

**Nomination of Patrick Bumatay to the U.S. Court of Appeals for the Ninth Circuit  
Questions for the Record  
Submitted November 6, 2019**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. At your confirmation hearing, you testified that you made two oral arguments before the Ninth Circuit Court of Appeals.

**Please identify the case captions, date(s) of the arguments, whether the cases were civil or criminal, and a brief description of the cases.**

*Al Mutarreb v. Holder*, No. 04-75676 (9th Cir.) (argued Dec. 11, 2008). This immigration case involved a sufficiency of the evidence challenge to a notice to appear issued by the then-Immigration and Naturalization Service.

*United States v. Campos-Nunez*, No. 13-50194 (9th Cir.) (argued July 8, 2014). This case involved the appeal of Mr. Campos-Nunez's conviction for importation of marijuana.

2. Apart from these two oral arguments before the Ninth Circuit, how many oral arguments have you made before any state or federal appellate court? For each argument, please identify the case caption, the date of the argument, the court where you presented oral argument, whether the case was civil or criminal, and a brief description of the case.

As a trial Assistant U.S. Attorney, I argued primarily in federal district court. Aside from the two arguments before the Ninth Circuit, I have not argued in any other state or federal appellate court.

3. How many motions, briefs, or other legal filings have you submitted as counsel of record before any state or federal appellate court? For each motion, brief, or other legal filing submitted as counsel of record, please identify the case caption, the date the document was filed, the court where the document was submitted, whether the case was civil or criminal, and a brief description of the case.

I have submitted approximately one dozen appellate briefs, motions, or other legal filings. In addition to the cases identified in response to Question 1, to the best of my recollection, I have submitted appellate briefs, motions, or other legal filings in the following cases:

*Simels v. United States*, No. 11-947 (U.S.) (petition filed Jan. 30, 2012). This petition for a writ of certiorari involved the question of whether 18 U.S.C. § 2515 (Title III's suppression rule) includes an exception for impeachment purposes.

*United States v. Ruiz*, No. 19-50058 (9th Cir.) (submitted Oct. 11, 2019). This matter involved the appeal of a sentence in a drug importation case.

*United States v. Silva-Garcia*, No. 19-50052 (9th Cir.) (submitted Sept. 30, 2019). This matter involved the appeal of a sentence in an illegal reentry case.

*United States v. De La Paz*, No. 18-50439 (9th Cir.) (submitted, Aug. 19, 2019). This matter involved an appeal of a conviction and sentence in a drug importation case.

*United States v. Nava-Arellano*, No. 18-50424 (9th Cir.) (submitted June 3, 2019). This matter involved an appeal of a conviction and sentence in an illegal reentry case.

*United States v. Buenaventura-Velasquez*, No. 14-50484 (9th Cir.) (submitted Apr. 22, 2015). This case involved the appeal of a conviction for illegal transportation in violation of 8 U.S.C. § 1324.

*United States v. Luis Alvarado Lopez*, No. 14-50268 (9th Cir.) (submitted Feb. 12, 2015). This matter involved the appeal of a sentence in a drug importation case.

*United States v. Anabel Ocegueda*, No. 12-50259 (9th Cir.) (submitted Jan. 25, 2013). This case involved a response to a brief filed pursuant to *Anders v. State of California*, 386 U.S. 738 (1967).

*United States v. Manuel Alarcon-Maldonado*, No. 12-50457 (9th Cir.) (submitted Jan. 22, 2013). This matter involves the appeal of a sentence in an illegal reentry case.

*Morfaw v. Holder*, No. 08-1249 (4th Cir.) (submitted July 14, 2008). This case involved an appeal of a denial of a motion to reopen immigration proceedings.

4. How many civil cases have you handled as counsel of record?

During my time at Morvillo Abramowitz, Grand, Iason, Anello & Bohrer, P.C., I worked on several civil matters. I have not maintained a record of these matters.

5. When was the last time you worked on a civil matter? Please identify the case caption of that civil matter and a brief description of the case.

As a Counselor to the Attorney General, I advised on the opioid multidistrict litigation, *In re: National Prescription Opiate Litigation*, No. 17-MD-02804 (N.D. Ohio).

6. Why did you choose to go on detail to the Office of Legal Policy (OLP)?

I accepted a detail with OLP because I believed it would be an honor to work on a historic matter like the confirmation of a Supreme Court justice.

7. Why did you choose to go on detail to the Office of the Deputy Attorney General (ODAG)?

I served as a counsel and senior counsel in ODAG because I believed it was a privilege to serve the Department of Justice in a leadership position.

8. Why did you choose to go on detail to serve as Counselor to Attorney General Sessions?

I served as a Counselor to Attorney General Sessions because I believed it was a privilege to serve the Department of Justice in a leadership position.

9. Did you ever ask to go on detail before 2017? If not, why not?

Not to my recollection. Prior to 2017, I focused my career on serving as a trial and narcotics prosecutor.

10. Did any official in or employee of the Trump administration ever suggest that any of these aforementioned details would increase your chances of being nominated to a federal judgeship? If so, please identify when, who was involved, and what was discussed.

No.

11. Did any active or retired federal judge ever suggest that any of these aforementioned details would increase your chances of being nominated to a federal judgeship? If so, please identify when, who was involved, and what was discussed.

No.

12. Did anyone affiliated with the Federalist Society or the Heritage Foundation ever suggest that any of these aforementioned details would increase your chances of being nominated to a federal judgeship? If so, please identify when, who was involved, and what was discussed.

No.

13. Please identify and describe each conversation you had with members of the White House Counsel's Office or any other official in the Trump administration regarding your nomination prior to November 2018.

In or about March 2017, an Assistant U.S. Attorney colleague asked me if I would like to be considered for a judicial vacancy in the Southern District of California. I replied affirmatively and provided him with my resume, which I understood he would transmit to the White House. In the week of July 10, 2017, a colleague at the Department of Justice asked me if I would like to be interviewed for a judicial vacancy on the Court of Appeals for the Ninth Circuit and I responded affirmatively. On July 17, 2017, I interviewed with White House and Office of Legal Policy attorneys.

In early September 2018, I was asked by the White House Counsel's Office to review a draft biography for a potential nomination to the Ninth Circuit. On October 10, 2018, the President announced his intention to nominate me to the Ninth Circuit.

Throughout this period, I have been in periodic contact with attorneys with the Office of Legal Policy and White House Counsel's Office.

14. You joined the Appellate Section of the San Diego-based U.S. Attorney's Office in March 2019. Before doing so, did you have any discussions with anyone in the Trump Administration about the need to gain appellate experience in order to be re-considered for a Ninth Circuit seat?

No. The U.S. Attorney for the Southern District of California made the decision to place me in the Appellate Section. My understanding is that the Office believed that I should not appear in district court as a pending district court nominee.

15. Please answer the following questions regarding the work you performed while on detail in the Office of Legal Policy, the Office of the Deputy Attorney General, and/or the Office of the Attorney General. If you worked or advised on any of the policies or issues listed below, please explain the nature and extent of your work on each.

- a. Did you work or advise on anything related to the investigation of Russian interference in the 2016 election, including the appointment of a special counsel?**
- b. Did you work on any matters related to the census citizenship question?**
- c. What was the nature of your involvement in the Justice Department's opioids initiatives?**
- d. What was the nature of your involvement in the Justice Department's work on prison reform?**
- e. In October 2017, it was reported that the Justice Department had reduced funding for halfway houses for federal prisoners, and had terminated federal contracts with sixteen facilities nationwide. Were you involved in this policy? Please explain.**
- f. In September 2017, the Bureau of Prisons faced criticism for neglecting inmates in the wake of Hurricane Harvey, leading to illnesses and death. Inmates and their families reported a lack of food, contaminated drinking water, and unsanitary sewage conditions. Were you involved in BOP's response to Hurricane Harvey? Please explain.**
- g. In January 2018, the Justice Department ordered the Bureau of Prisons to identify all eligible inmates to be transferred to private prisons. Were you involved in this policy? Please explain.**

- h. In March 2018, Attorney General Sessions announced that the Justice Department would offer voluntary firearms training for teachers. Were you involved in this policy? Please explain.**
- i. Have you worked on any gun control measures?**
- j. Have you worked on the Administration's response to mass shootings?**
- k. Have you worked or advised on the Administration's policy of separating families at the border?**
- l. Have you worked or advised on efforts to limit the number of asylum seekers or refugees permitted to enter the country?**
- m. Have you worked or advised on funding options for building a wall along the border between the United States and Mexico?**
- n. Have you worked or advised on the Administration's rules or policies restricting asylum for people entering through the Southern border?**
- o. Have you worked or advised on the Administration's public charge rule?**
- p. Have you worked or advised on the creation or implementation of the Administration's Migrant Protection Protocols policy?**
- q. Have you worked or advised on any potential safe-third party country agreements?**
- r. Have you worked or advised on the creation or implementation of the Administration's rule to expand the scope of expedited removal?**
- s. Have you worked or advised on the Department's charging and sentencing policy instructing prosecutors to charge and pursue "the most serious, readily provable offense," announced May 12, 2017?**
- t. Have you worked on the Department's reversal of policy protecting transgender individuals from discrimination under Title VII, announced October 4, 2017?**
- u. Have you worked on the Department's prohibition on issuance of guidance documents "that have the effect of adopting new regulatory requirements or amending the law," announced November 17, 2017?**
- v. Have you worked on the Department's revised policy on marijuana enforcement, announced January 4, 2018?**

- w. **Have you worked on the Department’s “zero-tolerance” policy for criminal illegal entry under 8 U.S.C. 1325(a), announced April 6, 2018?**
- x. **Have you worked or advised on the Department’s rescission of 24 guidance documents deemed to be “unnecessary, outdated, inconsistent with existing law, or otherwise improper,” announced July 3, 2018?**
- y. **Have you worked or advised on the Department’s issuance of “principles and procedures for civil consent decrees and settlement agreements with state and local government entities,” announced November 7, 2018?**
- z. **Have you worked or advised on the Department’s rescission of 69 guidance documents deemed to be “unnecessary, outdated, inconsistent with existing law, or otherwise improper,” announced December 21, 2018?**

From February 2017 to April 2017, I served on detail to the Office of Legal Policy (OLP) to work on the confirmation of Justice Neil Gorsuch. As a federal prosecutor on detail to OLP, I was asked to consult on the policy that was later announced in the May 12, 2017 Memorandum, entitled “Department Charging and Sentencing Policy.”

From April 2017 to February 2018, I served as a Counsel and Senior Counsel to the Deputy Attorney General. My areas of responsibility included illicit opioids initiatives, contraband cellphones in prisons, prison reform and inmate reentry, and oversight of the DEA, the Federal Bureau of Prisons (BOP), and OLP.

From February 2018 to March 2019, I served as a Counselor to the Attorney General. I focused on combatting the opioid crisis, strengthening efforts against transnational organized crime, and prison reform and inmate reentry initiatives, including the First Step Act. I also assisted in the oversight of DEA, BOP, U.S. Marshals Service, Organized Crime and Drug Enforcement Task Forces, and Bureau of Alcohol, Firearms, Tobacco and Explosives (ATF), including ATF’s bump stock regulation. Although immigration matters were not in my portfolio, because I had experience with criminal immigration enforcement as a prosecutor in the Southern District of California, I was asked to consult on the Memorandum for Federal Prosecutors along the Southwest Border dated April 6, 2018.

16. Did you work or advise on any judicial nominations at the Office of Legal Policy? If yes, please identify the nominations you worked on and the nature of your involvement.

Yes. During my most recent service at the Department of Justice, I worked and advised on the confirmations of Justices Neil Gorsuch and Brett Kavanaugh. I also attended a hearing preparation session for one other judicial nominee.

In addition, I served as a Special Assistant and Counsel in the Office of Legal Policy from 2007 to 2008 and as an unpaid law clerk in the Office of Legal Policy in 2005 and 2006.

During this time, I assisted in the judicial nomination process, including the confirmations of Chief Justice John Roberts and Justice Samuel Alito. Beyond that, I have not maintained records of the other nominations for which I provided assistance.

17. Did you work or advise on Justice Kavanaugh's nomination to the Supreme Court? If yes, please explain the nature of your involvement.

Yes. I primarily worked on the Department of Justice's confirmation hearing operations.

18. It has been reported that more than 20 individuals involved with Justice Kavanaugh's nomination to the Supreme Court were awarded the Attorney General's Award for Distinguished Service. Did you receive the Attorney General's Award for Distinguished Service for your work on Justice Kavanaugh's nomination to the Supreme Court?

Yes.

19. 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 lower courts to depart from Supreme Court precedent.

**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?**

A circuit court judge must faithfully follow Supreme Court precedent. As the Ninth Circuit has opined, "[j]udges of the inferior courts may voice their criticisms, but follow it they must." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Even still, judges should not criticize precedent unless for compelling reason.

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

Absent a reversal by an *en banc* panel, circuit judges are bound by the circuit's prior precedent. *Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1018 (9th Cir. 2000). Additionally, the Ninth Circuit has recognized, when prior circuit authority is "clearly irreconcilable" with the reasoning or theory of a Supreme Court authority, circuit judges should follow the Supreme Court precedent. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*).

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

Only the Supreme Court has the authority to decide when to overturn its precedents and it has said it will only do so under "special justification." *Gamble v.*

*United States*, 139 S. Ct. 1960, 1969 (2019). The Supreme Court has identified several factors its considers in evaluating precedent, such as whether its statutory or doctrinal underpinnings have eroded over time, its workability, any reliance interests, and the soundness of its reasoning. See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).

20. 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”?**

*Roe v. Wade* is a binding Supreme Court precedent that has been reaffirmed multiple times. If confirmed, I would faithfully apply it and all Supreme Court precedent.

b. **Is it settled law?**

All Supreme Court precedents, including *Roe v. Wade*, are settled law. If confirmed, I would faithfully apply it and all Supreme Court precedent.

21. 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?**

All Supreme Court precedents, including *Obergefell v. Hodges*, are settled law. If confirmed, I would faithfully apply it and all Supreme Court precedent.

22. 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?**

As a judicial nominee, it would be inappropriate to comment on or grade opinions of the Supreme Court. If confirmed, I would faithfully apply *Heller* and all Supreme Court precedent.



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

In *Heller*, the Supreme Court recognized that the Second Amendment was “not unlimited” and its ruling would not proscribe “longstanding prohibitions on the possession of firearms,” “laws forbidding the carrying of firearms in sensitive places,” and “law imposing conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008). As questions regarding particular gun regulations may come before the courts, it would be inappropriate to comment beyond what the Supreme Court has said.

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

As a judicial nominee, it would be inappropriate to comment on or grade the decisions of the Supreme Court. If confirmed, I would faithfully apply *Heller* and all Supreme Court precedent.

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

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

The Supreme Court has recognized that the “First Amendment protection extends to corporations.” *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). If confirmed, I would faithfully apply *Citizens United* and all Supreme Court precedent.

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

As a judicial nominee, it would be inappropriate to comment on legal matters that may come before the courts. If confirmed, I would faithfully apply all Supreme Court precedent regarding the First Amendment.

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

The Supreme Court has held that the Religious Freedom Restoration Act applies to for-profit closely held corporations. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 719 (2014). The Supreme Court did not reach the First Amendment claims in that case. *Id.* at 736. As a judicial nominee, it would be inappropriate to comment on legal matters that may come before the courts. If confirmed, I would faithfully apply *Hobby Lobby* and all Supreme Court precedent.

24. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Constitution guarantees both the equal protection of the laws and the right to the free exercise of religion. Both of these protections are cherished rights in this country. If confirmed, I would faithfully apply the Constitution and all applicable Supreme Court precedent.

25. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk's sincerely held religious beliefs?

Please see my answer to Question 24.

26. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist's sincerely held religious beliefs?

Please see my answer to Question 24.

27. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2003. 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 had not previously encountered this webpage. As I did not author the statement, I cannot speak to its meaning.

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

Please see my answer to Question 27(a).

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

Please see my answer to Question 27(a).

**d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.**

Yes. I have many friends and colleagues who are members of the Federalist Society and I have had numerous discussions about my nominations with those friends and colleagues.

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

To my recollection, no.

**b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

To my recollection, no.

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

As a federal prosecutor, I have not focused on matters related to administrative law. If confirmed, I would faithfully apply Supreme Court precedent regarding administrative law, including *Chevron v. Nat. Resources Def. Council*, 467 U.S. 837 (1984).

29. Do you believe that human activity is contributing to or causing climate change?

As a judicial nominee, it would be inappropriate to comment on policy matters or matters that may come before the courts.

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

In interpreting statute, the Supreme Court has held that if the text of a statute is unambiguous, that is end of the inquiry. *See, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The Supreme Court has used legislative history as a tool to determine the meaning of ambiguous statutes. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). If confirmed, I would faithfully apply Supreme Court precedent on statutory interpretation.

31. 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.

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

After receiving these questions, I drafted answers to each question. In formulating my response to these questions, I researched some matters, including searching Westlaw and consulting the responses of other nominees. I then gave my responses to attorneys at the Department of Justice Office of Legal Policy, who provided some input. I incorporated any edits I deemed appropriate. The answers to these questions are my own.

**Written Questions for Patrick Joseph Bumatay**  
**Submitted by Senator Patrick Leahy**  
**Wednesday, November 6, 2019**

1. In an op-ed in a student publication at Yale, you wrote that “[t]he loss of a Yale identity began with the institution’s obsession with diversity.” You argued that programs and groups designed to help specific minority groups adjust to largely homogenous institutions “force[s] minorities to balkanize themselves.”

**(a) You are currently a member of the Filipino American Lawyers Society of San Diego, the Pan Asian Lawyers of San Diego, and the National Asian Pacific Islander Prosecutors Association. Do these organizations “force minorities to balkanize themselves?” Or do they allow minorities to build professional networks while celebrating their diverse backgrounds?**

These professional organizations offer an important opportunity for minority lawyers to build professional networks. I have enjoyed my experience with these organizations.

2. In 2007, you wrote an article entitled “Causes, Commitments, and Counsels,” in which you considered whether government lawyers who work for a particular president should be treated as so-called “cause lawyers.” You defined “cause lawyers” as those who “have a moral, political, or ideological commitment to the causes of their organizations.”

**(a) In your work for the executive branch, have you considered yourself a “cause lawyer”? In the Office of Legal Policy at the Justice Department, who do you consider your client?**

No, I do not consider myself a “cause lawyer.” I wrote that article as a law school student, prior to becoming a lawyer. Since the start of my career at the Department of Justice, I have always considered my client to be the United States.

**(b) How can you assure us that if confirmed, you won’t also be a “cause judge”?**

I have served in the Department of Justice for almost ten years, under three presidential administrations and six Attorneys General of all parties. As a career federal prosecutor, political or policy preferences had absolutely no role in my job. Furthermore, I firmly believe that the role of the judge is to apply the law to the facts of each case fairly and impartially, without regard to the judge’s preferred outcomes or policy preferences. Simply put, politics and policy preferences have no role in the courtroom.

3. In 2015, as an Assistant United States Attorney, you were prosecuting a case in which the convicted defendant, Ms. Elena Ibarra, alleged that you had engaged in prosecutorial misconduct. The Department of Justice actually *agreed* with the defendant, ultimately moving to vacate her conviction.

**(a) Can you explain why you've listed this case in which your conviction was vacated as one of your 'top 10' litigated cases in your Senate Judiciary Questionnaire?**

I listed the *United States v. Ibarra* case in my Senate Judiciary Questionnaire because that case involved significant pre-trial and trial litigation.

**(b) Do you accept responsibility for engaging in prosecutorial misconduct in Ms. Ibarra's case?**

I am proud of my record as a prosecutor. I learned a lot from that case and from all my cases. After the jury found Ms. Ibarra guilty, she argued on appeal that there was a violation of the rule against eliciting opinion testimony. *See United States v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999). While it could be argued that that rule did not extend to the circumstances of the case, I accept that the U.S. Attorney's Office ultimately decided to not to contest the appeal.

4. During your time on detail at the Justice Department, you worked on "prison reform and inmate reentry initiatives" and oversight of the Bureau of Prisons. Also during that time, there were a series of failures where the health and safety of inmates were placed at risk, including a federal prison in Brooklyn going without heat for days in the middle of winter and a number of instances of prisoners with mental illness being held in solitary confinement.

**(a) In your capacity conducting oversight of the Bureau of Prisons, did you become aware of these instances and others where the health and safety of federal inmates were placed at risk? Did you do anything to investigate those incidents that occurred during your time at the Justice Department? If not, why not?**

During my time in the Office of the Attorney General, media reports indicated that a federal prison in Brooklyn lost heat during the winter. After consultations within the Department, I traveled to Brooklyn to investigate the reports.

I do not recall being aware of instances of Bureau of Prisons prisoners with mental illness being held in solitary confinement.

5. In your Senate Judiciary Questionnaire you indicate that you were a detailee for the Office of Legal Policy in 2017. But you did not explain which issue areas you worked on.

**(a) Please describe the types of matters you handled in the Office of Legal Policy.**

From February 2017 to April 2017, I served on detail to the Office of Legal Policy (OLP) to work on the confirmation of Justice Neil Gorsuch. As a federal prosecutor, I was also asked to consult on the policy that was later announced in the May 12, 2017 Memorandum, entitled "Department Charging and Sentencing Policy."

6. 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?’”**

**Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?**

The Supreme Court has opined that it is a “fundamental canon of statutory construction” to construe the words of a statute in “their context and with a view to their place in the overall statutory scheme.” *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014). If confirmed, I would faithfully apply this and all Supreme Court precedent.

7. 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?**

The independence of the judiciary is a fundamental aspect of our constitutional framework and is the cornerstone of the Constitution’s separation of powers. Article III vests judges with certain protections, including lifetime tenure, to ensure judicial independence. Thus, the role of the judge is to apply the law to the facts of each case fairly and impartially, without regard to public pressure or criticism.

**(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 answer to Question 7(a).

8. 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?**

Under Supreme Court precedent, courts have the authority to review executive branch decisions involving national security matters. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 549 (1952); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). If confirmed, I would faithfully apply these and all Supreme Court precedent.

9. Many are concerned that the White House’s denouncement 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 general matter, courts have authority to remedy a party’s failure to comply with a court order. With respect to this particular question, it would be inappropriate to comment on matters that may come before the courts.

10. 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 assigns war powers to both the Executive and Legislative branches. *See* U.S. Const. Art. I, § 8, Art. II, § 2. Under Supreme Court precedent, courts may review disputes between the branches over these authorities. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 549 (1952), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). If confirmed, I would faithfully apply these and all Supreme Court precedent.

Justice O’Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

**(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?**

Please see my answer to Question 10(a).

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

Please see my answer to Questions 8(a) and 10(a).

12. 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 the Equal Protection Clause of the Fourteenth Amendment applies to women. *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed, I would faithfully apply this and all Supreme Court precedent.

**13. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”**

The Voting Rights Act is a landmark law protecting the fundamental right to vote. As the Supreme Court has stated, “[p]assage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote.” *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). If confirmed, I would faithfully apply the Voting Rights Act and any applicable Supreme Court precedent.

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

The Constitution states 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.” U.S. Const. Art. I, § 9, cl. 8.

15. 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?**

Appellate courts should not disturb the factual findings of lower courts unless they are clearly erroneous.

**16. 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 Thirteenth, Fourteenth, and Fifteenth Amendments, “by appropriate legislation.” These Amendments and Congress’s authorities granted thereunder have been important tools to combat racial discrimination.

17. 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 binding precedent of the Supreme Court. If confirmed, I would faithfully apply it and all Supreme Court precedent.

18. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

**(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

It is never appropriate for lower courts to depart from Supreme Court precedent. Only the Supreme Court has the authority to decide when to overturn its precedents and it has said it will only do so under “special justification.” *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). The Supreme Court has identified several factors it considers in evaluating precedent, such as whether its statutory and doctrinal underpinnings have eroded over time, its workability, any reliance interests, and the soundness of its reasoning. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). With respect to Ninth Circuit precedent, absent a reversal by an en banc panel, circuit judges are bound by the circuit’s prior precedent. *Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1018 (9th Cir. 2000). Additionally, the Ninth Circuit has recognized, when prior circuit authority is “clearly irreconcilable” with the reasoning or theory of a Supreme Court authority, circuit judges should follow the Supreme Court precedent. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*).

19. 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.**

Under the recusal statute, a government attorney shall recuse himself from any matter the attorney “participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.” 28 U.S.C. § 455(b)(3). If confirmed, I will follow the recusal statute, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances. Thus, I would recuse myself from matters I have worked on as a counsel, adviser, or material witness while at the U.S. Attorney’s Office or the Department of Justice.

20. 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?**

Under our constitutional framework, courts play a critical role in protecting the rights of individual and ensuring all people receive the equal protection of the laws. As the judicial oath states, judges are duty bound to “administer justice without respect to persons,” and “do equal right to the poor and to the rich.” 28 U.S.C. § 453. If confirmed, I will apply the law fairly and impartially.

21. 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 and the events discussed in the Mueller report 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. The system of checks and balances is a critical feature of our Constitution.

**22. Do you believe there are any discernible limits on a president’s pardon power? For example, President Trump claims he has an “absolute right” to pardon himself. Do you agree?**

As a federal prosecutor, I have not encountered this question. If confirmed, I would look to the Constitution and any applicable Supreme Court and Ninth Circuit precedent regarding the scope of the pardon power.

**23. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Under the Constitution, Congress has the authority to regulate commerce among the several states. U.S. Const. Art. I, § 8, cl. 3. The Supreme Court has provided guidance on the scope of the commerce clause. *See, e.g., Nat. Fed'n. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Lopez*, 514 U.S. 549 (1995). Under the Fourteenth Amendment, Congress has the authority to enforce the Amendment's protections "by appropriate legislation." U.S. Const. Admt. XIV, § 5. The Supreme Court has also provided guidance on the scope of this authority. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). If confirmed, I would faithfully apply these and all Supreme Court precedent.

24. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

**(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?**

*Trump v. Hawaii* is a precedent of the Supreme Court. If confirmed, I would faithfully apply it and all Supreme Court precedent. As a judicial nominee, it would be inappropriate for me to comment on matters that may come before the courts.

**25. How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

The Supreme Court has held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992)). If confirmed, I would faithfully apply these and all Supreme Court precedent.

26. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

**(a) Do you think that the qualified immunity doctrine should be reined in? Has the “qualified” aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?**

The Supreme Court has continued to affirm the doctrine of qualified immunity. *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148 (2018). As judicial nominee, it would be inappropriate to grade or comment on Supreme Court precedent. If confirmed, I would faithfully apply all Supreme Court precedent.

27. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted “seismic shifts in digital technology”, such as the “exhaustive chronicle of location information casually collected by wireless carriers today.”

**(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?**

The Supreme Court has recognized that courts must be in vigilant in protecting the rights afforded by the Fourth Amendment “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes.” *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018). If confirmed, I would faithfully apply this and all Supreme Court precedent.

28. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress’s constitutional duty to decide how the government spends money.

**(a) With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?**

As a federal prosecutor, I have not encountered this legal question. If confirmed, I would look to the Constitution and applicable Supreme Court precedent in considering this question.

29. During Justice Kavanaugh’s confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting “revenge on behalf of the Clintons” and warned that “what goes around comes around.” The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

**(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?**

The independence of the judiciary is a fundamental aspect of our constitutional framework and is the cornerstone of the Constitution’s separation of powers. Article III vests judges with certain protections, including lifetime tenure, to ensure judicial independence. Thus, the role of the judge is to apply the law to the facts of each case fairly and impartially, without regard to political influence or policy preferences.

**Senator Dick Durbin**  
**Written Questions for VanDyke and Bumatay**  
**November 6, 2019**

For questions with subparts, please answer each subpart separately.

**Questions for Patrick Bumatay**

1. From April 2017 to March 2019, you served as a top advisor to Deputy Attorney General Rosenstein and to Attorney General Sessions and Acting Attorney General Whitaker. Presumably you worked on legal matters and policies that would raise potential conflicts of interest and recusal questions should you be confirmed.

**Without disclosing the contents of your advice, please identify whether you worked on the following legal matters and policies while you were a counsel to the Attorneys General and Deputy AG:**

- a. **The Mueller investigation into Russian election interference**
- b. **The First Step Act and its implementation**
- c. **The Justice Department's efforts to withhold Byrne-JAG and COPS funding from grant recipients in order to force compliance with the Administration's immigration policies**
- d. **The Justice Department's May 2017 guidance that rescinded the Obama Smart on Crime sentencing policy and encouraged the seeking of maximum prison sentences for drug offenses**
- e. **The Southwest Border "zero tolerance" policy announced by Attorney General Sessions in April 2018**
- f. **Attorney General Whitaker's authority under the Vacancies Reform Act**
- g. **Judicial nominations**
- h. **The March 2018 proposed ATF regulation to ban bump stocks**

From April 2017 to February 2018, I worked as a Counsel and Senior Counsel to the Deputy Attorney General. My areas of responsibility included illicit opioids initiatives, contraband cellphones in prisons, prison reform and inmate reentry, and oversight of the DEA, the Federal Bureau of Prisons (BOP), and OLP. Previously, while on detail to OLP, I was asked to consult on the policy that was later announced in the May 12, 2017 Memorandum, entitled "Department Charging and Sentencing Policy."

From February 2018 to March 2019, I served as a Counselor to the Attorney General. I focused on combatting the opioid crisis, strengthening efforts against transnational organized crime, and prison reform and inmate reentry initiatives, including the First Step Act. I also assisted in the oversight of DEA, BOP, U.S. Marshals Service, Organized Crime and Drug Enforcement Task Forces, and Bureau of Alcohol, Firearms, Tobacco and Explosives (ATF), including ATF's bump stock regulation. Although immigration matters were not in my portfolio, because I had experience with criminal immigration enforcement as a prosecutor in the Southern District of California, I was asked to consult on the Memorandum for Federal Prosecutors along the Southwest Border dated April 6, 2018. Furthermore, I did not work on the Vacancies Reform Act, but that question may have impacted some of my work. While in the Office of the Attorney General, I also worked on the confirmation of Justice Brett Kavanaugh.

**2. Will you commit that if you are confirmed, you will recuse yourself from cases involving any matters or policies on which you worked while you were at the Justice Department?**

Under the recusal statute, a government attorney shall recusal himself from any matter the attorney "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(3). If I am fortunate enough to be confirmed, I will follow the recusal statute, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances. Thus, I would recuse myself from matters I have worked on as counsel, adviser, or material witness while at the U.S. Attorney's Office or the Department of Justice.

**3. Do you believe that a child is capable of fairly representing himself or herself in court without counsel in a legal proceeding, for example an immigration proceeding?**

As a federal prosecutor, I have not encountered this issue. If confirmed, I would faithfully apply the Constitution and any applicable Supreme Court and Ninth Circuit precedent on this issue.

4.

**a. Is waterboarding torture?**

Under the law, waterboarding is "torture" to the extent it is an act "intended to inflict severe physical or mental pain or suffering" upon a person. 18 U.S.C. § 2340(1).

**b. Is waterboarding cruel, inhuman and degrading treatment?**

Under the law, "cruel, unusual, and inhumane treatment" means "treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." 42 U.S.C. § 2000dd-0. My understanding is that waterboarding may constitute "cruel, inhuman, and degrading treatment" because, under



the law, no person in custody of the United States can be subjected to an interrogation technique not authorized by the Army Field Manual, 42 U.S.C. § 2000dd-2, and waterboarding is not among the techniques in the Army Field Manual.

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

Please see my answers to Questions 4(a) and (b) above.

5.

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.**

I am not aware of any such donations. As a judicial nominee, it would be inappropriate to comment on political matters or the judicial nomination process.

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 answer to Question 5(a). If I am fortunate enough to be confirmed, I will follow 28 U.S.C. § 455, Canon 3 of the Code of Conduct for United States Judges, and any and all other laws, rules, and practices governing such circumstances.

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

Please see my answer to Question 5(a).

6.

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

As a federal prosecutor, I have not encountered this issue. If confirmed, I would look to the Constitution and any applicable Supreme Court and Ninth Circuit precedent regarding the scope of the pardon power.

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

Please see my answer to Question 6(a).

**Nomination of Patrick J. Bumatay  
to the United States Court of Appeals for the Ninth Circuit  
Questions for the Record  
Submitted November 6, 2019**

**QUESTIONS FROM SENATOR WHITEHOUSE**

1. Your questionnaire indicates that you became a member of the Federalist Society beginning in 2003.

a. What was your primary motivation for joining the organization?

I joined the Federalist Society in law school because I enjoyed the exchange of legal ideas and discussions of constitutional law sponsored by the organization.

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

Yes.

c. If confirmed, do you plan to donate money to the Federalist Society?

I do not believe I have ever donated money to the Federalist Society aside from basic membership dues. I do not plan on changing this practice.

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

I have many friends and colleagues who are members of the Federalist Society and I have had numerous discussions about my confirmation hearing with those friends and colleagues.

2. A Washington Post report from May 21, 2019 (“A conservative activist’s behind-the-scenes campaign to remake the nation’s courts”) documented that Federalist Society Executive Vice President Leonard Leo raised \$250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven’t already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

Yes.

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

As a judicial nominee, it would be inappropriate to comment on political matters or the judicial nomination process.

c. Mr. Leo was recorded as saying: “We’re going to have to understand that judicial confirmations these days are more like political campaigns.” Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my answer to Question 2(b).

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I am not aware of such advocacy.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we “stand at the threshold of an exciting moment” marked by a “newfound embrace of limited constitutional government in our country [that hasn’t happened] since before the New Deal.” Do you share the beliefs espoused by Mr. Leo in that recording?

Please see my answer to Question 2(b).

3. 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?

The role of the judge is to apply the law to the facts of each case fairly and impartially. Like umpires, judges should be neutral and unbiased adjudicators.

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

The role of the judge is to apply the law to the facts of each case fairly and impartially, without regard to the judge’s personal views on the consequences of a particular ruling.

4. Federal Rule of Civil Procedure 56 provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact” in a case. Do you

agree that determining whether there is a “genuine dispute as to any material fact” in a case requires a trial judge to make a subjective determination?

In ruling on a summary judgment motion under Fed. R. Civ. P. 56, judges should apply the governing law fairly and impartially, without regard to their subjective personal views.

5. 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?

As a federal prosecutor, I found empathy to be an important trait. In my job, I strove to treat all defendants fairly and respectfully. If confirmed as a judge, I would treat all parties before me fairly and respectfully.

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

Although judges come from different backgrounds and bring different life experiences with them to the bench, the rule of law means that judges should apply the law in similar cases in similar fashion. Judges should not rule based on any personal biases or preferences.

6. In her recent book, *The Chief*, Supreme Court reporter Joan Biskupic documents the Court’s decision-making process in *NFIB v. Sebelius*, the landmark case concerning the constitutionality of the Affordable Care Act’s individual mandate and Medicaid expansion plan. Biskupic reported that the final votes, 5-4 to uphold the individual mandate as a valid exercise of the taxing clause, and 7-2 to curtail the Medicaid plan, “came after weeks of negotiations and trade-offs among the justices.”

a. In your view, what is the role of negotiating with other judges when deliberating on a case?

If confirmed, I would enjoy the opportunity to deliberate, contemplate, and collaborate with colleagues on the fair and impartial application of the governing law in a particular case.

b. As a judge, under what circumstances would you consider conditioning your vote in one case or on one issue in a case on your vote, or the vote of a colleague’s, in another?

The rule of law requires that every matter be decided based on the fair and impartial application of the governing law to the facts of the case. It would not be appropriate for a judge to rule based on considerations outside of the law.

c. Are there aspects or principles of your judicial philosophy that you consider non-negotiable? For example, if you consider yourself an originalist are there circumstances in which you might stray from the result dictated by that philosophy?

If confirmed, I would faithfully follow the Constitution, any governing laws, and any applicable precedent of the Supreme Court. I consider this non-negotiable.

7. 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.

8. 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?

The right to a jury trial is a treasured right under our Constitution. By vesting juries, instead of the government, with the fact-finding function, the Constitution gives juries a paramount role in protecting individual liberty.

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

As a judicial nominee, it would be inappropriate to comment on matters that may come before the courts. If confirmed, I would follow the Constitution and any applicable precedents on this matter.

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 8(b).

9. What do you believe is the proper role of an appellate court with respect to fact-finding?

Appellate courts should not disturb the factual findings of lower courts unless they are clearly erroneous.

10. Do you believe fact-finding, if done by appellate courts, has the potential to undermine the adversarial process?

Please see my response to Question 9.

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

As a federal prosecutor, I have not encountered this issue. If confirmed, I would faithfully follow any Supreme Court and Ninth Circuit precedent regarding this question.

12. Earlier this year, the Federal Judiciary's Committee on the Codes of Conduct issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

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

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

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

v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

If confirmed, I will comply with the Code of Conduct for United States Judges and will consult and take into account any other applicable ethical guidance, including Advisory Opinion #116, before participating in any educational seminar covered by that opinion.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to Question 12(b).

Senate Judiciary Committee  
“Nominations”  
Questions for the Record  
November 5, 2019  
Senator Amy Klobuchar

Questions for Patrick Bumatay, Nominee to the Ninth Circuit Court of Appeals

You previously served as Counselor to the Attorney General, in which capacity you worked on drug policy and prison reform. I strongly support treatment solutions like drug courts that have helped people across the country get the help they need, and I lead a letter to the Appropriations Committee with Senator Wicker every year in support of funding for these programs.

- Did you work on policies related to drug courts or other programs that divert non-violent drug offenders to treatment, and do you agree that these kinds of programs can help those struggling with addiction to get the help they need while maintaining public safety?

At the Department of Justice (DOJ), one of my responsibilities was to help establish a DOJ pilot program involving a drug or mental health court under the 21st Century Cures Act, Pub. L. 114-255, § 140003 (Dec. 13, 2016). In that capacity, I learned of the various drug courts established throughout the country and benefited from observing a drug court session. As a judicial nominee, however, it would be inappropriate to comment on policy matters.

Like many of my colleagues on this Committee, I have been working for years to reform our sentencing laws and provide more discretion to judges who sentence low-level drug offenders.

- What have you learned about our criminal justice system during your time as a prosecutor, and what principles will guide your review of lower court sentencing decisions?

As a prosecutor, I have always been cognizant of my duty to do justice in each case. This means my job was never about winning a case, but ensuring that every prosecution was appropriate and conducted under the highest ethical standards, and that each defendant was treated with respect and dignity.

Appellate courts review lower court sentences for “substantive reasonableness.” *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). This review “afford[s] significant deference to a district court’s sentencing decision.” *United States v. Christensen*, 828 F.3d 763, 819-20 (9th Cir. 2015). If confirmed, I would faithfully follow the binding precedent of the Supreme Court and the Ninth Circuit.

**Nomination of Patrick J. Bumatay,  
to be United States Circuit Judge for the Ninth Circuit  
Questions for the Record  
Submitted November 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?

The Supreme Court has set forth several factors and guideposts in determining whether a right is fundamental and protected under the Fourteenth Amendment. If confirmed, I would faithfully follow the Constitution and any applicable precedent of the Supreme Court and Ninth Circuit.

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

The Supreme Court has recognized enumerated rights as fundamental rights. If confirmed, I would faithfully follow the Constitution and all Supreme Court precedent.

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?

The Supreme Court has recognized that fundamental rights include those that are "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citations omitted). The inquiry into whether an asserted right implicates the due process clause begins with "examining our Nation's history, legal traditions, and practices." *Id.* at 710. If confirmed, I would faithfully follow this and all Supreme Court precedent.

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 the Ninth Circuit precedents recognizing fundamental rights. I would consider precedent of another court of appeals for its persuasive value.

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

Yes.



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*).

*Planned Parenthood v. Casey* and *Lawrence v. Texas* are precedents of the Supreme Court. If confirmed, I would faithfully apply these and all Supreme Court precedent.

f. What other factors would you consider?

I would consider the factors identified by the Supreme Court and the Ninth Circuit in determining whether a right is fundamental and protected under the Fourteenth Amendment.

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

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment applies to women. If confirmed, I would faithfully apply this and all Supreme Court precedent.

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 judicial nominee, it would be inappropriate to comment on or grade decisions of the Supreme Court. If confirmed, I would faithfully apply *Virginia* and all Supreme Court precedent.

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?

Please see my response to Questions 2(a).

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 held that the state laws are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couple.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). If confirmed, I would faithfully apply this and all Supreme Court precedent.

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

It is my understanding that these questions are involved in active or impending litigation. As a judicial nominee, it would be inappropriate to comment on matters that may come before the courts.

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 such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965). If confirmed, I would faithfully apply it and all Supreme Court precedent.

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 such a right in *Roe v. Wade*, 410 U.S. 113 (1973). If confirmed, I would faithfully apply it and all Supreme Court precedent.

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 such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully apply it and all Supreme Court precedent.

c. 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.

Please see my responses above.

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?

In resolving this question, I would look to how the Supreme Court and the Ninth Circuit has resolved whether to consider such evidence. If confirmed, I would faithfully follow any such Supreme Court and Ninth Circuit precedent.

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

In resolving this question, I would look to how the Supreme Court and the Ninth Circuit has resolved the role of sociology, scientific evidence, and data in judicial analysis. If confirmed, I would faithfully follow any such Supreme Court and Ninth Circuit precedent.

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 v. Hodges*, 135 S. Ct. 2584 (2015) is a precedent of the Supreme Court. If confirmed, I would faithfully apply it and all Supreme Court 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. You are a member of the Federalist Society, a group whose members often advocate an “originalist” interpretation of the Constitution.

a. 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. 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 am aware of scholarship that makes this argument. *See, e.g.*, Michael W. McConnell, Originalism and the Desegregation Decision, 81 Va. L. Rev. 947 (1995). As I stated at

my confirmation hearing, I believe *Brown* was rightly decided. If confirmed, I would faithfully apply it and all Supreme Court precedent.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ or ‘equal protection,’ or ‘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 Nov. 7, 2019).

These terms have been interpreted by the Supreme Court and the Ninth Circuit. If confirmed, I would faithfully apply those precedents of the Supreme Court and the Ninth Circuit.

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 has recognized the importance of the Constitution’s text, structure, and original understanding in interpreting a constitutional provision. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). If confirmed, I would faithfully apply any applicable Supreme Court and the Ninth Circuit precedent on interpreting the Constitution.

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 6(c).

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

Please see my response to Question 6(c).

7. In your Senate Judiciary Committee Questionnaire, you state that you served as a detailee and special assistant and counsel in the Department of Justice’s Office of Legal Policy. Please provide a complete list of the matters you worked on during your service in the Office of Legal Policy.

As a detailee to the Office of Legal Policy (OLP) in 2017, I worked on the confirmation of Justice Neil Gorsuch. As a federal prosecutor, I was also asked to consult on the policy that was eventually announced in the May 12, 2017 Memorandum, entitled “Department Charging and Sentencing Policy.”

As a special assistant and counsel in the OLP in 2007, to the best of my recollection, I worked on judicial nominations, Indian Country law, consumer products safety, and international law issues. I also served on an interagency working on import safety and as a liaison to a United

Nations delegation. I also recall working on the confirmation of Attorney General Michael Mukasey.

8. In your Senate Judiciary Committee Questionnaire, you state that you served as counsel to the Associate Attorney General of the United States. Please provide a complete list of the matters you worked on during your service as counsel to the Associate Attorney General.

As counsel to the Associate Attorney General in 2008, to the best of my recollection, I assisted the Associate Attorney General in the oversight of the Antitrust, Tax, Civil, Civil Rights, and Environmental and Natural Resources divisions. I recall also working on a handful of immigration appeals and a tax appeal and reviewing the Department's civil settlements over \$ 2 million.

9. In your Senate Judiciary Committee Questionnaire, you state that you served as senior counsel and counsel to the Deputy Attorney General of the United States. Please provide a complete list of the matters you worked on during your service as senior counsel and counsel to the Deputy Attorney General.

From April 2017 to February 2018, I worked as a Counsel and Senior Counsel to the Deputy Attorney General. My areas of responsibility included illicit opioids initiatives, contraband cellphones in prisons, prison reform and inmate reentry, and oversight of the DEA, the Federal Bureau of Prisons (BOP), and OLP.

10. In your Senate Judiciary Committee Questionnaire, you state that you served as counselor to the Attorney General of the United States. Please provide a complete list of the matters you worked on during your service as counselor to the Attorney General.

From February 2018 to March 2019, I served as a Counselor to the Attorney General. I focused on combatting the opioid crisis, strengthening efforts against transnational organized crime, and prison reform and inmate reentry initiatives, including the First Step Act. I also assisted in the oversight of DEA, BOP, U.S. Marshals Service, Organized Crime and Drug Enforcement Task Forces, and Bureau of Alcohol, Firearms, Tobacco and Explosives (ATF), including ATF's bump stock regulation. Although immigration matters were not in my portfolio, because I had experience with criminal immigration enforcement as a prosecutor in the Southern District of California, I was asked to consult on the Memorandum for Federal Prosecutors along the Southwest Border dated April 6, 2018. While in the Office of the Attorney General, I also worked on the confirmation of Justice Brett Kavanaugh.

11. In your Senate Judiciary Committee Questionnaire, you state that you were the lead prosecutor for the trial in *United States v. Ibarra*, and the trial ended in a guilty verdict.

a. On appeal, the United States joined a motion asking the Ninth Circuit to summarily reverse the conviction and remand the case due to the prosecution's improper solicitation of one witness's opinion of the credibility of another's extrajudicial statements. Did you err in repeatedly asking a witness about Ms. Ibarra's credibility?

I am proud of my record as a prosecutor. I learned a lot from that case and from all my cases. After the jury found Ms. Ibarra guilty, she argued on appeal that there was a violation of the rule against eliciting opinion testimony. *See United States v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999). While it could be argued that that rule did not extend to the circumstances of the case, I accept that the U.S. Attorney's Office ultimately decided to not to contest the appeal.

b. Please explain why you listed *United States v. Ibarra* in your Senate Judiciary Committee Questionnaire as one of the "ten (10) most significant litigated matters which you personally handled."

I listed the *United States v. Ibarra* case in my Senate Judiciary Questionnaire because that case involve significant pre-trial and trial litigation.

12. In your Senate Judiciary Committee Questionnaire, you state that you were the lead prosecutor in *United States v. Cedeno-Cedeno*, and the United States "dismissed the case mid-trial due to unexpected discovery issues." Please explain what unexpected discovery issues arose that necessitated dismissal of the case.

During the course of that trial, information came to light that was previously undisclosed to the prosecution team. This necessitated dismissal of the case.

**Questions for the Record for Patrick J. Bumatay  
From Senator Mazie Hirono**

1. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

**a. Do you agree that training on implicit bias is important for judges to have?**

It is the duty of the judge to ensure that bias, implicit or otherwise, has no place in our justice system.

**b. Have you ever taken such training?**

Yes.

**c. If confirmed, do you commit to taking training on implicit bias?**

I will work with the Administrative Office of the U.S. Courts to determine what trainings are offered and participate in such trainings if appropriate.

2. In 2007, you authored a law review article titled “Causes, Commitments, and Counsels: A Study of Political and Professional Obligations Among Bush Administration Lawyers.” In the article, you differentiated between “cause” lawyers and “conventional” lawyers. You described “cause” lawyers as those who “have a moral, political, or ideological commitment to the causes of their organizations.” You went on to say that “cause” lawyers aim “to produce a particular outcome through their legal work” rather than simply advance the interests of their clients.

**a. In your opinion, can a “cause” lawyer be sufficiently objective to be entrusted with a lifetime appointment to the federal judiciary?**

I do not consider myself a “cause lawyer.” I wrote that article as a law school student, prior to becoming a lawyer. As a judicial nominee, it would be inappropriate to comment on what considerations are used in the judicial confirmation process.

**b. Would you describe yourself as a “cause” lawyer? What evidence can you point to in support of your answer?**

No, I do not consider myself a “cause lawyer.” I wrote that article as a law school student, prior to becoming a lawyer. I have served in the Department of Justice for almost ten years, under three presidential administrations and six Attorneys General of all parties. As a career federal prosecutor, political or policy preferences had absolutely no role in my job. Furthermore, I firmly believe that the role of the judge is to apply the law to the facts of each case fairly and impartially, without regard to the judge’s preferred outcomes or policy preferences. Simply put, politics and policy matters have no role in the courtroom.

3. Former-Judiciary Committee counsel turned activist Mike Davis tweeted in supported of your nomination, noting your “[t]ireless work for Gorsuch & Kavanaugh confirmations.”

**a. What role did you play in the confirmations of Justices Gorsuch and Kavanaugh?**

I primarily worked on the Department of Justice’s confirmation hearing operations.

**b. What was your involvement in the decision to significantly limit the FBI’s investigation into serious sexual assault allegations against Justice Kavanaugh?**

None.

4. In January 2018, you were Senior Counsel to Deputy Attorney General Rod Rosenstein. In your Senate Judiciary Questionnaire, you described your responsibilities in this role as including oversight of the Federal Bureau of Prisons. At this time, the Bureau of Prisons was undertaking an effort to increase the use of private prisons—a reversal of Obama-era policy.

**a. What was your involvement in the decision to increase the use of private prisons?**

To the best of my recollection, that policy was announced prior to my working in the Office of the Deputy Attorney General. I do not have any recollection of working on implementation of that policy, but it is possible since the Bureau of Prisons was in my portfolio.

**b. Are you aware of any evidence that shifting additional federal prisoners to private prisons would actual reduce the cost of confinement or lead to greater safety?**

Respectfully, that question may implicate the duty of confidentiality I owe to the Department of Justice.

5. In your Senate Judiciary Questionnaire, you identified as one of your top 10 most significant litigated matters *United States v. Ibarra*, a prosecution involving a 22-year-old woman arrested at the border after drugs were found hidden under the seat cushions of her car. You wrote in your questionnaire that “[t]he trial ended in a ‘guilty’ verdict.”

Following the verdict, the United States government jointly moved with Ms. Ibarra to summarily reverse and vacate the conviction. The joint motion cited *United States v. Sanchez* for the proposition that an attorney cannot elicit “one witness’s opinion of the credibility of another witness’s extrajudicial statements,” thereby suggesting that your repeated questioning of a border agent to testify regarding Ms. Ibarra’s credibility was the reason to vacate the conviction.

**a. Do you agree that your questioning related to Ms. Ibarra’s credibility was improper?**



I am proud of my record as a prosecutor. I learned a lot from that case and from all my cases. After the jury found Ms. Ibarra guilty, she argued on appeal that there was a violation of the rule against eliciting opinion testimony. *See United States v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999). While it could be argued that that rule did not extend to the circumstances of the case, I accept that the U.S. Attorney's Office ultimately decided to not to contest the appeal.

**b. Why didn't you provide the full context of the case in your questionnaire?**

I listed the *United States v. Ibarra* case in my Senate Judiciary Questionnaire because that case involve significant pre-trial and trial litigation. I provided my role in that case. I was not appellate counsel in that case.

**Nomination of Patrick J. Bumatay**  
**United States Court of Appeals for the Ninth Circuit Questions for the Record**  
**Submitted November 6, 2019**

**QUESTIONS FROM SENATOR BOOKER**

1. In response to a question from Senator Feinstein about the extent of your appellate law experience prior to your nomination, you said, “As a trial [Assistant U.S. Attorney], I mostly focused my work in the district courts.” You noted that you had made two oral arguments before the Ninth Circuit and had served as a law clerk on a federal appeals court.

a. Please explain why you believe the appellate experiences you cited are adequate preparation to serve as a judge on the Ninth Circuit.

As I mentioned at my hearing, as a trial Assistant U.S. Attorney (“AUSA”), I have handled hundreds of criminal prosecutions in the Southern District of California. I have argued and briefed dozens of motions in the district court. I have argued two times before the Ninth Circuit Court of Appeals and authored over a half dozen appellate briefs. I have also clerked for a federal appellate judge and a federal district court judge. I have also worked as a civil litigator and defense counsel and served at the highest levels of the Department of Justice. These experiences have prepared me well to serve as an appellate judge if I am fortunate enough to be confirmed.

b. How much experience in appellate law do you think a nominee should have to be prepared to serve on a federal appeals court?

As a judicial nominee, it would be inappropriate to comment on what considerations are used in the judicial confirmation process.

2. Please describe your most significant experiences litigating before the Ninth Circuit.

In *Al Mutarreb v. Holder*, No. 04-75676 (9th Cir.), I argued an immigration matter challenging the sufficiency of the evidence to a notice to appear issued by the then-Immigration and Naturalization Service. The matter involved a unique issue regarding the due process implications of an *in absentia* removal proceeding.

In *United States v. Campos-Nunez*, No. 13-50194 (9th Cir.), I argued the appeal of Mr. Campos-Nunez’s conviction for importation of marijuana. The case involved questions of the admissibility of “structure evidence,” the admissibility of expert testimony, and the propriety of demeanor evidence.

3. What is the most difficult experience you have had making an oral argument before a federal court of appeals, and why?

In the *Al Mutarreb* case, the judges raised an issue at oral argument that neither party had briefed. The judges then allowed the parties to file a supplemental brief after the oral argument.

4. What is the most difficult experience you have had writing a brief for a federal court of

appeals, and why?

I recently had to file an appellate brief shortly after the birth of my twin daughters. Being a new father and writing an appellate brief was a challenging experience.

5. During the century before President Trump came into office, the Senate had *never* confirmed a judicial nominee over the objections of *both* home-state Senators, according to the Congressional Research Service.<sup>1</sup> If you're confirmed, you would be part of a major break from that longstanding Senate tradition of respect for the views of home-state Senators through the blue slip process.

a. Do you think the Trump Administration meaningfully consulted with your home-state Senators about your nomination?

As a judicial nominee, it would be inappropriate to comment on the judicial confirmation process.

b. Did you indicate any objection or concerns to anyone in the Administration or on the majority side of the Senate Judiciary Committee about testifying before the Committee over the objections of both of your home-state Senators?

Please see my response to Question 5(a).

6. In 2014, you were the lead prosecutor in the trial of Elena Ibarra.<sup>2</sup> Ms. Ibarra had been arrested after border agents found drugs hidden inside the seat cushions of her car. She had purchased the car two days earlier and testified she did not know the drugs were in the car. Ms. Ibarra was convicted.

On appeal, Ms. Ibarra argued, among other things, that you had improperly solicited testimony on witnesses' credibility. Her brief stated: "By repeatedly soliciting witnesses' opinions on credibility, the prosecutor was improperly treading on the jurors' factfinding role by telling them who to believe and who not to believe. Because the Court's precedent shows this was improper, the prosecutor committed misconduct."<sup>3</sup> The brief further explained: "At trial, Ms. Ibarra then testified that two [Drug Enforcement Administration] agents told her during her interrogation that she was 'going to jail no matter what' and would 'get less time' if she confessed that she knew there were drugs in the car. Ms. Ibarra confessed but testified that she only did so because of the agents' statements. Rather than allowing the jurors to judge Ms. Ibarra's credibility for themselves, prosecutors repeatedly solicited the DEA agents to tell the jury that they believed Ms.

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<sup>1</sup> BARRY J. MCMILLION, CONG. RESEARCH SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 8 & n.47 (2017), <http://www.crs.gov/Reports/pdf/R44975>; MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT 7-22 (2003), <https://fas.org/sgp/crs/misc/RL32013.pdf>.

<sup>2</sup> SJQ at 21.

<sup>3</sup> Appellant's Opening Brief at 61, *United States v. Ibarra*, No. 15-50011 (9th Cir. Nov. 12, 2015), Dkt. No. 12-1.

Ibarra was lying.”<sup>4</sup>

In 2016, the United States moved jointly with Ms. Ibarra to summarily reverse and vacate her conviction.<sup>5</sup> The filing stated: “The United States agrees that, under the particular circumstances of this case, it erred, and the conviction should be vacated in the interests of justice.”<sup>6</sup> It cited a Ninth Circuit precedent standing for the proposition that a prosecutor “cannot elicit ‘one witness’s opinion of the credibility of another witness’s extrajudicial statements.’”<sup>7</sup>

a. Please explain why the United States eventually confessed error in this prosecution and moved to vacate Ms. Ibarra’s conviction.

I am proud of my record as a prosecutor. I learned a lot from that case and from all my cases. After the jury found Ms. Ibarra guilty, she argued on appeal that there was a violation of the rule against eliciting opinion testimony. *See United States v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999). While it could be argued that that rule did not extend to the circumstances of the case, I accept that the U.S. Attorney’s Office ultimately decided to not to contest the appeal.

b. Although you were the lead trial prosecutor, your name is not listed on the joint motion to summarily reverse the conviction. Please explain the extent of your involvement in the government’s decision to confess error and seek to vacate the conviction. If you opposed this decision, please explain why. If you did not, please explain why your name is absent from the joint motion to reverse the conviction.

Please see my response to Question 6(a). In addition, I was not appellate counsel in that case. In our Office, appeals are usually handled by the Appellate Section. At the time, I was a trial prosecutor.

c. To what extent did your own actions in this case form the basis of the government’s eventual confession of error?

Please see my response to Question 6(a).

d. Do you believe you made any errors in your handling of this case? What did you learn from this case?

Please see my response to Question 6(a).

e. In your Senate Judiciary Questionnaire, you stated only that “[t]he trial ended in a

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<sup>4</sup> *Id.* at 2.

<sup>5</sup> Joint Motion to Summarily Reverse and Remand, *United States v. Ibarra*, No. 15-50011 (Jan. 21, 2016), Dkt. No. 23-1.

<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> *Id.* at 2 (quoting *United States v. Sanchez*, 176 F.3d 1214, 1221 (9th Cir. 1999)).

‘guilty’ verdict.”<sup>8</sup> Please explain why you omitted the fact that the United States later confessed error and moved to vacate the conviction.

I listed the *United States v. Ibarra* case in my Senate Judiciary Questionnaire because that case involve significant pre-trial and trial litigation. I provided my role in that case. I was not appellate counsel in that case.

f. Please explain why you included this case in your 10 “most significant litigated matters.”<sup>9</sup>

Please see my response to Question 6(e).

7. You wrote an op-ed in 1999 in which you criticized Yale’s diversity initiatives. You wrote that “[t]he loss of a Yale identity began with the institution’s obsession with diversity.”<sup>10</sup> You continued:

Yale begins to divide her students by race even before the first day of classes starts. All incoming freshmen of color are invited to an exclusively-minority orientation program known as Cultural Connections . . . . Yale intriguingly assumes that minorities need extra academic help to get by on campus. This type of “help” reinforces the perception that minorities are somehow different. Yale’s affirmative action policies already place minorities under suspicions of special preferences. Now, they have Cultural Connections to prove it. How can minorities at Yale compete on an equal level with other Yalensians when they are from the beginning treated as inferior to everyone else? Are non- minority Yalensians going to listen and debate fairly with someone they may perceive as undeserving of their Yale status? These actions brand the Scarlet AA (for affirmative action) on all minority students.<sup>11</sup>

a. Do you stand by your statement that race-conscious university admissions policies and other initiatives to support a diverse student body “place minorities under suspicions of special preferences” and “brand the Scarlet AA (for affirmative action) on all minority students”?

I wrote that article when I was a college student in the late 1990s. The article included my reflections on being a minority student at the time. I wrote about how some of the college’s programs made me feel like an outsider and I had hoped for a more unified and inclusive campus.

As a judicial nominee, it would be inappropriate for me to comment on policy or legal matters that may come before the courts.

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<sup>8</sup> SJQ at 21-22.

<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Yale’s Empty Promise*, LIGHT & TRUTH: YALE J. OPINION & INVESTIGATIVE REPORTING, Fall 1997, in SJQ Attachments to Question 12(a) at 47.

<sup>11</sup> *Id.*

b. Do you believe that the Supreme Court’s landmark decisions upholding race-conscious admissions programs—such as *Regents of the University of California v. Bakke*,<sup>12</sup> *Grutter v. Bollinger*,<sup>13</sup> and *Fisher v. University of Texas* (known as *Fisher II*)<sup>14</sup>—were correctly decided?

*Bakke*, *Grutter*, and *Fisher II* are all precedents of the Supreme Court. If confirmed, I would faithfully apply those and all Supreme Court precedent.

c. Do you believe that *Bakke*, *Grutter*, and *Fisher II* are settled law?

As precedents of the Supreme Court, they are settled law.

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

The Supreme Court has held that “the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education.” *Fisher v. Univ. of Texas*, 570 U.S. 297, 310 (2013) (quoting *Bakke*, 438 U.S. at 311-12). If confirmed, I would faithfully apply those and all Supreme Court precedent.

8. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

Yes, the Supreme Court has recognized the importance of the Constitution’s text, structure, and original understanding in interpreting a constitutional provision. If confirmed, I would faithfully follow the Constitution and Supreme Court precedent on constitutional interpretation.

9. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

Yes, in statutory interpretation, the Supreme Court has recognized if the text of a statute is plain, that is generally the end of inquiry. If the statute is ambiguous, courts turn to the tools of statutory construction to determine the statute’s meaning. Of course, if there is binding precedent on the question, lower court judges must follow the precedent. If confirmed, I would faithfully apply Supreme Court precedent on statutory interpretation.

10. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress’s intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

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<sup>12</sup> 438 U.S. 265 (1978).

<sup>13</sup> 539 U.S. 306 (2003).

<sup>14</sup> 136 S. Ct. 2198 (2016).

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

In interpreting statute, the Supreme Court has held that if the text of a statute is unambiguous, that is end of the inquiry. *See, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The Supreme Court has used legislative history as a tool to determine the meaning of ambiguous statutes. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). If confirmed, I would faithfully follow Supreme Court precedent on statutory interpretation.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 10(a).

11. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes. I understand judicial restraint to mean that the role of the judge is to apply the law to the facts of each case fairly and impartially, without regard to the judge's policy or outcome preferences.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.<sup>15</sup> Was that decision guided by the principle of judicial restraint?

As a judicial nominee, it is not appropriate to comment on or grade Supreme Court decisions.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.<sup>16</sup> Was that decision guided by the principle of judicial restraint?

Please see my response to Question 11(a).

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.<sup>17</sup> Was that decision guided by the principle of judicial restraint?

Please see my response to Question 11(a).

12. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID

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<sup>15</sup> 554 U.S. 570 (2008).

<sup>16</sup> 558 U.S. 310 (2010).

<sup>17</sup> 570 U.S. 529 (2013).

laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.<sup>18</sup> In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.<sup>19</sup>

a. Do you believe that in-person voter fraud is a widespread problem in American elections?

I have not studied this issue, but understand that voter fraud is a serious offense. If confirmed, I would faithfully apply any binding statutes or precedent that bear on this issue.

b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Voting is a fundamental right that courts must be vigorous in protecting. Nevertheless, as a judicial nominee, it would be inappropriate to comment on policy or legal matters that may come before the courts.

c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please my response to Question 12(b).

13. 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.<sup>20</sup> Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.<sup>21</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>22</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>23</sup>

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

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<sup>18</sup> *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

<sup>19</sup> *Id.*

<sup>20</sup> Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

<sup>21</sup> *Id.*

<sup>22</sup> 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>.

<sup>23</sup> *Id.*



Bias, implicit or otherwise, has no place in our criminal justice system. As a prosecutor, I made sure none of my cases were infected by such bias.

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

I understand statistics show that minorities are disproportionately represented in this country's prison population.

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 attended a training on implicit bias.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.<sup>24</sup> Why do you think that is the case?

I have not studied the reasons for such disparities, but it is a concerning issue.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.<sup>25</sup> Why do you think that is the case?

Please see my response to Question 13(d).

f. What role do you think federal judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

Bias, implicit or otherwise, has no place in our criminal justice system. As a prosecutor, I made sure none of my cases were infected by such bias. Judges have the responsibility of ensuring that bias has no place their courtrooms and that every defendant is treated fairly, respectfully, and with dignity.

14. 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.<sup>26</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.<sup>27</sup>

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<sup>24</sup> U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

<sup>25</sup> Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

<sup>26</sup> 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>.

<sup>27</sup> *Id.*

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.

As a judicial nominee, it would be inappropriate to comment on policy matters.

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

Please see my response to Question 14(a).

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

My grandfather came to the United States from the Philippines in the 1920s and earned a living picking fruits and vegetables in the fields of California. I think he would have been proud to see his grandson being nominated to be a federal judge.

16. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes, unless doing so would prejudice a disputed legal or factual matter to be decided in the case.

17. Do you believe that *Brown v. Board of Education*<sup>28</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

18. Do you believe that *Plessy v. Ferguson*<sup>29</sup> was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

*Brown v. Board of Education* corrected a manifest injustice in the *Plessy v. Ferguson* decision.

19. 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?

I did receive a briefing from Department of Justice lawyers on the requirements of the Code of Conduct for U.S. Judges. My answers are my own.

20. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel,

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<sup>28</sup> 347 U.S. 483 (1954).

<sup>29</sup> 163 U.S. 537 (1896).

who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”<sup>30</sup> Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

As a judicial nominee, it would be inappropriate for me to comment on political matters regarding cases litigated in the Ninth Circuit.

21. 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.”<sup>31</sup> Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has recognized 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). If confirmed, I would faithfully apply this and all Supreme Court precedent.

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<sup>30</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

<sup>31</sup> 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 November 6, 2019  
For the Nomination of**

**Patrick Bumatay, to the U.S. Court of Appeals for the Ninth Circuit**

1. In 2015, you served as lead trial counsel in a case called *United States v. Ibarra*. After the jury convicted the defendant, defense counsel argued on appeal that you committed prosecutorial misconduct in your questioning of witnesses. Specifically, defense counsel wrote that “the prosecutor was obsessed with eliciting testimony on witness credibility. Defense counsel also called your attempts to elicit testimony on credibility an “organizational theme” for the government’s case.

a. **Do you dispute defense counsel’s characterizations of your conduct at trial?**

I am proud of my record as a prosecutor. I learned a lot from that case and from all my cases. After the jury found Ms. Ibarra guilty, she argued on appeal that there was a violation of the rule against eliciting opinion testimony. *See United States v. Sanchez*, 176 F.3d 1214, 1220 (9th Cir. 1999). While it could be argued that that rule did not extend to the circumstances of the case, I accept that the U.S. Attorney’s Office ultimately decided to not to contest the appeal.

b. **Did you pursue these lines of questioning on your own initiative? Or was this a policy or directive from your supervisors at the U.S. Attorney’s Office?**

I pursued the questioning on my own initiative. The district court overruled objections to several questions at issue, but not to all of them.

2. After defense counsel filed their appellate brief in *Ibarra*, the U.S. Attorney’s Office moved to reverse the defendant’s conviction.

a. **Were you consulted before the U.S. Attorney’s Office submitted this filing?**

Yes, but I was not appellate counsel.

b. **Do you agree with the government’s decision to move to reverse the defendant’s conviction based on your questioning?**

Please see my response to Question 1(a).

**Nomination of Patrick Bumatay**  
**United States Court of Appeals for the Ninth Circuit**  
**Questions for the Record**  
**Submitted November 5, 2019**

**Senator Mike Lee**

➤ As a circuit court judge, you would be bound by both Supreme Court precedent, and Ninth Circuit precedent when not sitting en banc. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?

It is the duty of a lower court judge to faithfully follow binding Supreme Court and Ninth Circuit precedent. If there is no binding precedent, lower court judges have a “duty to interpret the Constitution in light of its text, structure, and original understanding.” *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring). If confirmed, I would faithfully follow the Constitution and any applicable precedent.

➤ In *Glucksberg*, Chief Justice Rehnquist explained that the Supreme Court’s “method of substantive-due-process analysis has two primary features: First, [the Court has] regularly observed 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. Second, [the Court has] required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.” What do you think it means for a right to be “objectively rooted in this nation’s history and traditions?” How would you go about analyzing a whether a right asserted by a litigant satisfies the *Glucksberg* test?

As the Supreme Court has held, judges should “exercise the utmost care” in identifying an asserted fundamental right, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the judicial branch].” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation marks and citations omitted). The inquiry into whether an asserted right implicates the due process clause begins with “examining our Nation’s history, legal traditions, and practices.” *Id.* at 710. In *Glucksberg*, the Supreme Court consulted historical sources such as early statutory law and common law tradition. *Id.* at 710-713. If confirmed, I would faithfully follow the Constitution and any applicable precedent.

➤ Under our Constitution, which branch of government bears the primary burden of adapting legal norms to changing societal conditions? Under what, if any circumstances, should the work of judges be influenced by changed societal conditions or attitudes, as opposed to focusing solely on the changes made by the legislature to legal texts?

Under our Constitution, it is for the political branches to make or amend the laws to adapt to any changing societal conditions. The role of the judge is to follow the law as enacted by Congress, irrespective of any outside considerations. As Alexander Hamilton appropriately summarized, the judicial branch should exercise “neither force nor will, merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961).

➤ Can you walk me through your understanding of how the Supreme Court evaluates compelled speech cases? What counts as “speech” under the First Amendment; do the rules on compelled speech vary depending on whether or not the “speech is sold rather than given away;”<sup>1</sup> and how high is the hurdle the government must clear to establish that it has a “compelling interest” in regulating speech?

The First Amendment protects our most cherished, fundamental rights, including our freedom of religion, freedom of speech, and freedom of association. See U.S. Const., Amdt. I. As the Supreme Court has stated, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Thus, “[c]ompelling individuals to mouth support for views they find objectionable” violates a “cardinal constitutional command” and is “universally condemned.” *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018). These protections are “not diminished” if the speech is “sold” rather than given away. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988). Furthermore, the Supreme Court has described the “compelling interest” test as a “rigorous First Amendment hurdle,” *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 737 (2011), which only protects “an interest of the highest order.” *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2232 (2015). If confirmed, I would faithfully follow the Constitution and any applicable precedent.

➤ How long have you been an active member of the Tom Homann Association? This association has publicly criticized recent Supreme Court decisions and takes active positions on questions currently unsettled in the courts. Were you aware of these public positions when you joined the association? If you are confirmed, will you faithfully and fully apply all binding Supreme Court precedent?

When I joined the Tom Homann Law Association in late 2017, I understood the group to be a community building and social networking organization for LGBT lawyers in the San Diego area. Since joining, the extent of my involvement has been attending two or three of their social functions.

Last month, I became aware of the group’s public positions on recent Supreme Court cases and other legal matters, especially in cases involving religious liberty. Religious liberty is a foundational right. Indeed, it is the first freedom of our Bill of Rights. If liberty means anything, it means that individuals should be able to live their lives and act according to their religious principles. The Supreme Court has vigorously protected religious liberty in recent

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<sup>1</sup> *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755 (1988) (“Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.”).

terms, in cases such as *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). If confirmed, I will faithfully and fully apply these and all precedents of the Supreme Court.

Furthermore, if confirmed, I do not intend to be a member of any organization that takes positions on specific cases in litigation. Therefore, if confirmed, I intend to resign my membership in the group.