "the traditionally understood independent agencies" would "promote a more constitutional and coherent regulatory policy." (Federalist Society 2018 Executive Branch Review Conference (Apr. 17, 2018)) (Emphasis added)

Do you believe it is constitutional for Congress to authorize agencies to issue regulations that do not take account of the President's personal or policy preferences, as many independent agencies currently do?

This question asks me to opine on the constitutionality of enactments of Congress. As a nominee for judicial office I do not believe it would be appropriate for me to offer such an opinion.

23. In 2015, you wrote an op-ed attacking Chief Justice Roberts for his decision in *King v. Burwell* upholding the federal government's ability to provide subsidies for insurance purchased through federally established exchanges. In your op-ed, you accused the Chief Justice of relying on the ACA's "talking points" instead of the law. (*The Supreme Court's Rule by Talking Points*, THE EXAMINER (July 7, 2015))

a. Please explain in detail how Chief Justice Roberts erred in his *King v. Burwell* opinion.

King v. Burwell is a precedent of the Supreme Court. If confirmed, I would faithfully adhere to this and other precedents of the Supreme Court.

b. Do you believe that *King v. Burwell* was wrongly decided? If so, why?

Please see my response to Question 23.a.

24. In a 2012 law review article, you indicated that the Affordable Care Act threatens "individual dignity" and argued that Congress might "lack the constitutional authority to require everyone to purchase health insurance." Of course, the Supreme Court held in *NFIB v. Sebelius* that the ACA is a constitutional exercise of Congress' taxing powers. (*American Dignity and Healthcare Reform*, 35 Har. J. L. & Pub. Pol'y 171 (2012)).

a. How exactly does the ACA – which has allowed millions of Americans to gain health coverage – pose a threat to "individual dignity?"

This article was published before the Supreme Court's decision in *NFIB v. Sibelius*, 567 U.S. 519 (2012), upholding the constitutionality of the ACA. I argued that when Congress exceeds its constitutional powers it can be an infringement of individual liberty. *NFIB v. Sibelius* is precedent of the Supreme Court. If confirmed, I would faithfully adhere to this precedent.

b. Do you believe that Congress lacked the constitutional authority to enact the ACA?

Please see my response to Question 21.a.

25. While you were a law student, you wrote an article criticizing the Supreme Court's decision in *Roe v. Wade* and indicated that there were "many persuasive legal arguments against recognizing a constitutional right to abortion." You further wrote that "substantive due process arguably has no textual support in the Fourteenth Amendment Due Process Clause, and was at any rate severely discredited after the Lochner era." (*A Backdoor to Policy Making: The use of Philosophers by the Supreme Court*, 65 U. Chi. L. Rev. 1371 (1998))

In a 2008 law review article, you wrote that rights to privacy and autonomy are "deeply contested." (*On the Use and Abuse of Dignity in Constitutional Law*, 14 Colum. J. Eur. L. 201 (2008))

a. What are the "many persuasive legal arguments against recognizing a constitutional right to abortion"? Please identify each legal argument with specificity.

Roe v. Wade and subsequent Supreme Court cases regarding abortion, including *Casey* and *Whole Women's Health*, are precedents of the Supreme Court. If I am confirmed, I would faithfully adhere to these and other precedents of the Supreme Court.

b. Do you believe women have a liberty interest in the Fourteenth Amendment that protects their right to obtain an abortion?

Please see my response to Question 25.a.

26. As discussed at your hearing, you wrote several controversial op-eds while a student at Yale. These op-eds touched on a variety of topics, including sexual assault, racism and sexism, and environmental issues. During your hearing, you told Senator Tillis that there were "certainly some sentences and phrases [you] would never use today" because they "don't reflect [your] views" or the way you express yourself.

Please specify which sentences and phrases from these op-eds are no longer reflective of your views today.

These opinion pieces from college referenced specific events at Yale in the early 1990s. When commenting on these events and participating in debates on campus, I sometimes expressed myself in a provocative style. As I stated at my hearing, I would not express myself in the same manner today and, in fact, some of the words and concepts make me cringe. Since college, my writing, speeches, and testimony have focused on the law and my scholarship, not topics outside of my expertise.

27. In a 2011 law review article, you seemed to be critical of efforts to ban the practice of "dwarf tossing," in which individuals compete to throw individuals with dwarfism. Referring to a French case that prohibited an individual from engaging in the practice, you wrote that the case "demonstrates how the concepts of dignity can be used to coerce individuals by forcing upon them a particular understanding" of appropriate conduct, regardless of their individual

choices. (*Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183 (2011))

Do you oppose state-level efforts to ban dwarf tossing, an activity that the Little People of America has categorized as being "dehumanizing and injurious?"

It would be inappropriate for a nominee for federal office to comment on or endorse legislation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "[a] judge should not engage in any . . . political activity."

28. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 1996. You also indicated that you have had several leadership roles with the Federalist Society, including: Regulatory Transparency Project, Regulatory Process Group (2017); Article I Project (2016-2017); Federalism & Separation of Powers Practice Group, Executive Committee Member (2013-2017); International & National Security Practice Group, Executive Committee Member (2006-2013, estimated); and University of Chicago Law School Chapter, President (1998-1999). The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

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

I am not the author of, and I do not know what the Federalist Society means by, this statement.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

Please see my response to Question 28.a.

c. What "traditional values" does the Federalist society seek to place a premium on?

Please see my response to Question 28.a.

29. 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 difference 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?

As the Administrator of OIRA, I frequently discuss questions of regulatory policy and administrative law with individuals around the executive branch. No such question about my views, however, were asked in meetings regarding my nomination to the D.C. Circuit.

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?

I have spoken at Federalist Society and Heritage Foundation events on topics that include matters of administrative law. I have disclosed those speeches as part of Question 12.d. of the Senate Judiciary Questionnaire.

c. What are your "views on administrative law"?

Administrative law encompasses a great deal. My personal views on some aspects of administrative law are reflected in my scholarship and speeches. I expressed these views as an academic about abstract questions of law or as an executive branch official. If confirmed to the court of appeals, I would put aside my academic and official views and faithfully follow Supreme Court precedent in each case.

30. 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.

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

I answered these questions with reference to my prior writings and testimony. I consulted with my colleagues at OIRA to ensure accurate answers to questions concerning the work of the office. As in all parts of the confirmation process, I have been in contact with individuals from the White House Counsel's Office and the Department of Justice.

Written Questions for Neomi Rao
Submitted by Senator Patrick Leahy
February 6, 2019

1. In November 2017, the EEOC delivered its new workplace sexual harassment guidelines to OIRA for review. Since arriving at your office, these guidelines have not seen the light of day. It normally takes your office 3 months to review such guidelines; it's been over 15 months now.

(a) Is the OIRA still reviewing these guidelines? If so, what are the reasons that the OIRA's review of these guidelines is taking so long?

OIRA is no longer reviewing these guidelines. The guidelines have been transmitted to the EEOC for further action.

(b) What personal involvement, if any, have you had in reviewing or making any determinations about the EEOC's sexual harassment guidelines?

These guidelines were informally reviewed by OIRA, which coordinated an interagency process and returned comments to the EEOC. The EEOC has confirmed that it is considering how to proceed.

2. You have said that President Trump has appointed people "because they were reform-minded about getting rid of regulation."

(a) Is that your primary objective at OIRA – to get rid of regulations?

As the Administrator of OIRA, I have sought to implement regulatory reform in a manner that is transparent, consistent with law, and in accordance with the longstanding principles of Executive Order 12866 (1993). OIRA also has important statutory responsibilities with respect to information quality, collections of government information, statistical policy, and privacy policy.

3. You've written an op-ed touting that your deregulatory work at the White House has saved the government "billions of dollars." Absent from that discussion is the number of American lives harmed by unraveling critical, life-saving regulations. For example, the Trump Administration's EPA is proposing to repeal the Obama Administration's Mercury and Air Toxics Standards Rule – a regulation that the EPA estimates prevents 11,000 premature deaths every year. The EPA's proposal is now with OIRA for review.

(a) The OMB directs all agencies to consider "important nonmonetary values" as part of their regulatory analyses. Will the premature deaths of 11,000 Americans be factored in as an "important nonmonetary value" in OIRA's analysis of the EPA's proposal to reverse this regulation?

The EPA did not propose to repeal the Mercury and Air Toxics emission standards for electric generating units currently subject to regulation. The current proposal is a

Reconsideration of the 2016 Supplemental Finding and Residual Risk and Technology Review. This proposal is currently not with OIRA for review, but is out for public comment. The EPA will be required to consider all relevant comments before finalizing the proposal.

4. 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?

Determining the meaning of a statute is a "holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), that requires examining the text and structure of the statute, as well as how statutory provisions work together to form a consistent whole.

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

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

Article III of the Constitution provides for the independence of the federal judiciary through life tenure and irreducible salaries. These protections were designed to allow judges to focus on what the law requires, irrespective of criticisms in public debates.

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

Please see my response to Question 5.a.

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

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

The Supreme Court has reviewed decisions of the President, even during wartime. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

7. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**

Questions regarding entry by foreign nationals into the United States, including challenges to entry policies invoking the First Amendment's Establishment and Free Exercise Clauses, are currently the subject of litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court." If confirmed, in any case raising these issues, I would follow the precedent of the Supreme Court.

8. Many are concerned that the White House's denouncement earlier this year of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

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

As a nominee to the court of appeals, it would not be appropriate for me to comment on abstract questions of law that could be raised in litigation.

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

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

The Constitution divides the war powers between Congress and the President and questions regarding the appropriate exercise of these powers continue to arise in litigation. If confirmed, I would follow the Supreme Court's precedents as well as any relevant statutory or constitutional provisions.

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

No man is above the law and the Supreme Court has checked the actions of the President even in wartime. As a nominee to the court of appeals, it would not be appropriate to comment on abstract questions of law that could arise in litigation. If confirmed, in any case raising these issues I would follow the precedents of the Supreme Court as well as any relevant statutory or constitutional provisions.

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

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

The Supreme Court has held that gender based government actions can be supported only by an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515 (1996). The state must show at least that the challenged classification serves important governmental objectives and that the discriminatory means are substantially related to the achievement of those objectives. *Id.* If confirmed, I would faithfully follow this and other precedents of the Supreme Court.

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

Justice Scalia's characterization (offered in oral argument) is not the holding of the Supreme Court with respect to the Voting Rights Act. If I am confirmed, I will faithfully adhere to Supreme Court precedent concerning the Voting Rights Act.

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

The Emoluments Clause provides "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State." U.S. Const. Art. I. § 9, cl. 8. The application of this Clause to the President is the subject of pending litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

13. 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 the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

As a general matter, courts of appeal rely on records developed prior to the filing of an appeal. The scope of *Shelby County v. Holder* is the subject of litigation as well as

ongoing policy discussions, including legislation introduced during this Congress. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

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

Congress has the power to enforce the protections of each of these amendments by "appropriate legislation." U.S. Const. amdt. XIII, § 2; U.S. Const. amdt. XIV, § 5; U.S. Const. amdt. XV, § 2.

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

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

Lawrence v. Texas is a precedent of the Supreme Court, which I would faithfully follow if confirmed.

16. In the confirmation hearing for Justice Gorsuch earlier this year, 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?

The Supreme Court has "[t]ime and time again . . . recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 202 (1991). The D.C. Circuit has held that "[a] panel of this court is bound to adhere to the holdings of prior circuit precedent even if we might resolve the case differently were we to decide it in the first instance." *Internat'l Union, Security, Police and Fire Professionals of America v. Faye*, 828 F.3d 969, 979 (D.C. Cir. 2016). If confirmed, I will adhere to the jurisprudence of the Supreme Court and D.C. Circuit regarding *stare decisis*.

17. 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.

Recusal in appropriate cases is important for maintaining the impartiality and independence of the judiciary. If confirmed, I would follow the standards in 28 U.S.C. § 455 and the practices of the D.C. Circuit for determining recusal. I will also consult with my colleagues, some of who have previously served in the Executive Branch, regarding in particular the scope of recusal arising from my service at OIRA.

18. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. 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."

(a) 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?

I agree that courts have a responsibility to protect the constitutional rights of individuals. As a nominee to the court of appeals, it would not be appropriate for me to comment on an abstract issue of law that may be presented in a future case.

19. 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 and politically motivated hiring and firing at the Justice Department during the Bush administration. 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 Trump administration's conflicts of interest, we make sure that we exercise our own power properly.

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

Yes.

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?**

The Constitution provides the federal government with limited and enumerated powers and questions regarding the scope of these powers regularly arise in litigation. For example, the

Supreme Court has articulated the scope of the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995), and the scope of Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I would faithfully follow these and other precedents of the Supreme Court in assessing the scope of congressional power.

Senator Dick Durbin
Written Questions for Neomi Rao

1. In your questionnaire you indicate that during your legal career you have authored only one brief in the American court system—an amicus brief that you wrote in 2017. Is that correct that you have only written one brief that was filed in a federal or state court?

Yes, however, my private practice in London was before international arbitral tribunals, a format akin to U.S. litigation. In the White House Counsel's office, I also reviewed briefs and worked with the Department of Justice on a variety of litigation matters and legal issues. Moreover, as a professor with a focus on administrative law and as faculty adviser to the Antonin Scalia Law School Administrative Law Clinic, I reviewed important cases before the courts of appeal.

2. Have you in your legal career ever argued a motion in federal or state court? If so, please list and discuss the motions you argued.

No. Like other some other nominees, my career has been largely dedicated to public service and academia. As the Administrator of OIRA, I coordinate regulatory policy across the Executive Branch, which involves many regulatory statutes and complex questions of administrative law. In the White House Counsel's office, I worked closely with agencies on legal issues and handled separation of powers disputes. As counsel to the Senate Judiciary Committee, I worked on constitutional law questions from the perspective of Congress, evaluating the legality of proposed legislation. Moreover, as a legal scholar for 11 years, I have closely studied, written, and taught in the areas of constitutional and administrative law, separation of powers, and statutory interpretation.

3. Have you in your legal career ever argued an appeal in federal or state court? If so, please list and discuss the appeals you argued.

Please see my response to Question 2.

4. Have you in your legal career ever appeared before a judge in federal or state court? If so, please list and discuss your court appearances.

Please see my response to Question 2.

5. Do you think your ability to serve as a judge would be enhanced if you had more practical experience handling matters in court?

My practical experience relates closely to the work of a court of appeals judge, particularly in the D.C. Circuit, and the American Bar Association has rated me well qualified for the position. As the Administrator of OIRA, I coordinate regulatory policy across the Executive Branch, which involves many regulatory statutes and complex questions of administrative law. In the White House Counsel's office, I worked closely with agencies on legal issues and handled separation of powers disputes. As counsel to the Senate Judiciary Committee, I worked on constitutional law questions from the perspective of Congress, evaluating the legality of proposed legislation.

Moreover, as a legal scholar for 11 years, I have closely studied, written, and taught in the areas of constitutional and administrative law, separation of powers, and statutory interpretation.

6. In your 2009 law review article entitled "The President's Sphere of Action" you said that the President:

> may say what the law is simply by executing the laws in a manner he determines to be consistent with the Constitution. Unlike Congress and the Supreme Court, the President can act alone in his judgment of what the Constitution requires. Judicial review, political condemnation, and even impeachment may follow, but they do not impede the President at the moment of action.

Do you believe that our nation is well-served by having a President act alone in his judgment of what the Constitution requires, even if the President's views are contradicted by the Supreme Court and Congress?

As I explain in this article, in practice the President is highly constrained by judicial and executive branch precedents. Executive branch lawyers generally provide advice to the President consistent with those precedents. The Office of Legal Counsel within the Department of Justice has recognized the President's ability to decline to enforce an unconstitutional statute, *see* Memorandum for Abner J. Mivka, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994); however, such authority is rarely exercised.

7. While you have served as the Administrator of OIRA, the Trump Administration and the DeVos Department of Education have proposed a rules change that would roll back protections for sexual assault survivors on college campuses under Title IX. **What has your involvement been in the development of this rules change? What views have you provided on it?**

The Department of Education has primary responsibility for setting regulatory policy under the statutes it administers. Regulations, such as the Title IX notice of proposed rulemaking, are developed by agency experts in line with legal requirements and administration priorities. OIRA coordinated review of the Title IX rule under Executive Order 12866. This review includes, *inter alia*, consideration of whether the regulation is consistent with law, provides substantial net benefits to the public, and furthers presidential priorities. Other agencies and White House policy councils participate in the review before the Department of Education publishes the rule. The comment period on the proposed rule ended on January 30, 2019, and the Department of Education will consider relevant comments in the course of drafting a final rule.

8. In a commentary you wrote in *The Weekly Standard* on November 10, 1996, you referred to affirmative action as "the anointed dragon of liberal excess."

a. Why did you use this phrase to refer to affirmative action?

In this article based on an interview with the scholar Thomas Sowell, the quoted phrase refers to the ideologies Sowell had criticized, not affirmative action.

b. Is this still your view?

Please see my response to Question 8.a.

9. On July 17, 1994 you wrote a commentary in *The Washington Times* entitled "How the Diversity Game is Played." You wrote:

The multiculturalists are not simply after political reform. Underneath their touchy-feely talk of tolerance, they seek to undermine American culture. They argue that culture, society and politics have been defined – and presumably defiled – by white, male heterosexuals hostile to their way of life. For example, homosexuals want to redefine marriage and parenthood; feminists in women's studies programs want to replace so-called male rationality with more sensitive responses common to women.

Do these views that you expressed in this commentary reflect your views today?

As I stated at my hearing, I would not express myself in the same manner today and, in fact, some of the words and concepts make me cringe.

10. In 1998, you wrote a law review article entitled "A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court." In this article you discussed your views on overruling precedent. You wrote:

> Frequently departing from precedent would be a type of judicial activism, but a dogmatic adherence to obsolete and incorrectly decided cases would be a form of judicial irresponsibility. . . . Legal reasoning includes its own processes for change, and reliance on the past does not bind judges to outmoded principles when social and political understandings have evolved.

a. Is it still your view that judges should overrule obsolete and incorrectly decided cases?

This student note discussed the use of philosophers by the Supreme Court, which may consider revisiting its precedents. Lower courts, such as the one to which I have been nominated, are bound by Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). The quotation above is incomplete, as it connects with ellipses two passages that are separated by several paragraphs in the article. The general discussion refers to the distinction between law and philosophy and the importance of precedent and conservation of the past for a coherent legal system. I explain that the legal system includes distinct, slow, and considered processes for change, and therefore does not require philosophy as a source for change.

b. Is it still your view that judges are not bound to outmoded principles when social and political understandings have evolved?

Please see my response to Question 10.a.

c. What is an example of an outmoded principle that no longer binds judges due to evolving social and political understandings?

Please see my response to Question 10.a.

11. In 2016 you said in testimony before the Senate HSGAC that "delegation to agencies, combined with deference to agency interpretations, has allowed for much of administration to operate outside the bounds of the Constitution." You have also written in favor of reviving the non-delegation doctrine as a check on agency action.

The Supreme Court has upheld the delegation of authority to agencies when Congress can provide an intelligible principle upon which agencies can base their regulations. In testimony before this Committee in 2015, you called the intelligible principle standard "toothless."

The strong views you have expressed about the constitutionality of delegations of authority to agencies and the intelligible principle standard raise serious questions about your impartiality if you were to consider such matters as a judge.

Would you commit to recuse yourself from cases involving subjects where you have already testified under oath as to your views?

In my congressional testimony, I represented views as an academic commentator on legal issues. A scholar comments on issues in the abstract, whereas a judge must exercise the judicial power in particular cases that affect the lives, liberty, and property of individuals. If confirmed as a judge, I would follow the law, not my personal views. With respect to recusal, I would follow the statutory standards in 28 U.S.C. § 455 and the practices of the D.C. Circuit, and consult with my colleagues regarding obligations of recusal in any particular case.

12.

a. Do you believe that judges should be "originalist" and adhere to the original public meaning of constitutional provisions when applying those provisions today?

The Supreme Court evaluates the original public meaning and considers it relevant when interpreting constitutional provisions. One example is *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which both Justice Scalia's opinion for the majority and Justice Stevens' dissenting opinion rely heavily on original public meaning arguments to ascertain the scope of the Second Amendment. Lower court judges are bound by Supreme Court precedent, and, if confirmed, I would faithfully follow those precedents.

b. If so, do you believe that courts should adhere to the original public meaning of the Foreign Emoluments Clause when interpreting and applying the Clause today? To the extent you may be unfamiliar with the Foreign Emoluments Clause in

Article I, Section 9, Clause 8, of the Constitution, please familiarize yourself with the Clause before answering. The Clause provides that:

> ...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or title, of any kind whatever, from any King, Prince, or foreign State.

Litigation concerning the appropriate interpretation and application of the Foreign Emoluments Clause is currently pending. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

13. You say in your questionnaire that you have been a member of the Federalist Society since 1996.

a. Why did you join the Federalist Society?

I joined the Federalist Society at the University of Chicago Law School because the chapter brought interesting and high-profile speakers to campus to discuss and debate questions of law and legal theory.

b. Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist? For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

As a judicial nominee, it would be inappropriate for me comment on the nomination or confirmation process.

c. Please list each year that you have attended the Federalist Society's annual convention.

To the best of my recollection, I have attended segments of the annual convention most years from 1999 to the present.

14.

a. Is waterboarding torture?

Pursuant to 18 U.S.C. § 2340(1), waterboarding would constitute torture if it were intentionally used "to inflict severe physical or mental pain or suffering."

b. Is waterboarding cruel, inhuman and degrading treatment?

Waterboarding may constitute "cruel, inhuman, or degrading treatment" within the meaning of Section 1003 of the Detainee Treatment Act of 2005, which was designed to afford detainees greater protection than that provided by the prior criminal prohibition on torture.

c. Is waterboarding illegal under U.S. law?

Please see my responses to Questions 14.a. and 14.b.

15. **Was President Trump factually accurate in his claim that three to five million people voted illegally in the 2016 election?**

I have not studied this question.

16.

a. Do you have any concerns about outside groups or special interests making undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination? Note that I am not asking whether you have solicited any such donations, I am asking whether you would find such donations to be problematic.

The First Amendment protects the rights of individuals to associate and to speak freely about matters of public concern. As a judicial nominee, it would be inappropriate for me to comment about the speech or funding of groups involved in public debates.

b. If you learn of any such donations, will you commit to call for the undisclosed donors to make their donations public so that if you are confirmed you can have full information when you make decisions about recusal in cases that these donors may have an interest in?

Please see my response to Question 16.a.

c. Will you condemn any attempt to make undisclosed donations to the Judicial Crisis Network on behalf of your nomination?

Please see my response to Question 16.a.

17.

a. Do you interpret the Constitution to authorize a president to pardon himself?

I have not had occasion to study this question.

b. What answer does an originalist view of the Constitution provide to this question?

Please see my response to Question 17.a.

Nomination of Neomi Rao to the United States Court of Appeals for the D.C. Circuit
Questions for the Record Submitted February 6, 2019

QUESTIONS FROM SENATOR WHITEHOUSE

1. While you were a professor at George Mason University Law School, the school received money directly from the Koch Foundation and an anonymous donor who used the Federalist Society as a conduit. Following that donation, the Kochs and the Federalist Society maintained a great deal of influence over essential university functions such as professorial hiring and admissions decisions.

a. What contacts did you have with the Koch brothers and the Federalist Society leading up to the anonymous, multi-million donation?

None.

b. Did you have any contact with the anonymous donor regarding their donation?

No.

c. Do you know who the anonymous donor is? If so, who is it?

No.

d. Why is it appropriate to conceal the identity of a large donor to a public university?

Anonymous philanthropy has a long tradition and this question would be best addressed to public universities that accept such donations. Moreover, issues surrounding the applicability of open records laws to the George Mason University Foundation are currently the subject of ongoing litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

e. Do you think it is appropriate for the Kochs or any other donor to exercise any influence over faculty hiring at a public law school?

This question calls upon me to offer my personal opinion with respect to a matter of ongoing public discussion. As a nominee to the court of appeals, it would be inappropriate for me to comment on this issue.

f. Do you think it is appropriate for the Kochs or any other donor to exercise any influence over admissions decisions at a public law school?

This question calls upon me to offer my personal opinion with respect to a matter of ongoing public discussion. As a nominee to the court of appeals, it would be

inappropriate for me to comment on this issue.

g. Do you think it is appropriate for an anonymous donor to funnel a donation to a public university through a private entity in order to hide their identity?

Issues surrounding the applicability of open records laws to the George Mason University Foundation are currently the subject of ongoing litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

h. Did you have contact with the Federalist Society or the Koch Foundation when considering potential faculty candidates? Please specify.

No. It is common practice for professors and other individuals to recommend potential candidates to the Law School hiring committee, and the committee similarly on occasion received recommendations from the faculty division of the Federalist Society. Determinations regarding hiring, however, were made exclusively by the faculty.

i. Did you have contact with the Federalist Society when designing your courses and/or syllabi? Please specify.

No. I designed my own courses and syllabi.

2. You founded the Center for the Study of the Administrative State with money from the Koch Foundation and an anonymous donor. How did the source of your funding influence your research at the Center for the Study of the Administrative State?

To my knowledge, the Center for the Study of the Administrative State was not founded with money from the Koch Foundation. Moreover, the Center did not receive money from an anonymous donor.

a. Did the Kochs or Federalist Society retain any influence or control, either express or implied, over the center's events, research, staffing or other activities?

To my knowledge, neither the Koch Foundation nor the Federalist Society donated to the Center. I am aware some news outlets asserted that the Koch Foundation donated to the Center, but I believe this is incorrect. Further, no donor to the Center exercised any express or implied control over the Center's events, research, staffing or activities.

b. What contacts did you have with Leonard Leo, representatives of the Koch Foundation, or other representatives of the Federalist Society in the process of founding the Center?

In the course of founding the Center, I spoke with many individuals familiar with administrative law. I also spoke with individuals who have successfully run non-profit

centers, including Mr. Leo.

c. What contacts did you have with Leonard Leo, representatives of the Koch Foundation, or other representatives of the Federalist Society while running the center?

I spoke with many people while running the Center—other professors, judges, practitioners, government officials, and non-profit organizations. As I recall, in general conversations with Mr. Leo we spoke about the Center and its progress, but at no time did he seek to influence the programming, speakers, or topics studied by the Center.

d. Did the Kochs, Leonard Leo, or the Federalist Society ever ask the Center for the Study of the Administrative State to host specific events, or to host particular speakers?

No. Moreover, no donor to the Center asked the Center to host specific events or particular speakers.

3. Have you had contacts with the Koch brothers, the Federalist Society, or their representatives about general regulatory policy during your tenure at OIRA?

a. Have you ever had contacts with former Koch Industries official and current EPA official David Dunlap while at OIRA? Please specify.

No.

4. Have you had contacts with the Koch brothers, the Federalist Society, or their representatives about specific regulations during your tenure at OIRA? Please specify.

No.

5. You have been an active member in the Federalist Society, giving 33 speeches at Federalist Society sponsored events. Do you think it is appropriate for judges to actively maintain membership in a group with a stated ideological perspective?

a. If confirmed, do you plan to remain an active participant in the Federalist Society?

If I am confirmed, I will evaluate my membership in any organization to determine whether such membership is consistent with the Code of Conduct for U.S. Judges and any applicable guidelines. I will also consult with staff of the Administrative Office of the Courts and my colleagues as necessary.

b. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing?

No.

6. In your exchange with Senator Kennedy you agreed that an originalist interprets the constitution as understood by an average or reasonably informed person at the time of ratification.

a. Do you believe that at the time of the adoption of the 14th Amendment a reasonably informed person considered that amendment to prohibit state- enforced segregation?

b. Do you believe that at the time of the adoption of the 14th Amendment a reasonably informed person considered that amendment to protect women from sex discrimination?

c. Do you believe originalism is consistent with current equal protection jurisprudence?

d. Do you believe the original meaning of the Constitution is consistent with our modern understanding of the inscription on the Supreme Court of the United States: "Equal Justice Under Law"?

e. Do you believe that at the time of the adoption of the 8th Amendment a reasonably informed person believed that compelling a prisoner to work at "hard and painful labor" and chaining him from wrist to ankle constituted cruel and unusual punishment?

f. Do you believe that at the time of the adoption of the 8th Amendment a reasonably informed person believed that executing a juvenile constituted cruel and unusual punishment?

g. Do you believe current 8th Amendment jurisprudence is consistent with the original meaning of that amendment?

Response to Question 6.a. through 6.g.: As a court of appeals nominee, it would not be appropriate for me to comment in the abstract on the original public meaning of these constitutional provisions, as the scope and meaning of these provisions regularly arise in litigation. If confirmed, I would faithfully follow the precedent of the Supreme Court and D.C. Circuit with regard to these issues.

7. Given your academic work and writings advocating against current delegation doctrine and *Chevron* deference, how can you assure members of Congress that you will adhere to these constitutionally recognized tenants of administrative law?

As a court of appeals judge, I would be bound to follow Supreme Court precedent and would faithfully do so.

a. Have you discussed the possibility of *Chevron* being overturned with any members currently serving or who have previously served as Justices of the Supreme

Court? Please specify.

No.

b. In the class you co-taught with Justice Thomas as George Mason, did you ever discuss the potential that the Court might overrule *Chevron*?

I do not recall discussing this issue and students did not ask Justice Thomas to discuss potential cases that might come before the Court. The course focused on the history and foundations of administrative law and much of the reading and coursework dealt with earlier materials.

8. In your 1998 Chicago Law Review Article *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court* you wrote that "[f]requently departing from precedent would be a type of judicial activism, but a dogmatic adherence to obsolete and incorrectly decided cases would be a form of judicial irresponsibility."

a. What current precedent do you believe is obsolete and incorrectly decided?

As a nominee to the court of appeals, I would be bound to follow Supreme Court precedent and it would be inappropriate for me to evaluate or grade any existing precedents.

b. As a circuit judge would you disregard governing precedent if you believe it to be obsolete and incorrectly decided?

No. Lower courts are absolutely bound by the precedents of the Supreme Court. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). If I am confirmed, I would faithfully adhere to all precedents of the Supreme Court.

9. What do you understand to be the holding of *Morrison v. Olson*? As a circuit court judge, would you be bound by that decision? When, if ever, would it be appropriate for you to disregard that decision?

Morrison v. Olson upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978. That particular statute is no longer in effect, but *Morrison v. Olson* continues to be a precedent of the Supreme Court. If confirmed, I would be bound by that decision.

10. What do you understand to be the holding of *Free Enterprise Fund v. PCAOB*? As a circuit court judge, would you be bound by that decision? When, if ever, would it be appropriate for you to disregard that decision?

In *Free Enterprise Fund v. PCAOB*, the Supreme Court held that dual for-cause limitations on the removal of the PCAOB members contravenes Article II's vesting of the executive power in the President. If confirmed, I would be bound by that decision.

11. When is it appropriate for a judge to use dicta in an opinion?

Most judicial opinions discuss the reasoning and justification the court used to reach the holding. Determining when such discussion is essential to the holding or "merely dicta" can often be a difficult line to draw. As a general matter, judicial opinions should refrain from discussion extraneous to the holding.

a. Is it ever appropriate for judges to raise issues not directly presented by the litigants? When?

Yes. Courts are required to raise certain issues, including the jurisdiction of the court, regardless of whether litigants present the issue. *See, e.g., Attias v. Carefirst, Inc.*, 865 F.3d 620, 623 (D.C. Cir. 2017) ("Although the parties agree that we have jurisdiction to hear this appeal, we have an independent duty to ensure that we are acting within the limits of our authority.").

b. Do you believe in judicial restraint as the proper approach to judicial review? Please elaborate.

The definition of judicial restraint is much contested. Judges should faithfully exercise their constitutional responsibility to resolve cases and controversies over which the court has jurisdiction.

c. Is use of dicta consistent with the ideals of judicial restraint?

Please see my response to Question 11.

d. If confirmed, what weight would you give to Supreme Court dicta in reaching your decisions?

The D.C. Circuit has held that "considered dicta of the Supreme Court has long been regarded as forceful, even though it is not binding." *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 481 (D.C. Cir. 2009).

12. Noted Federal Courts scholar Henry Monaghan wrote that "two basic adjuratory models – the dispute resolution model and the law declaration model – compete for the Court's affections." Monaghan writes: "The dispute resolution model focuses upon the actual dispute between the litigants" while the law declaration model focuses on "saying what the law is." In your view, what is the appropriate role of the federal courts? As a judge will you strive to adhere to the dispute resolution model or the law declaration model?

As the Supreme Court stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch)

137, 177 (1803). Thus, courts must declare the law in course of deciding specific disputes. These two models can be seen as two sides of the same coin.

13. A fact sheet published on NASA's website states that "scientific evidence for warming of the climate system is unequivocal" and "the current warming trend is of particular significance because most of it is extremely likely to be the result of human activity." Do you agree with this assessment?

As I stated in my hearing, I understand that there is an overwhelming scientific consensus about climate change and that humans contribute to these changes.

a. The D.C. Circuit often deals with complex scientific facts and data. As a circuit court judge, would you defer to scientific experts when presented with an issue of scientific fact?

If confirmed, I would follow Supreme Court and D.C. Circuit precedents with respect to the deference afforded scientific experts and when such evidence is properly considered.

14. 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?

This metaphor neatly captures the fundamental principle that judges should say what the law is, not what they wish it would be.

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

In some limited circumstances, the law requires a judge to consider the practical consequences of a decision. For example, when ruling on a motion for preliminary injunction, a judge must consider, among other factors, whether the moving party would suffer "irreparable injury" if the court does not issue the requested injunction. *See, e.g., Winter v. Nat'l Res. Defense Council*, 555 U.S. 7 (2008).

c. 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 judge to make a subjective determination?

Federal Rule of Civil Procedure 56 requires a judge to determine whether a genuine dispute as to any material fact exists. A judge does not make a subjective determination (*i.e.*, one guided by personal feelings or intuition) that such a dispute exists. Rather, a judge evaluates the allegations and factual assertions made by each party, takes into consideration precedent and prior decisions involving analogous facts, and decides whether summary judgment is appropriate based on this evaluation

15. 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?

Judges should follow the law, as then-Judge Sotomayor recognized in her confirmation hearings, "judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law." *Hearing on the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of Judge Sonia Sotomayor). Empathy, of course, is an important human quality, but in deciding cases the judge must be impartial and independent and follow the requirements of the law.

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

In assuming the judicial office, judges must follow the law and uphold the oath of office to "administer justice without respect to persons and do equal right to the poor and to the rich." 28 U.S.C. § 453.

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?

Judges must follow the law where it leads them. The oath requires that judges treat the parties fairly and equally, without favor to any group, agenda, or ideology. If confirmed, I will work to exercise proper judgment in interpreting and applying the law to the cases that come before me.

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

No.

17. 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?

Juries perform a critical role in our justice system by protecting the rights and liberties of the American people. Civil jury trials provide an important safeguard in our legal system.

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

Questions concerning the enforceability of mandatory pre-dispute arbitration clauses are the subject of ongoing litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

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 17.b.

18. What is the proper role of appellate courts with respect to fact-finding?

As a general matter, appellate courts decide cases on the record presented to them from a trial court or from the proceedings of an administrative agency.

a. What concerns do you have, if any, about appellate courts engaging in fact- finding?

An appellate court may find it necessary to engage in limited "fact-finding" (for example, to satisfy itself that the factual prerequisites for its jurisdiction are met) but, as noted above, the responsibility for "fact-finding" is the province of trial courts and administrative agencies.

19. What deference does congressional fact-finding merit when such fact-finding is used as a basis for legislation implementing the Fourteenth Amendment?

This question has arisen in Supreme Court cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000). If I am confirmed, I would faithfully adhere to Supreme Court and D.C. Circuit precedent with regard to the level of deference afforded to congressional factfinding in legislation supported by the Fourteenth Amendment enforcement power.

a. Is it ever appropriate for appellate courts to disregard Congressional findings of fact? If so, when and why?

Please see my response to Question 19.

20. In *Shelby County v. Holder* and *Citizens United v. FEC,* the Supreme Court considered laws that Congress had passed based on evidence collected through extensive oversight and hearings. In each case, the Court deemed Congress's facts irrelevant and concluded that Congress had, at least in part, acted unconstitutionally.

a. In *Shelby County* the Court's holding hinged largely on its understanding of the facts, but it ignored the facts that had prompted Congress to reauthorize the VRA in the

first place. Was is appropriate for the Court to ignore congressional findings of fact with regards to voting discrimination?

As a nominee to the court of appeals, it would be inappropriate for me to opine on the correctness of Supreme Court precedent.

b. *Citizens United* gave virtually no weight to Congress's findings documenting the role of money in our elections. The majority rejected the argument that Congress has a "compelling constitutional basis" to guard against corruption and the appearance of corruption in local and national elections. Instead, the Court summarily concluded "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." In so concluding, the Court entirely ignored the Senate Committee report's findings to the contrary. Was it appropriate for the Court to ignore congressional finding of fact regarding corruption and the appearance of corruption?

Please see my response to Question 20.a.

c. Throughout the Court's analysis in *Citizens United v. FEC,* it made factual assertions with citation only to an amicus brief or without any citation at all. Is it appropriate for Courts to disregard the record below when making factual assertions?

Please see my response to Question 20.a.

d. In *McCutcheon v. FEC* the Court ignored congressional fact finding and expertise in holding campaign limits unconstitutional. Was it appropriate for the Court to ignore congressional expertise and congressional findings of fact in regards to corruption and the appearance of corruption?

Please see my response to Question 20.a.

Senate Judiciary Committee
Hearing on the nomination of the Honorable Neomi J. Rao to be
United States Circuit Judge for the District of Columbia Circuit
Questions for the Record
February 6, 2019
Senator Amy Klobuchar

Questions for the Honorable Neomi Rao, nominee to be United States Circuit Judge for the District of Columbia Circuit

Question 1

At the hearing, you cited *Myers v. United States* (1926) as a Supreme Court case that supports your view that the Constitution requires that the President be able to fire the heads of independent agencies such as the Federal Trade Commission and Federal Reserve at will. But in *Humphrey's Executor v. United States* (1935), a unanimous Supreme Court specifically distinguished the Federal Trade Commission from the agency at issue in *Myers* and held that the Federal Trade Commission Act was constitutional, and that the President could not fire the commissioner without cause.

- Can you clarify why you cited *Myers* during the hearing?

- Do you think that *Humphrey's Executor* was rightly decided?

In *Free Enterprise Fund v. PCAOB*, the Supreme Court cited *Myers* for the proposition that "[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." 561 U.S. 477, 483 (2010); *see also id.* at 492-93. The Court went on to explain that *Humphrey's Executor* allowed some forms of for-cause removal over independent agencies, overruling *Myers* in part.

Humphrey's Executor is a precedent of the Supreme Court that is binding on inferior courts and I would faithfully follow it if confirmed.

Question 2

In a 2014 law review article, you wrote in favor of the unitary executive theory and suggested that the President can control the actions of independent agencies. In particular, you have argued that the White House should review all regulations before they are issued, even regulations by independent agencies.

- Under your view does the President have direct control—such as the ability to dismiss agency heads at will—over agencies like the Federal Reserve, the Securities and Exchange Commission, and the Federal Trade Commission?

In this article, I argue that the President's removal power is necessary and sufficient for presidential control over administration of the laws. The article seeks to identify the constitutional boundaries for administration between Congress and the President and concludes that the removal power provides the mechanism for presidential control and supervision over administration. This would require removal at will for any agency head that executes the law. I recognize, however, in this article that *Humphrey's Executor* remains good law. If confirmed, I would faithfully adhere to *Humphrey's Executor* and all other precedent of the Supreme Court.

- Does the Constitution empower the President to order the Department of Justice to change the regulations that govern an investigation by a special counsel in the middle of an investigation?

I have not addressed this question in my scholarship. This matter could arise in litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

Question 3

At a 2015 event with the Conservative Women's Network, you praised then-Judge Kavanaugh for "rethinking some . . . issues with the administrative state."

- In your view, is it the role of a judge to "rethink" the law?

The role of a judge is to resolve cases and controversies. Inferior court judges are bound to follow the precedents of the Supreme Court.

- Do you think that a judge is better positioned than an agency expert to interpret a rule regulating the internet?

The Supreme Court held that where statutory language is ambiguous, agencies are entitled to deference with regard to statutes the agency is charged with administering provided the interpretation is not plainly erroneous. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Court has also held that an agency is entitled to deference with respect to its interpretation of its own regulations when such regulations are ambiguous provided the interpretation is not plainly erroneous. *Auer v. Robbins*, 519 U.S. 452 (1997). The D.C. Circuit regularly extends deference to agencies in these situations. *See, e.g., North Carolina v. FERC*, 913 F.3d 148, 149 (D.C. Cir. 2019) ("The Court owes deference to FERC's interpretation of the Federal Power Act . . . since it is the agency charged with administering that statute.") (citing *Chevron*); *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1246 (D.C. Cir. 2018) ("The FCC's interpretations of 'its own orders and regulations' are also owed deference because of the agency's superior knowledge of its own regulations.") (citing *Auer*). If I am confirmed, I would faithfully adhere to *Chevron* and *Auer* and all other precedent of the Supreme Court.

Nomination of Neomi J. Rao
to be United States Circuit Judge for the District of Columbia Circuit
Questions for the Record
Submitted February 6, 2019

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

If confirmed, I would faithfully consider the factors articulated in Supreme Court and D.C. Circuit precedents regarding whether a right is fundamental and protected under the Fourteenth Amendment.

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

If confirmed, I would faithfully apply Supreme Court and D.C. Circuit precedent regarding what role the express enumeration of a right plays in constitutional interpretation.

b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

If confirmed, I would faithfully apply Supreme Court and D.C. Circuit precedent regarding whether to consider a right's roots in this nation's history and tradition and would rely on sources used by the Supreme Court.

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

If confirmed, I would faithfully apply Supreme Court and D.C. Circuit precedent. Although I would not be bound by the precedent of another court of appeals, I would certainly consider that precedent in arriving at a decision.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

If confirmed, I would faithfully apply Supreme Court and D.C. Circuit precedent regarding whether and to what extent to consider whether a similar right has previously been recognized.

e. Would you consider whether the right is central to "the right to define one's own

concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

If confirmed, I would faithfully adhere to *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

f. What other factors would you consider?

If confirmed, I would follow Supreme Court and D.C. Circuit precedent regarding any other factors to be considered.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the Equal Protection Clause applies to both race and gender.

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

As a nominee to the court of appeals, it would not be appropriate to offer personal views on the merits of Supreme Court decisions. If confirmed, I would faithfully follow the precedents of the Supreme Court concerning gender discrimination.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

As a nominee to the court of appeals, it would not be appropriate to offer personal views on the merits of Supreme Court decisions or on the development of law by the Supreme Court. If confirmed, I would faithfully follow the precedents of the Supreme Court protecting against gender discrimination.

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

The Supreme Court has recognized that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty . . . same-sex couples may exercise the fundamental right to marry." *See Obergefell v. Hodges*, – U.S. – , 135 S. Ct. 2584, 2604 (2015). If confirmed, I would faithfully follow this precedent.

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

Litigation concerning this issue is currently pending in federal courts. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

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

The Supreme Court has recognized this right in *Griswold v. Connecticut* and *Eisenstadt v. Baird.* If confirmed, I would faithfully adhere to these precedents.

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

The Supreme Court has recognized this right in *Roe v. Wade* and other cases. If confirmed, I would faithfully adhere to these precedents.

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

The Supreme Court has recognized this right in *Lawrence v. Texas* and other cases. If confirmed, I would faithfully adhere to these precedents.

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

As noted, the Supreme Court has recognized these rights and, if confirmed, I would follow all precedents of the Supreme Court.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

If confirmed, I would follow Supreme Court and D.C. Circuit precedents with respect to when such evidence is properly considered.

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

Please see my response to Question 4.a.

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

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

Obergefell is a precedent of the Supreme Court. If confirmed, I would faithfully adhere to this and other relevant precedent.

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

Please see my response to Question 5.a.

6. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93.

a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not had an opportunity to study whether *Brown v. Board of Education* is consistent with any particular interpretative methodology including originalism. *Brown* is an important, landmark decision of the Supreme Court that vindicated the dissent of the first Justice Harlan in *Plessy v. Ferguson*. If confirmed, I would faithfully adhere to *Brown* and all other Supreme Court precedent.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"?

Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white- papers/democratic-constitutionalism (last visited Feb. 4, 2019).

Scholars continue to debate the merits of originalism as a method of constitutional interpretation. A scholar has the freedom to comment on abstract questions of legal interpretation. A judge must state what the law is and resolve cases and controversies that affect the lives, liberty, and property of individuals. If confirmed, I would faithfully follow the precedents of the Supreme Court and the D.C. Circuit with regard to constitutional interpretation.

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

The Supreme Court evaluates the original public meaning and considers it relevant when interpreting constitutional provisions. One example is *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which both Justice Scalia's opinion for the majority and Justice Stevens' dissenting opinion rely heavily on original public meaning arguments to ascertain the scope of the Second Amendment.

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

Please see my response to Question to 6.c.

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

The first, and often only, source a lower court employs in interpreting constitutional provisions is Supreme Court precedent.

7. In a 2008 law review article, you criticized *Lawrence v. Texas*, 539 U.S. 558 (2003), for favoring "an 'emerging awareness' of the meaning and scope of liberty" and suggested that the political process was the proper venue for such a change, instead of interpreting the Constitution to enforce non-enumerated rights. In a 2013 law review article, you criticized *United States v. Windsor*, 570 U.S. 744 (2013), for using a "novel constitutional right to recognition" in striking down Section 3 of the Defense of Marriage Act, a decision you characterized as a "political choice, not a judicial one."

a. Is part of the role of the Constitution to guarantee minority rights that may not achieve protection through the democratic process?

The Constitution protects rights for political minorities through, *inter alia*, the structure of the federal government and the Bill of Rights.

b. Do you believe that LGBT individuals are entitled to equal rights under the Constitution?

The Supreme Court has recognized certain equality rights in *Lawrence v. Texas* and *Obergefell v. Hodges*. If confirmed, I would faithfully follow these precedents.

c. Given that the Supreme Court has recognized constitutional protection for LGBT rights, do courts have an obligation to apply this protection in future cases, rather than defer to the political process?

Lower courts are absolutely bound by the precedents of the Supreme Court. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). If confirmed, I would faithfully adhere to all precedents of the Supreme Court.

8. The Supreme Court has repeatedly recognized that the Fourteenth Amendment protects substantive due process, but in a 1998 law review article, you wrote that "substantive due process arguably has no textual support in the Fourteenth Amendment Due Process Clause."

a. Do you acknowledge that substantive due process is a constitutional doctrine you must apply if confirmed?

Yes.

b. Please define the test for substantive due process protection.

The Supreme Court has stated that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.'" *Obergefell v. Hodges*, – U.S. – , 135 S. Ct. 2584, 2598 (2015) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

9. You have been critical of the Supreme Court's reproductive rights decisions, asserting that the Court "focuse[s] on the inherent dignity of a woman's freedom to choose an abortion, but minimize[s] the competing inherent dignity of the fetus to life" and that the Court "often avoid[s] the conflict by emphasizing the centrality of one of these dignities at the expense of the other."

a. Does *Roe v. Wade* wrongly balance these competing interests, in your view?

As a nominee to the court of appeals, it would be inappropriate to offer personal views on Supreme Court precedents. If confirmed, I would follow *Roe* and all other precedents of the Supreme Court irrespective of personal views expressed in my scholarship.

b. What is the proper balance of these interests?

Please see my response to Question 9.a.

10. In a 2017 speech to the U.S. Chamber of Commerce, you highlighted the fact that the Trump administration had rolled back the Volks Rule, which allowed the Occupational Safety and Health Administration to issue citations for companies' failures to maintain accurate records of workplace illnesses, injuries, and deaths. Why did you commend the rollback of a rule that helps hold employers accountable for workplace safety?

The Volks rule was repealed through the process of the Congressional Review Act (CRA), which requires majorities of the House of Representatives and Senate and signature by the President. In the speech, I referred only in passing to rules that had been invalidated by Congress and the President through the CRA.

11. In 1993, you penned an article for the *Yale Free Press* titled "Submission, Silence, Mediocrity." In it, you stated, "Myths of sexual and racial oppression propogate [sic] themselves, create hysteria and finally lead to the formation of some whining new group."

a. Do you still agree with the views on sex and race that you expressed in your piece for the *Yale Free Press*?

As I stated at my hearing, I would not express myself in the same manner today and, in fact, some of the words and concepts make me cringe.

b. Do you believe that systemic sexism exists?

I have not examined this issue, but am aware that there are studies suggesting the existence of systemic or institutional sexism. If confirmed, I would apply the law equally to all persons and treat every litigant in court with equal respect and dignity.

c. Do you believe that systemic racism exists?

I have not examined this issue, but am aware that there are studies suggesting the existence of systemic or institutional racism. If confirmed, I would apply the law equally to all persons and treat every litigant in court with equal respect and dignity.

d. Do you continue to believe that sexual and racial oppression are "myths" that "create hysteria"?

I did not, and do not, believe that sexual and racial oppression are myths. My statement quoted above was not a general statement, but referred to the context of student groups at Yale College in the 1990s.

12. In a 1994 piece for the *Washington Times* called "How the Diversity Game is Played," you described yourself as a "traitor" to the "multicultural police." You wrote, "I'm supposed to be out there marching to 'take back the night,' demonstrating for more Asian-American deans or throwing myself on the ground, covered with ketchup, to protest the mistreatment of Haitian refugees."

a. What did you mean by the "multicultural police"?

More than once when I was a student at Yale College, I was called a "traitor to my race and gender" for my political beliefs. This intolerance to diverse viewpoints was one of the subjects of my critique.

b. Why did you include negative references to demonstrations on faculty diversity, "take back the night" (an anti-sexual assault march), and the mistreatment of Haitian refugees?

In the article I took exception to statements that I was a "traitor to my race and gender" if I did not participate in certain political demonstrations.

c. Do you still stand by the views expressed in this article?

This article referenced specific events at Yale in the early 1990s. When commenting on these events and participating in debates on campus, I sometimes expressed myself in a provocative style. As I stated at my hearing, I would not express myself in the same manner today and, in fact, some of the words and concepts make me cringe.

13. In the same 1994 *Washington Times* article called "How the Diversity Game is Played," you criticized "multiculturalists" for pro-LGBT rights views, stating, "Underneath their touchy-feely talk of tolerance, they seek to undermine American culture. They argue that culture, society and politics have been defined and presumably defiled – by white, male heterosexuals hostile to their way of life. For example, homosexuals want to redefine marriage and parenthood . . . ."

a. Do you believe that LGBT people experience discrimination today?

Yes.

b. Do you believe that marriage equality or LGBT parenthood undermines American culture?

No. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution requires a state to license a marriage between same-sex couples. If I were confirmed, I would faithfully follow *Obergefell* and other Supreme Court precedents.

c. Do you disavow any of the opinions expressed in this article?

This article referenced specific events at Yale in the early 1990s. When commenting on these events and participating in debates on campus, I sometimes expressed myself in a provocative style. As I stated at my hearing, I would not express myself in the same manner today and, in fact, some of the words and concepts make me cringe.

14. In a 1995 *Yale Free Press* article called "In Defense of Authentic Elitism," you stated, "In this age of affirmative action, women's rights, special rights for the handicapped and welfare for the indigent and lazy, elitism is a forgotten and embarrassing concept. . . . In our new feel-good era, everybody is okay, and political and academic standards can adjust to accommodate anyone."

a. What did you mean by "welfare for the indigent and lazy"?

b. What did you mean by "special rights for the handicapped"?

c. What did you mean when you said, "In our new feel-good era, everybody is okay, and political and academic standards can adjust to accommodate anyone"?

d. Do you disavow any of the opinions expressed in this article?

Response to Questions 14.a. through 14.d: When commenting on these events and participating in debates on campus, I sometimes expressed myself in a provocative style. As I stated at my hearing, I would not express myself in the same manner today and, in fact, some of the words and concepts make me cringe.

15. In a 1994 *Yale Herald* article called "Shades of Gray," you stated, "If [a woman] drinks to the point where she can no longer choose, well, getting to that point was part of her choice." Is there ever a situation where a woman loses a part of her right to consent?

No. Non-consensual sexual activity is never appropriate or excusable.

16. In a 1994 *Yale Herald* article called, "So Long, Wonder Woman," you stated, "When women ask for clean, rational, fair relations between the sexes, they betray their own instincts by subscribing to a horrible, masculine stupidity."

a. What did you mean by stating that women "betray their own instincts" when they ask for "clean, rational, fair relations between the sexes"?

In the article I was quoting Nietzsche, who called the dulling of the feminine instinct "an almost masculine stupidity of which a woman who had turned out well would have to be thoroughly ashamed." *See* Friedrich Nietzsche, Beyond Good and Evil (1886). In retrospect, mixing Nietzsche with discussions of campus feminism seems a perfect storm of overwrought college writing. I would not express myself this way today.

b. What did you mean by stating that such women "subscrib[e] to a horrible, masculine stupidity"?

c. Is it your view that women should not ask for equal treatment in society?

No. I have always advocated strongly for equal rights and opportunities for women. If

confirmed, I would apply the law equally to all persons and treat every litigant in court with equal respect and dignity.

17. In a 1996 article in the *Weekly Standard* called, "The Hottest Duo in Academe," you referred to race as "a hot, money-making issue."

a. What did you mean?

The article referred to my attendance at a paid event supporting a book promotion tour for two academics discussing race. It was not a general statement about race but rather recounted a specific event and context.

b. Do you believe that race is "a hot, money-making issue"? If so, who profits from it?

Please see my response to Question 17.a.

Questions for the Record for Neomi Rao
From Senator Mazie K. Hirono

1. When you were a student at Yale, you argued that environmental student groups were focusing on "three major environmental bogeymen, the greenhouse effect, the depleting ozone layer, and the dangers of acid rain . . . though all three theories have come under serious scientific attack." As the current Administrator of the Office of Information and Regulatory Affairs (OIRA), you have supported many efforts to pull back regulations that provide protections for clean water and clean air, including restrictions greenhouse gas emissions.

a. What role do you think the government should play in regulating public protections such as ensuring that the air we breathe is clean, the food we eat is safe, and the everyday products we use are not dangerous?

Congress establishes the proper scope of government regulation through a variety of statutes in these areas, such as the Clean Air Act, the Clean Water Act, the Consumer Product Safety Act, and the Food, Drug, and Cosmetic Act.

b. Please explain your approach to analyzing costs and benefits when assessing whether to move forward or pull back on a rule as the OIRA Administrator. How do you weigh the costs and benefits of a proposed rule to businesses against the costs and benefits of a proposed rule to people's health and safety?

OIRA reviews regulations under Executive Order 12866, which requires agencies to consider the costs and benefits of regulation. Further standards for conducting cost-benefit analysis are set forth in the Office of Management and Budget Circular A-4. These longstanding standards apply to both regulatory and deregulatory actions. As Administrator, I work closely with career experts to ensure compliance with these standards in regulations reviewed by OIRA.

c. When regulations promulgated by agencies are challenged, how do you think a court should analyze and interpret those regulations? Do you believe the agencies' regulations and interpretations are owed any deference?

The standards for judicial review of regulations are set forth in the Administrative Procedure Act §§ 701-706 as well as in Supreme Court precedents such as *Chevron USA v. National Resources Defense Council*. If confirmed, I would follow the statutory requirements for judicial review as well as the Supreme Court's precedents regarding the appropriate scope of deference afforded to agency decisionmaking.

2. At the hearing, I asked you about your op-ed in the *Wall Street Journal* titled, *Elena Kagan and the 'Hollow Charade.'* In writing about the Supreme Court confirmation process, you asserted that nominees are "coached to choose from certain stock answers." You also wrote that "nominees are confirmed based on platitudes, and public discourse suffers as a result." Based on your observations of the confirmation process, you concluded that "[p]erhaps this indicates that conservatives have won the debate over the type of judges Americans want. But it is a Pyrrhic

victory if nominees with very different philosophies are confirmed based on incantations of the right formulas without an examination of their actual beliefs."

a. Please provide at least 3 examples of the "stock answers" to which you were referring.

b. Do you believe that if nominees have not provided sufficient information to allow Senators to examine their actual beliefs, they should not be confirmed?

Response to Question 2.a and 2.b.: This op-ed, written as an academic commentator, noted that nominees often promise fidelity to the law, but that it was important to understand what a nominee "actually means when he or she describes faithfulness to the law." As a judicial nominee, it would be inappropriate to comment on how the Senate should conduct its advice and consent responsibilities with respect to nominations.

3. In August 2017, you sent a memo to the Equal Employment Opportunity Commission (EEOC) to stop an equal pay measure adopted by the Obama administration to help uncover pay discrimination and close the wage gap. You claimed that the measure, which would require summary pay data by sex, race, ethnicity, and job category, was "unnecessarily burdensome" and "lack[ed] practical utility." But you provided little to no explanation or factual basis for why the rule was unnecessarily burdensome or lacked practical utility.

a. What sources did you consult to determine that the equal pay measure "lack[s] practical utility" and is "unnecessarily burdensome"?

This matter is currently in active litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

b. Did the EEOC provide you with any information that is contrary to your determination that the equal pay measure "lack[s] practical utility" and is "unnecessarily burdensome"? If yes, what was your basis for disregarding the EEOC's input?

Please see my answer to Question 3.a.

c. Do you believe this country has achieved equal pay for equal work? If not, how do you think this issue should be addressed?

Claims of gender based wage disparities are routinely the subject of litigation in federal courts. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

4. As a college student, you wrote about date rape and argued that if a woman "drinks to the point where she can no longer choose, well, getting to that point was part of her choice." In

another article you claimed that you were "not arguing that date rape victims ask for it," but you also argued that "when playing the modern dating game women have to understand and accept the consequences of their sexuality."

a. Do you think that evidence of whether a victim of sexual assault or rape was drinking alcohol should be admissible in a trial of the assailant? If yes, in your view, what truth or fact could such evidence be used to prove?

The Federal Rules of Evidence generally govern the admissibility of evidence in criminal and civil trials in federal courts. If confirmed, I will consider appeals concerning admissibility of evidence in cases involving sexual assault and rape consistent with these rules and the precedents of the Supreme Court and the D.C. Circuit.

b. Do you believe any of the following should be admissible as evidence: the sexual assault or rape victim's past conduct, what she or he was wearing during the assault, or whether she or he fought back?

Please see my answer to Question 4.a.

5. At the hearing, I asked you about statements supporting and reiterating the White House's claim that the Trump administration's deregulatory and regulatory efforts "saved American families and businesses $23 billion." You responded that "[w]e've tried to be very transparent about how we've calculated this" and stated that this information "is on our website."

a. Please provide the total amount of the $23 billion that was saved by American families. If you believe this information is provided in disaggregated form in the "underlying rules" on your website, please show how the government calculated the total amount saved by American families to support the claim above.

In Fiscal Year 2018, the American people saved $23 billion in regulatory costs, which includes individuals, families, and businesses. An accounting by agency of these savings can be found at https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf. Moreover, a list of the regulatory and deregulatory actions used for this accounting can be found at https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Completed_Actions_for_Fiscal_Year_2018.pdf.

b. Please provide the total amount of the $23 billion that was saved by businesses. If you believe this information is provided in disaggregated form in the "underlying rules" on your website, please show how the government calculated the total amount saved by businesses to support the claim above.

Please see my response to Question 5.a.

6. In 1994, you wrote an op-ed in the *Washington Times* with the title, *How the Diversity*

Game Is Played. You claimed that "multiculturalists" were "seek[ing] to undermine American culture." As an example, you pointed to "homosexuals want[ing] to redefine marriage and parenthood." In 2015, you criticized the Supreme Court's decision in *Texas Department of Housing v. Inclusive Communities Project* for recognizing that the Fair Housing Act protects against disparate impact discrimination, describing the decision as a "rul[ing] by talking points." Currently, as the OIRA Administrator, you are reportedly overseeing the Department of Housing and Urban Development's efforts to limit the disparate impact protections for minority communities under the Fair Housing Act.

a. Is it your view that discrimination is no longer a serious problem in this country and that minority communities' complaints about it are more often than not unfounded?

No. Discrimination remains a serious problem in this country.

b. Do you believe that civil rights laws should be enforced against laws and policies that have a discriminatory effect as vigorously as it is enforced against laws and policies with a discriminatory intent?

In *Texas Department of Housing v. Inclusive Communities Project*, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act. If confirmed, I would faithfully adhere to this and all other precedents of the Supreme Court.

7. As a college student, you wrote a book review in *The Yale Free Press* that asserted that "[i]n this age of affirmative action, women's rights, special rights for the handicapped and welfare for the indigent and lazy, elitism is a forgotten and embarrassing concept." Years later as a law professor, you continued to be critical of "affirmative action programs." For example, in a 2009 law review article, you argued that such programs "confirm[] and reinforce[] traditional and historical associations between race and disadvantage." And as noted above, in your current position as the OIRA Administrator, you are reportedly overseeing the Department of Housing and Urban Development's efforts to limit the disparate impact protections for minority communities under the Fair Housing Act.

a. You have remained consistent in your criticism of diversity programs and efforts to address historical discrimination. Are you aware that after the Supreme Court decided *Shelby County*, which gutted Section 5 of the Voting Rights Act, many states passed laws suppressing voting rights, particularly those of minorities?

I am aware that states regularly enact legislation that may impact voting rights and many of these statutes are the subject of litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

b. Do you believe that if a law has the effect of primarily suppressing minority voters, it is discriminatory?

The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment "prohibits intentional 'vote dilution'—'invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities.'" *Abbott v. Perez*, – U.S. – , 138 S. Ct. 2305, 2314 (2018) (quoting *Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980)). If confirmed, I would faithfully adhere to this case and all other precedent of the Supreme Court.

Nomination of Neomi Rao
United States Court of Appeals for the D.C. Circuit
Questions for the Record
Submitted February 6, 2019

QUESTIONS FROM SENATOR BOOKER

1. Your work in the Trump Administration has been focused on rolling back many vital public protections. This Administration has sought to cut back protections for clean air and water, food safety, workers' rights, LGBTQ rights, and fair housing for people of color, to name just a few examples. Now, you have been nominated to the D.C. Circuit, a court that often gets the last word in deciding legal challenges to important regulatory actions.

Impartiality is a fundamental part of a federal judge's duties. It is central to the rule of law and judicial independence. Canon 3 of the Code of Conduct for United States Judges instructs: "A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently." Canon 3(C), moreover, specifically provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

a. Please explain why, if you're confirmed, someone in your courtroom should expect to get a fair hearing from an impartial judge in a case about ensuring clean air, clean water, food safety, or protections for workers, LGBTQ people, or people of color.

Regulatory policy is set by the relevant agencies in accordance with law and consistent with administration priorities. As the Administrator of OIRA, I have coordinated the implementation of the administration's regulatory reforms in a manner consistent with Executive Order 12866 (1993) and to promote good regulatory practices such as transparency, fair notice, and due process. Serving as the Administrator of OIRA requires assisting in the execution of the laws, a very different role from exercising the judicial power in specific cases and controversies. If confirmed, I would faithfully follow the oath of office and uphold the impartiality and independence of the judiciary.

b. More specifically, when Ranking Member Feinstein asked you about your approach to recusing yourself from cases, you said, "I currently oversee regulatory policy, which are generally applicable rules. It's somewhat different than a lawyer working in the White House Counsel's Office providing legal advice." In what circumstances would it be appropriate for you to serve as a judge in a case concerning a rule or regulation on which you provided advice to the Trump Administration?

I recognize that my service as OIRA Administrator may raise questions about recusal if I am confirmed to the D.C. Circuit. Whether I recuse will depend on the facts and issues presented in specific cases or controversies. I would take seriously the obligations of recusal and would follow the standards for recusal in 28 U.S.C. § 455 and the practices of the D.C. Circuit, and seek the advice of my colleagues.

c. You said in a 2018 speech to the American Bar Association that the role of your

office, the Office of Information and Regulatory Affairs (OIRA), is to "help[] coordinate and drive the Administration's deregulatory efforts."[1] Would it be reasonable to question a judge's impartiality if that judge previously worked to "drive" the specific agency action that is being challenged by a lawsuit?

Please see my response to 1.b.

d. Could providing advice to the Trump Administration and participating in internal deliberations about a given rule or regulation constitute "personal knowledge of disputed evidentiary facts" that would require you to recuse yourself under the federal recusal statute?[2]

Please see my response to 1.b.

e. The federal recusal statute also requires recusal where a judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[3] Could *any* of your work for the Trump Administration potentially fall under this provision?

Please see my response to 1.b.

2. When judges consider legal challenges to public protections, they are supposed to look at how the agency reached a decision, how the agency collected its data, how the agency analyzed its data, and how it weighed the costs and the benefits.[4]

But during your tenure at OIRA, the agencies you oversee have often come under fire for conducting analyses that are sharply skewed and often just patently wrong. As one report noted, for example, the Administration's justification for rolling back fuel economy standards was "riddled with calculation mistakes, indefensible assumptions, and broken computer models."[5]

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[1] Neomi Rao, Draft Remarks to the Am. Bar Ass'n Admin. Law Conference (Nov. 1, 2018), *in* SJQ Attachments to Question 12(d), at 6.

[2] 28 U.S.C § 455(b)(1).

[3] *Id.* § 455(b)(3).

[4] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1036 (D.C. Cir. 2012).

[5] Robinson Meyer, *The Trump Administration Flunked Its Math Homework*, ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors- clouding-its-legal-future/574249.

In an early 2018 speech, you referred to these soon-to-be-proposed changes to fuel economy standards as part of an effort by the Administration "to focus on deeper, cross-cutting reform efforts."[6]

a. Do you believe that the August 2018 proposal to weaken fuel economy and greenhouse gas tailpipe standards was based on solid evidence and sound science?

This proposed rule was reviewed by OIRA, but it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. To the extent the question seeks information about the costs, benefits, and transfer effects of the proposed rule, I refer you to the rule's preamble and regulatory impact analysis.

b. In comments submitted to the Office of Management and Budget (which includes OIRA) and the Department of Transportation about these proposed changes, the Environmental Protection Agency (EPA) stated, "EPA analysis to date shows significant and fundamental flaws" that "make the CAFE model unusable in current form for policy analysis and for assessing the appropriate level of the CAFE or GHG standards."[7] Why were the extensive errors flagged by the EPA not addressed?

The cited document is a proposal, not a final regulation. It would be inappropriate for me to discuss internal executive branch deliberations regarding the rule. To the extent the question seeks information about the public evidentiary basis advanced in the proposed rule, I refer you to the rule's preamble and regulatory impact analysis.

c. Please explain why, if you're confirmed, someone in your courtroom should expect you to undertake the objective analysis required of federal judges, as opposed to the deeply flawed analysis used by this Administration.

If confirmed, I would faithfully adhere to the oath of office and maintain the impartiality and independence of the judiciary.

3. In your academic writings, you have criticized aspects of many landmark Supreme Court decisions, including *Roe v. Wade*[8] and *Planned Parenthood v. Casey*[9] (abortion), *Lawrence v.*

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[6] Neomi Rao, Draft Remarks to Nat'l Ass'n for Bus. Econ. Conference (Feb. 27, 2018), *in* SJQ Attachments to Question 12(d), at 122.

[7] Letter from Sen. Tom Carper, Ranking Member, U.S. Senate Comm. on Env't & Pub. Works, to Sec'y Elaine L. Chao, U.S. Dep't of Transp. & Andrew Wheeler, Acting Adm'r, Envtl. Prot. Agency (Oct. 16, 2018), https://www.epw.senate.gov/public/_cache/files/e/6/e66d6d50-e3c5-42c1-9663-c1ea1d2215dc/3752E5E73547A5D722D1BEADA0E69405.10.16.2018-cafe.pdf.

[8] Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1379-80 (1998) [hereinafter Rao, *Backdoor*], https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5009&context=uclrev.

[9] Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 211 (2011),

Texas[10] and *United States v. Windsor*[11] (LGBTQ rights), *King v. Burwell*[12] (health care), and even *Brown v. Board of Education*[13] (racial segregation).

a. If confirmed to serve as a lower-court judge, would you adhere fully to the letter and spirit of each of those Supreme Court decisions, despite your criticism?

b. Have you ever criticized the Supreme Court's decision in *Citizens United v. FEC*,[14] which opened the floodgates to big money in politics?

c. Have you ever criticized the Supreme Court's decision in *District of Columbia v. Heller*,[15] which dramatically changed the Court's longstanding interpretation of the Second Amendment?

d. Have you ever criticized the Supreme Court's decision in *Shelby County v. Holder*,[16] which gutted Section 5 of the Voting Rights Act?

Response to Questions 3.a. through 3.d.: I have not, to my recollection, offered criticism of the Court's decisions listed in Questions 3.b. through 3.d. I will faithfully follow all precedents of the Supreme Court including the ones cited in this question.

4. In a July 2010 interview, you described the conservative legacy of the Roberts Court as merely "incremental." You said that the conservative Justices on the Supreme Court "haven't gone as far as some conservatives would have hoped they would go."[17]

a. The Supreme Court issued its decision in *Citizens United* about six months before you gave that interview. In what way was *Citizens United* an "incremental" decision for

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https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1056&context=ndlr.

[10] Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 241 (2008), https://www.law.gmu.edu/assets/files/publications/working_papers/08-34%20Use%20and%20Abuse%20of%20Dignity.pdf.

[11] Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 30, 35 (2013), https://www.law.gmu.edu/assets/files/publications/working_papers/1347TroublewithDignity.pdf

[12] Neomi Rao, *The Supreme Court's Rule by Talking Points*, WASH. EXAMINER (July 7, 2015), https://www.washingtonexaminer.com/the-supreme-courts-rule-by-talking-points.

[13] Rao, *Backdoor*, *supra* note 8, at 1395

[14] 558 U.S. 310 (2010).

[15] 554 U.S. 570 (2008).

[16] 570 U.S. 529 (2013).

[17] Interview, PBS NewsHour (July 5, 2010), *in* SJQ Attachments to Question 12(e), at 125.

campaign finance?

b. In what way was *Heller*, which was issued in 2008, an "incremental" decision for the Second Amendment?

c. Do you think *Shelby County* was an "incremental" decision for voting rights?

d. Would you still describe the Roberts Court's conservative legacy as "incremental" today?

Response to Question 4.a. through 4.d.: I made the comment about incrementalism generally, and not with reference to any specific case. If confirmed, I would faithfully follow all precedents of the Supreme Court including the cases cited above.

5. In 2009, you testified before this Committee on the nomination of Sonia Sotomayor to the Supreme Court. You argued that her approach to judging was "beyond even mainstream pragmatic judicial philosophies."[18]

a. Why did you think Justice Sotomayor's approach to judging was outside the mainstream?

In my 2009 testimony before this Committee, I explained how then-Judge Sotomayor expressed "a view of the judicial role that is personal and consequentialist." The comment related to her view of judging as relative and personal. I also noted "Judge Sotomayor is accomplished and hard-working, and this process should give respectful and serious consideration to the jurisprudential principles she has articulated during her tenure as a federal judge." I also expressed "no position on the ultimate question of whether Judge Sotomayor should be confirmed."

b. Now that Justice Sotomayor has spent almost a decade on the Court, do you still believe her approach is outside the mainstream?

As a nominee to the court of appeals, it would be inappropriate for me to comment on members of the Supreme Court.

6. You have written that the Supreme Court's landmark decision in *Brown v. Board of Education* "arguably went against the historical understanding of the Fourteenth Amendment."[19] You added that "most commentators, including conservative ones, consider the case to be rightly decided because it responded to changes in social and political realities."[20]

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[18] *Continuation of the Nomination of Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009), *in* SJQ Attachments to Question 12(c), at 139.

[19] Rao, *Backdoor*, *supra* note 8, at 1395.

[20] *Id.*

a. Do you believe that *Brown v. Board of Education*[21] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown is an important, landmark decision of the Supreme Court that vindicated the dissent of the first Justice Harlan in *Plessy v. Ferguson*. If confirmed, I would faithfully follow it and all other precedent of the Supreme Court.

b. Do you believe that *Plessy v. Ferguson*[22] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. *Brown v. Board of Education* overruled *Plessy* and vindicated the dissent of the first Justice Harlan.

c. The Fourteenth Amendment guarantees "the equal protection of the laws" to every American.[23] Why would desegregating the nation's schools, as the Court mandated in *Brown*, be in tension with ensuring the equal protection of the laws?

In *Brown*, the Supreme Court held that segregation of the schools on the basis of race violated the equal protection of the laws. If confirmed, I would faithfully follow *Brown* and all other Supreme Court precedent.

7. In the past, you have expressed controversial views about the use of affirmative action. You wrote in a 2009 academic article, for example, that "racial preferences that purport to ameliorate discrimination against minorities may simply reinforce and entrench the causes and attitudes of discrimination."[24]

a. Do you believe that the Supreme Court's landmark decisions upholding race-conscious admissions programs—in particular, Regents of the University of *California v. Bakke*,[25] *Grutter v. Bollinger*,[26] and *Fisher v. University of Texas*[27]—were correctly decided?

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[21] 347 U.S. 483 (1954).

[22] 163 U.S. 537 (1896).

[23] U.S. CONST. amend. XIV.

[24] Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053, 1083 (2009), https://pdfs.semanticscholar.org/d351/821ff7c47ce7dc7e2456ff18e068ea96e2c0.pdf.

[25] 438 U.S. 265 (1978).

[26] 539 U.S. 306 (2003).

[27] 136 S. Ct. 2198 (2016).

b. Do you believe that having a diverse student body is a compelling government interest?

c. Why do believe that affirmative action programs "reinforce and entrench the causes and attitudes of discrimination"?

Response to Question 7.a. through 7.c.: The Supreme Court has recognized that "the educational benefits that flow from a diverse student body" are a "compelling interest." *Fisher v. University of Texas*, 570 U.S. 297, 308 (2013); *see also Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("Today, we hold that the [University of Michigan] Law School has a compelling interest in attaining a diverse student body."). If confirmed, I will faithfully adhere to Supreme Court precedent addressing the consideration of race in university admissions programs.

8. In August 2017, as the head of OIRA, you issued a memo suspending a key measure that would have required companies with 100 or more employees to confidentially report to the Equal Employment Opportunity Commission (EEOC) employee pay data by race, ethnicity, and gender.[28] The EEOC measure was an important effort to detect pay discrimination and close the wage gap.

a. Do you believe there is a racial wage gap in America?

b. Do you believe there is a gender wage gap in America?

c. Do you believe efforts to improve pay transparency, with appropriate confidentiality protections, are useful tools to combat pay discrimination and close the wage gap?

d. Before issuing your August 2017 memo suspending the EEOC's data-collection efforts—which were established in 2016 as the culmination of an extensive administrative process—did you provide any formal notice or opportunity for public comment about your action? If not, please explain why you declined to do so.

e. Why did you think that the EEOC's effort to collect pay data and address the wage gap "lack[ed] practical utility,"[29] as you stated in your memo?

f. Why did you think this effort, which used the existing EEO-1 form, was still "unnecessarily burdensome,"[30] as you stated in your memo?

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[28] Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs, to Victoria Lipnic, Acting Chair, Equal Employment Opportunity Commission, *EEO-1 Form; Review and Stay* (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

[29] *Id.* at 2.

[30] *Id.*

g. The EEOC's website states that data collection through the EEO-1 form, going back to 1966, "turned out to be an invaluable tool to pinpoint possible zones of employment discrimination, and to identify major patterns of exclusion and discriminatory practices in select industries, job categories, and geographic areas."[31]

h. Do you believe that suspending these revisions to the EEO-1 form made it more effective in serving these historic purposes?

i. Overall, do you believe that this August 2017 directive made it easier for Americans who have been subjected to pay discrimination to close the wage gap?

The matter referenced in Questions 8.a. through 8.i. is the subject of ongoing litigation. To the extent Questions 8.a. and 8.b. reference race and gender wage disparities more generally, such claims are routinely the subject of litigation in federal courts. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states, "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

9. You indicated in your Questionnaire that, while you have served in a number of positions in government during your career, you have never represented a plaintiff, a defendant, or the government in state or federal court.[32] Your time at the British law firm Clifford Chance was spent "entirely" on international arbitration matters.[33] You also indicated that you have never litigated an appeal, though you worked on one amicus brief.[34]

If you are confirmed to serve as a judge, what specific steps would you take to try to overcome your almost total lack of experience litigating cases in court?

My public service and academic experience with administrative and constitutional law, statutory interpretation, and separation of powers disputes is highly germane to the work of a court of appeals judge, particularly on the D.C. Circuit. If confirmed, in each case I would carefully consider the arguments of the parties, closely study the law and relevant precedents, and discuss the issues with my colleagues and law clerks before rendering a decision.

10. 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.[35] Notably, the same study

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[31] *Early Enforcement Efforts*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/history/35th/1965- 71/early_enforcement.html (last accessed Feb. 6, 2019).

[32] SJQ at 38.

[33] *Id.*

[34] *Id.*

[35] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30,

found that whites are actually *more likely* than blacks to sell drugs.[36] 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.[37] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[38]

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

I have not examined this issue, but am aware of studies that suggest the existence of such bias.

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

I am aware of the incarceration of people of color at rates higher than their percentage in the population at large.

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.

I have not studied this issue.

11. 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.[39] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[40]

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

I have not examined this issue.

b. Do you believe there is a direct link between decreases in a state's incarcerated

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2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.

[36] *Id.*

[37] 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.

[38] *Id.*

[39] 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.

[40] *Id.*

population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not examined this issue.

12. 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. America is a diverse country and there are social benefits when public institutions reflect that diversity.

13. 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.

14. 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."[41] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The contours of what due process entails, however, is the subject of ongoing litigation. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states, "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

[41] 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 February 6, 2019
For the Nomination of

Neomi J. Rao, to be United States Circuit Judge for the District of Columbia Circuit

1. In 1993, you co-authored an article for the *Yale Free Press* titled "Separate But More Than Equal," which criticized Yale's recruitment of minority applicants and described student criticisms of Yale's support services for minority students. The title appears to be a reference to the Supreme Court's decision in *Plessy v. Ferguson*, which upheld racial segregation in public facilities.

a. **When you wrote this article, did you intend to invoke *Plessy*'s "separate but equal" principle?**

This article was published more than 25 years ago. I do not recall my intention with respect to this title, or whether the title was chosen by me or an editor. As I stated at my hearing, I regret some of the language I used at the time.

b. **Do you believe it was offensive to use the phrase "separate but more than equal" to describe Yale's diversity outreach and retention efforts? If yes, please explain why. If no, please explain why not.**

Please see my response to Question 1.a.

c. **Do you believe that racial diversity in college admissions is a permissible objective under the U.S. Constitution?**

The Supreme Court has addressed this issue in a number of decisions. *See, e.g.*, *Fisher v. University of Texas*, – U.S. – , 136 S. Ct. 2198 (2016) ("*Fisher II*"); *Fisher v. University of Texas*, 570 U.S. 297 (2013) ("*Fisher I*"); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In these decisions, the Supreme Court has recognized that "the educational benefits that flow from a diverse student body" are a "compelling interest." *Fisher I*, 570 U.S. at 308; *see also Grutter*, 539 U.S. at 328 ("Today, we hold that the [University of Michigan] Law School has a compelling interest in attaining a diverse student body."). If confirmed, I will faithfully adhere to Supreme Court precedent addressing the consideration of race in university admissions programs.

d. **Can educational institutions achieve racial diversity if they are not allowed to recognize and take account of race?**

Please see my response to Question 1.c.

2. The Department of Health and Human Services has issued proposed rules to change the Title X program, which funds clinics that provide family planning and preventive health

services. The proposed Title X regulations would block the availability of federal funds to family planning providers that also offer abortion services. The proposed regulations would also eliminate the requirement that Title X sites provide non-directive counseling that includes information about prenatal care, adoption, and abortion.

a. **Has the Office of Information and Regulatory Affairs evaluated the proposed changes to Title X?**

Yes. OIRA reviewed the proposed regulation.

b. **Before issuing the proposed regulations, did the administration consider the economic impact of restricting family planning? If not, why not?**

During the process of regulatory review, OIRA circulates the proposed regulation to other agencies and to White House policy councils, and OIRA career experts work with the agency to meet the longstanding standards of Executive Order 12866 (1993). While it would be inappropriate for me to discuss internal executive branch deliberations regarding the rule, to the extent the question seeks information about the costs, benefits, and transfer effects of the proposed rule, I refer you to the rule's preamble and regulatory impact analysis.

c. **Before issuing the proposed regulations, did the administration consider the impact of these changes on low-income women and women of color? If not, why not?**

Please see my response to Question 2.b.

3. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortions. After the law passed, the number of those health care facilities dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman's Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

a. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

In *Whole Woman's Health*, the Supreme Court held that lower courts considering whether a law related to abortion places an undue burden on a woman must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health v. Hellerstedt*, – U.S. – , 136 S. Ct. 2292, 2309 (2016). Litigation concerning the contours of the Supreme Court's decision in *Whole Woman's Health* is currently pending in federal courts. *See, e.g., June Med. Svcs., L.L.C. v. Gee*, 17-30397 (petition for certiorari pending). The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

b. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law has an overall impact of reducing abortion access statewide?**

Please see my response to Question 3.a.

Senator Josh Hawley
Questions for the Record

Neomi J. Rao
Nominee, U.S. Court of Appeals for the District of Columbia Circuit

1. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set out the precedent of judicial deference that federal courts must afford to administrative actions.

a. Please explain your understanding of the Supreme Court's holding in *Chevron.*

In *Chevron*, the Supreme Court held that the Environmental Protection Agency's plantwide definition of the statutory term "stationary source" was a permissible construction. In the course of deciding this issue, the Court explained that if Congress has not directly spoken to a particular issue, the court should defer to a reasonable agency interpretation of the statute. 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

b. Please describe how you would determine whether a statute enacted by Congress is ambiguous.

The first step of *Chevron* requires determining whether Congress has directly spoken to the issue, a question of statutory interpretation. As the Supreme Court has repeatedly stated, statutory interpretation begins with the text and where the text is clear, that is the end of the inquiry. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

c. In your view, is it relevant to the *Chevron* analysis whether the agency that took the action in question recognized that the statute is ambiguous?

In determining the relevance of an agency conclusion concerning whether the statute is ambiguous, I would be guided by Supreme Court and D.C. Circuit precedent.

2. What is your understanding of the major questions doctrine following the Supreme Court's decision in *King v. Burwell*, 135 S. Ct. 475 (2014)?

In *King v. Burwell*, the Supreme Court declined to apply the *Chevron* framework to the Internal Revenue Service's interpretation of the Affordable Care Act, and noted that the case was "extraordinary" and implicated "a question of deep 'economic and political significance'" that must be interpreted by the Court itself. 135 S. Ct. at 2488-89. Commentators continue to debate the contours of the major question doctrine and litigation pertaining to the scope and reach of *Burwell* are currently pending in federal courts. The Code of Conduct for United States Judges,

which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

3. Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?

Numerous challenges to the scope of nationwide injunctions are pending in federal courts. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring). The Code of Conduct for United States judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

4. In your article *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183, 231 (2011), you quote Professor Reva Siegel's characterization of the Supreme Court's holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007), as being based on "gender-paternalist justification[s] for abortion restrictions."

a. Do you agree with Professor Siegel's view of the Supreme Court's holding in *Carhart?*

The purpose of this article was to identify and examine different conceptions of dignity used by constitutional courts and I cite many cases to elucidate these different conceptions. I quote Professor Siegel's view of *Carhart*, because she characterizes the case as demonstrating a conflict between two dignities. As a nominee to the court of appeals, it would be inappropriate for me to opine on the merits of Siegel's view of a Supreme Court precedent.

b. In your view, is *Carhart*'s holding consistent with "[t]he American constitutional law tradition [that] has primarily emphasized intrinsic human dignity that promotes liberty and autonomy"? Rao, 86 Notre Dame L. Rev. at 270.

As a nominee to the court of appeals, it would be inappropriate for me to opine on the correctness of Supreme Court precedent. If confirmed, I will faithfully adhere to *Carhart* and all other precedents of the Supreme Court.

5. What is your understanding of the Supreme Court's holding in *Washington v. Glucksberg*, 521 U.S. 702 (1997)?

In *Glucksberg*, the Supreme Court upheld the constitutionality of the State of Washington's prohibition against causing or aiding a suicide because the liberty protected by the Due Process Clause of the Fourteenth Amendment did not protect a right to assisted suicide. In reaching this conclusion, the Court held "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." 521 U.S. at 721 (internal citations and quotations omitted).

6. In your view, how did the Supreme Court's holding in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), extend, modify, or replace the Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973)?

Casey and *Roe* are precedents of the Supreme Court that I would faithfully follow if confirmed. As a nominee to the court of appeals, it would not be appropriate for me to opine on the relationship between Supreme Court precedents, particularly as the scope of *Casey* and *Roe* continue to be the subject of litigation in the federal courts. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

7. Please explain your view of *Casey's* contribution to substantive due process doctrine.

The scope and application of *Casey* and subsequent cases such as *Whole Women's Health v. Hellerstedt*, – U.S. – , 136 S. Ct. 2292 (2016), continues to be the subject of litigation in the federal courts. The Code of Conduct for United States Judges, which is applicable to nominees for judicial office, states "judge[s] should not make public comment on the merits of a matter pending or impending in any court."

8. Do you believe that the promotion of moral behavior and the expression of moral judgment are legitimate government interests?

As a nominee to a court of appeals, it would not be appropriate for me to share my personal views on abstract issues that might be presented in litigation.

9. What role should the original public meaning of the Constitution's text play in courts' interpretation of its provisions?

The Supreme Court evaluates the original public meaning and considers it relevant when interpreting constitutional provisions. One example is *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which both Justice Scalia's opinion for the majority and Justice Stevens' dissenting opinion rely heavily on original public meaning arguments to ascertain the scope of the Second Amendment.