

**Nomination of Maureen K. Ohlhausen  
to the United States Court of Federal Claims  
Questions for the Record  
May 16, 2018**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. In 2017, you said in public remarks that you had looked to the book *The Art of the Deal*—written by President Trump with Tony Schwartz—for ideas about how you would lead the FTC, if given the opportunity to serve as Chairman. You reportedly told *The Wall Street Journal* that you had an agenda for the FTC that you believed “could advance President Trump’s agenda.” A reporter from *Politico* noted to you that the FTC is supposed to be independent, and you were quoted as stating, “I’m not concerned about the independence of the FTC.”

**a. What led to your conclusion that you are “not concerned about the independence of the FTC”?**

I meant my quoted statement to convey that I was not concerned that the FTC, an independent agency with bipartisan leadership, would actually be subject to any political interference in our decision making, not that I did not value or would not seek to protect the agency’s independence. The reason for my lack of concern is that in my long experience at the FTC across several administrations, I have never encountered any attempts to interfere with the agency’s independence as an enforcement, regulatory, or adjudicatory agency.

**b. Is there any benefit from having the FTC operate as an independent agency? If so, please describe.**

There are numerous benefits from having the FTC operate as an independent agency. For matters, such as mergers, that involve large commercial stakes and affect the economic fortunes of individual firms and communities, this independence reduces the risk that political considerations could influence the agency to bend the proper application of competition law to serve special interests at the expense of the appropriate goals of antitrust, which is to protect consumers. This concern also applies to enforcement actions under the agency’s consumer protection authority against influential businesses in the tech, financial, or automotive industries for example. The FTC also conducts administrative litigation, with the Commissioners serving in a quasi-judicial role, which makes independence particularly important.

**c. What is your understanding of the purpose independent agencies serve within the executive branch?**

It is my understanding that Congress created certain bipartisan independent agencies, such as the FTC, to enable enforcement officials and regulators with specialized expertise to make decisions (either enforcement action, regulations, or administrative adjudication) without the direct intervention by the political branches of government.

**d. Do you believe it is appropriate for the chair of any independent federal agency to focus on advancing a President's agenda?**

The FTC is an independent agency with bipartisan political leadership, and Commissioners, including Chairmen, have long focused on issues that may coincide with the policy goals of a particular administration. For example, during the Clinton administration, former Chairman Robert Pitofsky focused, among other things, on the issue of reducing the advertising of violent entertainment to children and appeared at the White House with President Clinton to announce an FTC study on this issue. During the Obama administration, Chairwoman Edith Ramirez, focused, among other things, on misleading advertising by for-profit schools, an administration priority. At Chairwoman Ramirez's invitation, President Obama visited the FTC and addressed the staff. I have focused on, among many things, increasing economic opportunities for all Americans, including low income people and military spouses, and giving small businesses guidance to protect the personal data they hold from breaches, themes that the administration has also advanced.

I do not believe that the actions by my Democratic predecessors or myself in any way compromised the independence of the FTC. It would be inappropriate, however, for any Commissioner to allow a particular enforcement or regulatory decision on whether certain conduct violated the laws enforced by the FTC to be influenced by the intervention of the political branches of government.

**e. What assurance can you provide this Committee that if confirmed as a judge, you will make rulings without consideration of whether your decisions "advance President Trump's agenda"?**

I can assure the Committee that, if confirmed by a judge, I will faithfully follow my oath to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States" 28 U.S.C. § 453.

2. In 2017, you participated in a panel discussion at the annual Conservative Political Action Conference that was titled "When Did WWII Begin? Part A: Threats at Home."

**a. What does the title of this panel event mean to you? What did you understand "WWII" to reference exactly?**

Although I had no role in creating the name of this panel, what it meant to me was that the panel would focus on emerging global threats to the interests of the United States. I spoke about challenges in Asia to protecting U.S. intellectual property from piracy and misappropriation and the need for companies to protect consumers' personal information from data breaches.

**b. What do you believe are the "Threats at Home" as referenced in the events title?**

Although I had no role in creating the name of this panel, what “threats at home” meant to me was activity occurring in the U.S. that might exacerbate the emerging global threats. Thus, I spoke about actions in the U.S. to devalue intellectual property rights that might encourage regimes around the world to disregard U.S. intellectual property rights, and the importance of the FTC data protection enforcement to deter vulnerabilities that allow foreign regimes to access the private information of Americans.

One of your fellow panelists at CPAC was Trevor Loudon. During the event, Mr. Loudon told the audience, “[f]or the last eight years you have had a president who was more interested in aiding your enemies and trashing your allies than any you’ve had before.”

**c. Do you agree with Mr. Loudon that President Obama was “interested in aiding [our] enemies”?**

Mr. Loudon’s remarks were his own and do not represent my views.

**d. Did you react in any way at the time to Mr. Loudon’s comments? If so, how did you express your disagreement with those views in any way?**

This panel was a series of individual speeches with no discussion among the speakers on the panel. There was no opportunity to react to the other speakers’ comments.

3. In your Senate Questionnaire, in response to a question about the number of cases you have tried to verdict, judgment or final decision, you wrote, “None.”

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

As a law clerk to a judge on the Court of Federal Claims, I was extensively involved in litigation matters at the court, including assisting in several trials, performing legal research, helping to assess witness testimony and other evidence, and drafting numerous opinions, all which withstood appellate review including one that went up to the U.S. Supreme Court. I have not litigated a matter before the court on behalf of a client, however.

**b. How many times have you appeared in federal court on behalf of a client?**

I have personally authored and filed amicus briefs representing the United States Federal Trade Commission in five matters in various state and federal courts.

**c. How many times have you argued a motion in federal court on behalf of a client?**

In my role as an FTC Commissioner and Acting Chairman, I have a quasi-judicial role in the agency’s administrative litigation process. In this capacity, I have ruled on and issued written decisions on dozens of motions. Most recently, in 2018, I heard oral

argument on a motion to dismiss an enforcement action and authored a written opinion denying the motion that is now on appeal before the U.S. Court of Appeals for the Fifth Circuit. I have not, however, argued a motion in court on behalf of a litigant.

**d. How many times have you participated in hearings in federal court on behalf of a client?**

As an FTC Commissioner since 2012 and Acting Chairman of the FTC from January 2017 to May 2018, I have led the U.S. government's antitrust and consumer protection enforcement efforts, which constitute hundreds of federal cases over six years. I supervise federal court litigation, including subsequent appeals.

For administrative litigation, I play a quasi-judicial role. I have assessed and ruled on a variety of evidentiary motions, as well as motions to dismiss. If there is an appeal after a trial and a decision by an administrative law judge, I review the legal and factual conclusions through briefs and oral arguments as an adjudicator. I have also authored and contributed to numerous merits opinions that have withstood appellate review in the U.S. Courts of Appeal.

I also have extensive court experience from my 6 years in the federal court system, including at the trial level at the U.S. Court of Federal Claims, and my 5 years at the U.S. Court of Appeals for the D.C. Circuit, as a staff attorney and law clerk.

Although the ABA Standing Committee on the Federal Judiciary does not evaluate nominees to the U.S. Court of Federal Claims, as a point of comparison I note that the Committee states that due consideration will be given to experience that is similar to in-court trial work, such as service on an administrative agency. Thus, although I have not participated in hearings in federal court on behalf of a client, I believe my experience leading a federal law enforcement agency and ruling on many motions and merits matters in a quasi-judicial role, representing the U.S. in a variety of matters, and serving in the federal court system make me qualified to join the Court of Federal Claims.

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

My approach to constitutional interpretation is based on respect for the doctrine of stare decisis and the words and principles set forth in the Constitution. Thus, as a nominee to a lower court, I would look first to precedent in all cases involving constitutional interpretation and follow it. In the unlikely event that I, as a judge on the U.S. Court of Federal Claims, would be called upon to undertake further constitutional interpretation that has not been determined by precedent, I would be guided by the text of the Constitution, looking to the meaning of the words as commonly understood at the time and their underlying principles.

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

As the Supreme Court stated in cases such as *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004),

judges should first review the text of a statute and, if its meaning is clear and unambiguous, apply it to the facts. Judges may also use the canons of statutory construction, such as reviewing where the text appears in a statutory scheme (*i.e.*, in grants or limits of authority) and whether the same word appears in other parts of the statute. If the meaning of the text is still not clear from an analysis of the statute, the Supreme Court has held that extrinsic materials are relevant “to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

6. You indicate on your Senate Questionnaire that you have been a member of the Federalist Society since 1992. The Federalist Society’s “About Us” webpage states that, “[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” The same page states that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

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

I did not write those statements nor am I familiar with them. I cannot speak for the Federalist Society as to their meaning.

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

I did not write those statements and cannot speak for the Federalist Society as to their meaning. My understanding of the purpose of the Federalist Society is to encourage debate on the principles that the state exists to preserve freedom, that the separation of powers is central to our Constitution, and the proper role of the judiciary in our system is a limited one.

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

While I cannot speak for the Federal Society, my understanding of the purpose of the organization is to encourage debate on the principles that the state exists to preserve freedom, that the separation of powers is central to our Constitution, and the proper role of the judiciary in our system is a limited one.

7. 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 district court judge or a Court of Federal Claims judge to depart from Supreme Court or relevant circuit court precedent.

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

As I stated above, it is never appropriate for a district court judge or a Court of Federal Claims judge to depart from Supreme Court or relevant circuit court precedent. A lower court judge may, however, distinguish precedent that is not on point, identify a developing legal issue, or suggest a need for clarification by a higher court.

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

As a nominee to the U.S. Court of Federal Claims, it would be inappropriate for me to comment on the appropriate circumstances under which a district court may overturn its own precedent. As for the U.S. Court of Federal Claims, I believe it would be appropriate for the court to overturn its own precedent if there have been changes in relevant precedent in superior courts, such as the U.S. Court of Appeals for the Federal Circuit or the Supreme Court.

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

As a nominee to a lower court, it would be inappropriate for me to comment on the appropriate circumstances under which the Supreme Court may overturn its own precedent.

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

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

All Supreme Court precedent, including *Roe*, is equally binding precedent for lower courts.

**b. Is it settled law?**

Yes.

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

**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?**

Although I do not recall anyone in the administration asking me about my views of administrative law in general, I recall discussing the doctrine of *Chevron* deference (which involves deference to an administrative agency's interpretation of a statute) during my interview with attorneys from the White House Counsel's Office and the Justice Department's Office of Legal Policy on September 21, 2017. I stated that *Chevron* deference directed the court to look first to the language of the statute and, if it was clear, to apply it as written but, if it was ambiguous, to defer to the agency's interpretation if it was based on a permissible construction of the statute.

10. 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.

I did not have any discussions with anyone about loyalty to President Trump at any point during the process that led to my nomination.

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

I received the questions on May 16, 2018, from the Office of Legal Policy (OLP) at the Department of Justice. I drafted my responses based on my own views and research. I sent the draft to OLP on May 17 for their review. After their review, I finalized my answers and approved OLP's submission of my responses to the Committee.

**Senator Dick Durbin**  
**Written Questions for Ryan Bounds, J. Campbell Barker, and Maureen Ohlhausen**  
**May 16, 2018**

For questions with subparts, please answer each subpart separately.

**Questions for Maureen Ohlhausen**

1. You have had a lengthy career working at the Federal Trade Commission, but in your questionnaire you wrote that you have tried zero cases to verdict, judgment or final decision. Now you are seeking to become a judge on the Court of Federal Claims presiding over bench trials. **Do you think it is advisable to have people who have never tried a case serve as federal judges?**

As an FTC Commissioner since 2012 and Acting Chairman of the FTC from January 2017 to May 2018, I have led the U.S. government's antitrust and consumer protection enforcement efforts, which constitute hundreds of cases over six years. To initiate litigation after a staff investigation, I review the extensive evidence gathered, such as declarations by possible defendants and other witnesses, business records, and economic expert reports. I also assess the relevant federal statutes and case law, including precedent in particular circuits and the Supreme Court. I then vote to issue a complaint, determining what violations to allege and in what forum (federal court or administrative litigation). For federal court litigation, I supervise subsequent appeals, including before the Supreme Court.

For administrative litigation, I play a quasi-judicial role. I have assessed and ruled on a variety of evidentiary motions, as well as motions to dismiss. If there is an appeal after a trial and a decision by an administrative law judge, I review the legal and factual conclusions through briefs and oral arguments. I have also authored and contributed to numerous merits opinions that have withstood appellate review in the U.S. Courts of Appeal.

Through my tenure in various other positions at the FTC and in private practice, I have wide experience in complex areas of federal law. For example, most antitrust cases and numerous consumer protection cases involve the application of complex legal doctrines to highly detailed facts and business behavior. I have also been deeply engaged in legal academic activities, having published over 15 scholarly articles in law reviews and authored a variety of articles for legal journals and magazines.

I also have extensive court experience from my six years in the federal court system, including at the trial level at the U.S. Court of Federal Claims, and my five years at the U.S. Court of Appeals for the D.C. Circuit, as a staff attorney and law clerk.

Although the ABA Standing Committee on the Federal Judiciary does not evaluate nominees to the U.S. Court of Federal Claims, as a point of comparison I note that the Committee states that a nominee to the federal bench ordinarily should have at least twelve years' experience in the practice of law and that due consideration will be given to distinguished accomplishments in the field of law or experience that is similar to in-court trial work, such as service on an



administrative agency. I believe my 27 years of experience as a lawyer, which includes leading a federal law enforcement agency and serving in a quasi-judicial capacity in numerous proceedings, representing the U.S. in a variety of matters as well as businesses in private practice, serving in the federal court system, and engaging in extensive legal scholarship, make me qualified to join the Court of Federal Claims at this point in my career.

2. On May 11, *Reuters* reported that “a lawyer who represented credit reporting companies over a massive data breach at Equifax is being considered to head the Federal Trade Commission’s Bureau of Consumer Protection.” The article noted that the FTC has opened an investigation into Equifax over its handling of consumer data.

**Please articulate the standard you have used at the FTC for determining whether an attorney’s representation of clients who are under investigation by the FTC, or the attorney’s representation of associations whose members are under investigation by the FTC, might preclude the attorney from serving effectively as a member of the leadership of the Bureau of Consumer Protection.**

The core principle used at the FTC for Commissioners, senior staff, and all Commission employees is strict adherence to applicable ethics laws and rules. Many individuals selected for senior positions have come to the Commission with substantial experience in the private sector. Thus, it is not unusual for incoming senior lawyers to have represented clients involved in past and present FTC matters. Under the Standards of Conduct, as supplemented by the Trump Administration Ethics Pledge, senior non-career officials may not participate in particular matters involving specific parties or matters that involve former employers or clients they have served within the two years before joining the government for two years following their appointment. These senior officials establish screening procedures to assure compliance with this requirement. Key FTC staff members are provided with lists of the individuals and entities in question so that the senior official complies with ethical requirements.

As you note, Bureau Directors serve as a member of the organization’s leadership team. In matters where a Bureau Director does not participate, another senior Bureau official will be responsible for leading the staff in developing recommendations for action by the full Commission. In my experience, recusals by Bureau Directors based on having formerly represented an involved party have not prevented the Commission from vigorously pursuing its missions.

**Nomination of Maureen Kraemer Ohlhausen  
United States Court of Federal Claims  
Questions for the Record  
Submitted May 16, 2018**

**QUESTIONS FROM SENATOR WHITEHOUSE**

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

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

Yes, I agree with Justice Robert’s statement as a metaphor for the Constitutional separation of powers between the three co-equal branches of government, pursuant to which Congress makes the law, the executive branch enforces it, and judges apply the law to particular facts based on the statutory text and precedent, not personal policy preferences.

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

Judges should take the practical consequences of a particular decision into account where precedent requires it, such as decisions about whether to issue an injunction, or where interpretation of a statute would lead to absurd results. *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Where precedent or a statute does not require consideration of consequences, the judge should apply the law to the facts of a case without regard to practical consequences, which should be considered by the political branches.

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

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

Federal judges take an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States” 28 U.S.C. § 453. A judge is thus obligated to ensure that circumstances such as a party’s age, wealth, social standing, race, or disability do not negatively affect that party’s rights before the court. Empathy for litigants should help a judge carry out this obligation.

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

For a trial judge, some decisions involve discretion and should draw on a judge's experience. One example is decisions involving the admissibility of evidence and the weight given to particular testimony. In these areas, a judge's personal life experiences can help the judge understand better the particular facts or circumstances of a case. Other decisions, however, such as assessing the controlling precedent or statutory text, are based on an impartial analysis.

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

No.

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

Federal judges take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States." 28 U.S.C. § 453. A judge is thus obligated to ensure that circumstances such as a party's wealth or social standing do not negatively affect that party's rights before the court. If confirmed, I pledge to discharge this obligation to the best of my ability. I also believe my long career in public service at the Federal Trade Commission, fighting fraud and deception and stopping anticompetitive mergers and behavior by companies large and small, has demonstrated my commitment to applying the law fairly in the interests of individual Americans, regardless of the size or wealth of the parties involved.

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

Federal courts have long recognized the problem with such tactics in discovery. Rule 26(b)(1) of the Rules of the United States Court of Federal Claims states that parties can obtain discovery "proportional to the needs of the case, considering the importance of the issues at stake in the action," and Rule 26(b)(2)(C) states that "the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines" that discovery is not proportional. Thus, a judge on the U.S. Court of Federal claims can limit problematic discovery *sua sponte* or by motion.

5. Do you believe that the federal judiciary has a role to play in ensuring what you describe as "regulatory humility" in balancing economic liberty and business interests with agencies' regulatory and enforcement interests? If yes, what should this role look like, and how will it affect your tenure as a federal judge?

I have discussed regulatory humility as concept to guide policymakers, such as legislatures and regulators, as they promulgate laws and regulations to control business conduct in dynamic industries and markets. It is the role of the legislature or the regulator to decide what balance to strike between business or economic liberty interests and any other public interest goals. Once a legislature or regulator promulgates particular laws and regulations, the role of a judge is to apply the laws and regulations to the facts at issue, consistent with controlling legal precedent and Constitutional requirements. Thus, my concept of regulatory humility will not apply to my tenure as a federal judge.

6. You previously noted that you are “not concerned about the independence of the FTC” in regard to President Trump’s potential involvement in a merger between AT&T and Time Warner. What do you see as the value of agency independence—particularly for independent agencies such as the FTC, EPA, and FCC—from direct Presidential control? What role should the federal judiciary play in ensuring this independence?

To be clear, I meant my quoted statement to convey that I was not concerned that the FTC, an independent agency with bipartisan leadership, would actually be subject to any political interference in our decision making, not that I did not value or would not seek to protect the agency’s independence. I would also note that the FTC did not review the AT&T/Time Warner merger, which was reviewed and challenged by the Department of Justice Antitrust Division, so I did not make that statement with regard to FTC oversight of that particular merger.

As for agency independence, Congress created certain bipartisan independent agencies, such as the FTC, to enable enforcement officials and regulators with specialized expertise to make decisions (either enforcement action or regulation) without the direct intervention by the political branches of government. For matters, such as mergers, that involve large commercial stakes and affect the economic fortunes of individual firms and communities, this independence reduces the risk that political considerations could influence the agency to bend the proper application of competition law to serve special interests at the expense of the appropriate goals of antitrust, which is to protect consumers.

The most important and common role for the federal judiciary in ensuring this independence is in deciding cases brought to challenge the agency enforcement or regulatory action. The court should review the action to ensure it meets the requirements of the relevant statutes and case law and is well supported by factual and other relevant evidence, whether economic or scientific.

**Questions for the Record for Maureen K. Ohlhausen Senator Mazie K. Hirono  
May 16, 2018**

**Questions for Maureen K. Ohlhausen, nominee for the Court of Federal Claims**

1. Chief Justice John Roberts has recognized that “the judicial branch is not immune” from the widespread problem of sexual harassment and assault and has taken steps to address this issue. As part of my responsibility as a member of this committee to ensure the fitness of nominees for a lifetime appointment to the federal bench, I would like each nominee to answer two questions.

**a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?**

No.

**b. Have you ever faced discipline or entered into a settlement related to this kind of conduct?**

No.

**Nomination of Maureen K. Ohlhausen to the  
United States Court of Federal Claims  
Questions for the Record  
Submitted May 16, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</sup> 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.<sup>3</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.<sup>4</sup>

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

The 14th Amendment mandates equal protection of the laws, and fair and impartial treatment of all persons is a fundamental duty of judges, as reflected in the judicial oath. Racism still exists in our society, however, and it is possible there is implicit racial bias in our justice system. If there is evidence that certain persons are not receiving equal protection or not being treated fairly and impartially by courts for any reason, including because of implicit racial bias, I think it is important to identify and eliminate such conduct.

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

According to the Census Bureau, African Americans are approximately 13% of the population, and statistics from the Bureau of Prisons state that approximately 38% of the population of prison inmates are African Americans. Thus, African Americans are disproportionately represented in jails and prisons.

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.

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<sup>1</sup> JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

<sup>2</sup> *Id.*

<sup>3</sup> ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>4</sup> *Id.* at 8.

As an attorney who has practiced exclusively civil law for the last 20 years of my career, and a nominee to a court with no criminal jurisdiction, I have not studied the issue of implicit racial bias in our criminal justice system.

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

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

As an attorney who has practiced exclusively civil law for the last 20 years of my career, and a nominee to a court with no criminal jurisdiction, I have not studied the issue of any possible relationship between incarceration rates and crime rates in states and lack the knowledge to form a belief on this issue.

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

As an attorney who has practiced exclusively civil law for the last 20 years of my career, and a nominee to a court with no criminal jurisdiction, I have not studied the issue of any possible relationship between incarceration rates and crime rates in states and lack the knowledge to form a belief on this issue.

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

Yes.

4. Since *Shelby County, Alabama v. Holder*, states across the country have adopted restrictive voting laws that make it harder, not easier for people to vote. From strict voter ID laws to the elimination of early voting, these laws almost always have a disproportionate impact on poor minority communities. These laws are often passed under the guise of widespread voter fraud. However, study after study has demonstrated that widespread voter fraud is a myth. In fact, an American is more likely to be struck by lightning than to impersonate someone voter at the polls.<sup>7</sup> One study that examined over one billion ballots cast between 2000 and 2014, found

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<sup>5</sup> THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at [http://www.pewtrusts.org/~media/assets/2016/12/national\\_imprisonment\\_and\\_crime\\_rates\\_continue\\_to\\_fall\\_web.pdf](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD, BRENNAN CENTER FOR JUSTICE 6 (2007), available at <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

only 31 credible instances of voter fraud.<sup>8</sup> Despite this, President Trump, citing no information, alleged that widespread voter fraud occurred in the 2016 presidential election. At one point he even claimed—again without evidence—that millions of people voted illegally in the 2016 election.

a. As a general matter, do you think there is widespread voter fraud? If so, what studies are you referring to support that conclusion?

My areas of legal practice have never touched on voting issues and such issues would not come before the U.S. Court of Federal Claims, which has jurisdiction over money claims against the government not sounding in tort. Thus, I lack the knowledge to form a belief on this issue.

b. Do you agree with President Trump that there was widespread voter fraud in the 2016 presidential election?

Please see my answer to question 4 a.

c. Do you believe that restrictive voter ID laws suppress the vote in poor and minority communities?

It is my understanding that challenges to voter ID laws based on their impact to certain communities are pending or impending in courts across the country. Because Canon 3(A)(6) of the Code of Conduct for United States Judges prohibits a judge or nominee from commenting on any matter that is pending or impending in any court, I cannot comment further.

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<sup>8</sup> Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, THE WASHINGTON POST, Aug. 6, 2014, available at [https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm\\_term=.4da3c22d7dca](https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.4da3c22d7dca).



**Questions for the Record from Senator Kamala D. Harris**  
**Submitted May 16, 2018**  
**For the Nominations of**

- **Maureen Ohlhausen** to be Judge on the U.S. Court of Federal Claims

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

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

Because the U.S. Court of Federal Claims, for which I am a nominee, has no criminal jurisdiction, I would never be called upon to sentence a defendant.

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

Please see my answer to question 1a.

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

As attorney who has practiced civil law for the past 20 years and a nominee to a court that does not have criminal jurisdiction, I do not have a basis for an opinion on when it is appropriate to depart from the Sentencing Guidelines.

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

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

As attorney who has practiced civil law for the past 20 years and a nominee to a court that does not have criminal jurisdiction, I do not have a basis for an opinion on Judge Reeve's statement.

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

As attorney who has practiced civil law for the past 20 years and a nominee to a court that does not have criminal jurisdiction, I do not have a basis for an opinion on mandatory minimum sentences.

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<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

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

As attorney who has practiced civil law for the past 20 years and a nominee to a court that does not have criminal jurisdiction, I do not have the knowledge to give an example of when a mandatory minimum sentence was unjustly applied to a defendant.

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

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

Because the U.S. Court of Federal Claims, for which I am a nominee, has no criminal jurisdiction, I would never be called upon to sentence a defendant.

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

Please see my answer to question 1d.iv.1 above.

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

Please see my answer to question 1d.iv.1 above.

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

Because the U.S. Court of Federal Claims, for which I am a nominee, has no criminal jurisdiction, I would never be called upon to sentence a defendant or consider alternatives to incarceration.

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

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<sup>2</sup> See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

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

Federal judges take an oath to “administer justice without respect to persons, and do equal right to the poor and to the rich . . . [to] faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States” 28 U.S.C. § 453. Thus, a judge is obligated to ensure that our justice system is fair and equitable.

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

The 14th Amendment mandates equal protection of the laws, and fair and impartial treatment of all persons is a fundamental duty of judges, as reflected in the judicial oath itself. Racism still exists in our society, however, and it is possible there is racial bias in our justice system. If there is evidence that certain persons are not receiving equal protection or not being treated fairly and impartially by courts for any reason, including because of racial bias, I think it is important to identify and eliminate such conduct.

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

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

Yes.

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

Yes.